PROTECTIONISM AND LIBERALISATION IN THE NIGERIAN INSURANCE SECTOR: A CRITICAL EXAMINATION OF THE ROLE OF MULTINATIONAL INSURANCE PROGRAMMES IN DEALING WITH PROTECTIONIST TRADE BARRIERS

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Thesis submitted for the Degree of Doctor of Philosophy to the School of Law in the University of Buckingham

March, 2019

ABSTRACT

This thesis critically examines protectionism in the Nigerian Insurance Sector and discusses it in the context of both the liberalisation efforts of the World Trade Organization (WTO) and the anti-protectionist measures that are inherent in a multinational insurance programme. Chapter one introduces the work and provides insights into the background, aims and objectives of the research. The Chapter also identifies the key research questions to be answered by the work and further discusses the key concepts relevant to multinational insurance programmes.

Chapter two critically analyses the global anti-protectionist legal framework for the insurance sector enshrined in the WTO General Agreement for Trade in Services (GATS). It proceeds to analyse the Nigerian insurance regulations and closely examines the extent to which they comply with or diverge from Nigeria's GATS obligations. This Chapter briefly discusses the insurance legal framework in the United Kingdom and comparatively identifies approaches that can be adopted and lessons Nigeria should learn from the UK. Despite the identified positives from the UK regulatory framework, Chapter two points out that the GATS liberalisation efforts have been highly inadequate and ineffective in resolving the insurance sector protectionism that characterises many jurisdictions including Nigeria. It therefore identifies multinational insurance programmes as a private sector driven solution to this problem and noted that the WTO approach and any other inter-governmental approach may not yield an immediate solution to this problem.

Chapter three essentially asesses the internal and external workings and operation of Multinational Insurance Programmes. The Chapter introduces and extensively discusses the Multinational Insurance Programme as a special type of insurance and argues that it was invented as a result of globalisation and it exists in two major forms – admitted and non-admitted cover. It then critically analyses the solutions and drawbacks inherent in both an admitted and non-admitted insurance cover. Finally, the chapter discusses the various forms of non-admitted cover including the design and structure of a controlled master policy.

Chapter four acknowledges the fact that the adoption of Multinational Insurance Programme helps to address the problem of protectionism, but it raises an additional issue of the legality of its adoption in the context of Nigerian law and under the laws of other non-admitted jurisdictions. The chapter therefore addresses this issue and discusses instances where severe regulatory sanctions had been imposed for usage of this form of insurance. The chapter further discusses the response by experts to this legality challenge through the invention of circumventing tools or permissive options like cut-through clauses, financial interest clauses, fronting arrangements, among others.

Chapter five recognises that apart from regulatory protectionism, state actors adopt fiscal measures in the form of taxation to protect a particular sector. The chapter proceeds with a critical analysis of the role of taxation as a protectionist tool in Nigeria and points out the widespread discrimination and unfair tax laws and policies that have stalled the growth of the insurance sector and affect both admitted and non-admitted insurers alike. The chapter

queries the rationale for such laws and policies, especially in view of the fact that it discourages growth and investment in the insurance sector. The chapter contains solutions for each problem identified and recommends quick fix option for the implementation of some of these solutions.

Chapter six of this thesis, summarises the work and concludes by making strong recommendations that can turn the fortunes of the Nigerian insurance sector through the adoption of more liberal laws and policies.

ACKNOWLEDGMENT

I wish to thank the Almighty God for the grace to commence and conclude this PhD. I am grateful to my supervisor, Dr. Adolfo Paolini for the amazing support I received from him throughout this programme and to my wife and son, Emmanuella Ibrahim and Joshua Ibrahim, respectively.

ABBREVIATIONS

AD & D – Accidental Death and Dismemberment Insurance
CAC – Corporate Affairs Commission
CAMA – Companies and Allied Matters Act
CIDRA – Consumer Insurance (Disclosure and Representations) Act
CIT – Companies Income Tax
CITA – Companies Income Tax Act
CJJA - Civil Jurisdiction and Judgments Act
CMP – Controlled Masters Programmes
COB – Conduct of Business Sourcebook
CPR – Civil Procedure Rules
DIC – Difference in Condition

DIL – Difference in Limits
DSB – Dispute Settlement Board

EFTA - European Free Trade Association
EU – European Union
FBIR – Federal Board of Inland Revenue
FCA – Financial Conduct Authority
FCT – Federal Capital Territory
FDI – Foreign Direct Investment
FIRS – Federal Inland Revenue Service
FPSV – Floating Production and Storage Vessel
FSA – Financial Conduct Authority
GATS – General Agreement on Trade in Services
GATT – General Agreement on Tariff and Trade
IAIS - International Association of Insurance Supervisors
ICOBS – Insurance Conduct of Business Sourcebook
MA – Market Access
MDU – Medical Defence Union
MFN - Most Favoured Nation
MIP – Multinational Insurance Programme
MNC – Multinational Corporations
NAIC – Nigerian Agricultural Insurance Corporation
NAICOM – National Insurance Commission
ND – Non-Discrimination
NHIS – National Health Insurance Scheme
NIA – Nigerian Insurance Association
NICON – National Insurance Corporation of Nigeria
Nigeria Re – Nigeria Reinsurance Corporation
NIPC – Nigerian Investment Promotion Commission
OECD – Organization of Economic Cooperation and Development
OTC – Over the Counter
PENCOM – National Pension Commission

PITA – Personal Income Tax Act
PRA – Prudential Regulation Authority
TRIPS – Trade Related Aspects of Intellectual Property Rights
UCTA – Unfair Contract Terms Act
UK – United Kingdom
UNCTAD – United Nations Conference on Trade and Tariff
US – United States
USD – United States Dollar
VAT –Value Added Tax
WHT – Withholding Tax
WTO – World Trade Organization

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DECLARATION OF ORIGINALITY

I hereby declare that my thesis/dissertation titled "*Protectionism And Liberalisation in the Nigerian Insurance Sector: A Critical Examination of the Role of Multinational Insurance Programmes in Dealing with Protectionist Trade Barriers* " is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text, and is not substantially the same as any that I have submitted, or, is concurrently submitted for a degree or diploma or other qualification at the University of Buckingham or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my thesis has already been submitted, or is concurrently submitted for any such degree, diploma, or other qualification at the University of Buckingham or any other University or similar institution except as declared in the Preface and specified in the text.

Signature: Date:

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CHAPTER ONE

INTRODUCTION AND DEFINITION OF KEY INSURANCE CONCEPTS RELEVANT TO MULTINATIONAL INSURANCE PROGRAMMES

1.0 Introduction

This Chapter introduces the research and is divided into two distinct parts. The first part addresses preliminary issues on the research for example, it sets out the background to the research, the aims and objectives of the research, the research questions, the structure and research methodology, the choice of jurisdictions, limitation of the research, outcome/findings and area(s) for future research.

The second part of this chapter addresses conceptual issues by focusing on the meaning of insurance and legal principles applicable to key insurance concepts, like key elements that must be present in an insurance contract, insurable interest, the doctrine of utmost good faith, the duty of disclosure, the duty to not misrepresent and subrogation. Owing to the nature of this part of this chapter being one that is conceptual in nature and seeks to define and clarify the meaning and principles that underlie key insurance, the approach to be adopted will be largely descriptive.

1.1 Background to the Research

A research with focus on multinational insurance programmes in the context of Nigeria cannot be separated from the numerous Nigerian laws that regulate and permit foreigners to do business directly and indirectly in Nigeria. By way of pre-emption, the law has changed over the years from being liberal, to being protectionist, and to a state that pretends to be pseudo-liberal but still has strong protectionist stance that tends to be confusing and incoherent. This is very evident in the insurance sector and in the ability of foreign insurers and Nigerian insureds to enjoy insurance services provided by foreign insurance players.

The legality of foreign companies doing business in Nigeria has for many years been a front burner issue. As far back as April 1964, the Nigerian Federal Minister of Economic Development advocated for taking over of certain businesses and also argued strongly for

exclusion of foreign firms from participation in a number of sectors in the Nigerian economy, including banking, insurance, retail and transportation.[1] This became particularly problematic in the 1970s, especially at the point the Federal Government of Nigeria formally introduced the indigenisation policy through the promulgation of the *Nigerian Enterprise Promotion Decree 1978*. This turn of events affected the involvement of foreign insurers in the Nigerian insurance market.

This protectionist policy thrust was partially discontinued in 1995 with the enactment of the *Nigerian Enterprise Promotion (Repeal) Decree 1995*. This ushered in a new drive towards attracting foreign investors and resulted in the passage of the *Nigerian Investment Promotion Act 1995 (NIPC Act)*.[2] The NIPC Act opened up all sectors of the economy to foreign participation[3] and introduced investment guarantees like transferability of capital, dividend, profits, payments in respect of loans, and repatriation of capital upon liquidation.[4] The NIPC Act also introduced guarantees against expropriation of any enterprise, except for National interest.[5]

On the insurance front, the passage of the *National Insurance Commission Act 1997* and the *Insurance Act 2003* created a clearer path for participation of foreign firms in insurance business in Nigeria. However, notwithstanding the path created by these Acts, the legal framework retains inherent bottlenecks that limits and restricts the ability of foreigners to freely participate in the Nigerian insurance market,[6] particularly, as it relates to regulation of insurance business, taxation of insurance and taxation of foreign businesses generally and the general corporate regulatory restrictions.[7] These restrictions automatically constitute restraints to multinational insurance programmes involving Nigeria.

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[1] Emmanuel Nwidoko, 'Trade and Protectionism in Nigeria: Effects on Employment and Income Distribution' (1988) ETD Collection for Fordham University

[2] Nigerian Investment Promotion Act 1995, s 17.

[3] However, Section 18 of the NIPC Act 1995 prohibits foreigners from participating in businesses listed in the negative list, which includes production of arms, production of and dealing in narcotic drugs, production of military and para-military wears accoutrement and any other item listed by the Federal Executive Council of the Nigerian Government.

[4] Nigerian Investment Promotion Act 1995, s 24.

[5] Nigerian Investment Promotion Act 1995, s 25.

[6] Insurance Act 2003, s 4.

[7] Companies and Allied Matters Act 2004, s 54.

1.2 Aim and Objectives of the Research

The general aim of this research is to examine the interplay between protectionism and liberalisation in the Nigerian insurance industry and to ascertain the efficacy of relying on multinational insurance programme to legally circumvent existing trade restrictions and barriers.

However, more specifically, the thesis examines in detail, the contemporary internal workings of admitted and non-admitted insurance, which are integral parts of Multinational Insurance Programmes, with the intention of contributing to the very limited body of academic work on this aspect of insurance.

In addition, the thesis will explain the manner in which Nigeria's insurance, investment and tax regulatory framework impacts on multinational insurance programmes. The thesis will considers the ways in which specific insurance regulations impact on providers of multinational insurance programmes operating or interested in operating in Nigeria.

Furthermore, the thesis will analyze the legality of participation of foreign insurers providing multinational insurance cover in Nigeria. The thesis will examine the restricted window created for foreign participation in the insurance business in Nigeria (including the provision of multinational insurance cover) and will analyze the limitations that still clog their involvement.

Finally, the thesis will examine the tax, fiscal policies and laws that negatively impact on multinational insurance programmes in Nigeria, including those that adversely affect profitability and attractiveness of the sector to foreign insurers and investors.

1.3 Research Questions

The mjor question that this research seeks to answer is – What effect does the current insurance, investment and tax laws have on the Nigerian insurance industry, especially insurers providing multinational insurance programmes in Nigeria?

It raises further questions, which are:

a. Are the legal and regulatory criteria for participation of insurers in Nigeria, unfair and protectionist towards non-admitted insurers providing multinational insurance programmes?
b. What effect does the current insurance, investment and tax laws have on the Nigerian insurance industry, especially insurers providing multinational insurance programmes in Nigeria?
c. If Nigerian laws are protectionist against insurers providing multinational insurance programmes, how can it be rebalanced to reflect a fairer and balanced playing field?
d. Globally, tax authorities are tightening tax regulations to increase local revenue, how does this impact on insurers providing multinational insurance programmes in Nigeria?

This thesis contributes to the relatively modest body of research work in the area of insurance law and practice in Nigeria and makes additional contribution to the existing literature on protectionism as it relates tothe delivery of global insurance services.

1.4 Structure and Research Methodology

The thesis is structured into three parts:

First, the thesis focuses on introductory concepts in insurance and the regulatory framework for insurance business in Nigeria. The approach of discussing and analysing these key insurance concepts is aimed at laying the foundation for subsequent analysis. For example, the concept of insurable interest is analysed and discussed in a bid to set the tone for subsequent expositions on financial interest clause, which is a ready tool applied by non-admitted insurers to address the protectionist problem posed by insurance, tax and corporate laws in Nigeria. Also, the analysis of the right of subrogation in the introductory part of the work takes the same trajectory and sets the tone for discussion and analysis on the applicability of the right of subrogation in the context of multinational insurance programmes.

This aspect of the first part of the thesis that deals with the Nigerian insurance, corporate and tax legal regimes, lays the foundation for the second and third parts of the work, which focus

on legal issues involving multinational insurance programmes. The right to participation of non-admitted insurers[8] in the Nigerian market may require approval not only from the insurance regulator; in some instances, it may require approval from both the insurance regulator and the companies' registry. However, in both instances, taxing obligations may or may not arise depending on the details of the form and style of the relationship between the insured, insurer and reinsurer. This part of the thesis traces the origin of multinational insurance programmes; the meaning, nature and types of multinational insurance programmes. The regulatory aspect of this part of the thesis, lays the foundation for the later discussion on these intricate issues. This part of the thesis analyses corporate protectionism in Nigerian company law and attempts to proffer solutions that can be explored by insurers providing multinational insurance programmes.

The second part of the thesis analyses the interplay between admitted and non-admitted insurance, which is a major focus of the research. The thesis identifies the fact that the design of multinational insurance programmes plays a role in determining their legality in the context of domestic law. Hence, the thesis identifies various designs of multinational insurance programmes and analyses their implications in terms of legality or otherwise in the context of Nigerian law. The question of legality of multinational insurance programmes is taken deeper through an analysis of Nigerian insurance regulations and insurance law that create a window for insurers to provide multinational insurance cover in Nigeria. The thesis also analyses the legality of specific approaches adopted by non-admitted insurers and reinsurers, aimed at circumventing the restrictions of Nigerian laws. Some of these approaches are cut-through clauses, financial interest clause and fronting arrangements.

The third part of the work deals with the tax issues affecting multinational insurance programmes in Nigeria. Nigerian tax laws are openly harsh towards foreign companies and are unfavourably biased against insurance companies. This aspect of the thesis analyses the specific provisions of the tax laws that are harsh towards multinational insurance programmes; for example, loss relief, unexpired risk, turnover taxation of foreign companies

[8] This is an insurer that is not licenced to conduct insurance business or provide insurance service in a particular jurisdiction. See The Vermont Statute Online, Title 8, Chapter 147, and Definition 12.

and double taxation of the insurer and the insured. This aspect of the work also proffers solutions to these harsh provisions.

Globally, there is now a shift in the conversation on international taxation, and governments around the world are pushing for greater scrutiny of cross-border taxation and multinational transactions in order to ensure that taxes are paid at the right time, at the right rate and in the right jurisdiction. Multinational insurance programmes fall within the scope of this global push for greater transparency in business activities and reporting by global businesses. This has resulted in changes in transfer pricing laws that regulate how sister or related company's price services are offered within their corporate group. International insurance companies and providers of multinational insurance programmes with subsidiaries or fronting agents in Nigeria may fall within the definition of related companies. This aspect of the work analyses the impact the new global regulations are having and may have on multinational insurance programmes.

The approach to the research is a combination of comparative, doctrinal, historical and critical legal analysis, directed at finding answers to the research questions mentioned above.

1.5 Choice of Jurisdiction

The primary jurisdiction for this research is Nigeria. However, by reason of comparative analysis, the work will examine legal provisions and positions in England, the United States, Ghana, South Africa and India. The reliance on England is informed by the colonial ties that link Nigeria and England and the fact that Nigeria inherits its common law and Statutes of General Application from England. There is also heavy reliance on English case law in Nigeria as it always stands as persuasive authority, where Nigerian case law is inadequate or under-developed.

In addition, Nigeria and Ghana have a lot of history in common as former British colonial territories[9] and both jurisdictions operate the common law system, share similar culture, circumstances and are both English speaking West African countries. In addition, there is a

[9] Amy Tikkanen, Enclyclopedia Britannica, 'British West Africa' < https://www.britannica.com/place/British-West-Africa> accessed on 20th August, 2019. See also Nwando Achebe, *History Textbook – West Africa Senior School Certificate Examination* (2018, Wordpress)

lot of cross-learning that takes place between Nigeria and Ghana in many aspects of the management of both the economy and the regulatory architecture that under-pins the economy.[10]

Furthermore, the choice of South Africa is informed by the fact that although Nigeria and South Africa are the two biggest economies on the continent, South Africa is more modern, advanced and has a better regulatory framework that can, in some instances, be compared to what is obtainable in the western hemisphere.[11] There is no doubt that Nigeria has a lot to learn from South Africa and a comparative analysis of both jurisdictions lends credence to this fact.

Similarly, India was selected for this comparative approach because like Nigeria, it is a country with a very large population[12], high levels of poverty and under-development and huge potential in the insurance sector. However, despite its challenges, India appears to be making steady and enviable progress, which has been difficult for Nigeria to replicate. It is therefore evident that there are practices in the Indian approach in the insurance sector that could be beneficial to Nigeria.

1.6 Limitation of the Research

A combination of different research approaches is adopted in this work; that is – doctrinal approach, critical analysis and comparative analysis. However, it comes with the possibility of some parts of the work appearing descriptive, hence, the need for critical and comparative analysis, especially of legal concepts and primary sources like case law, statute law and subsidiary legislative. However, to properly examine some key concepts that are relevant throughout the work, some aspect of the work has to be descriptive and explanatory, the essence is purely to lay a proper foundation for further analysis.

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[10] Mombert Hoppe and Francis Aidoo, 'Removing Barriers to Trade between Ghana and Nigeria: Strengthening Regional Integration by Implementing Ecowas Commitment' (2012) World Bank Africa Trade Policy Notes 1 – 10.

[11] Africa Development Bank, African Economic Outlook 2019, (ADB 2019) 11 – 53.

[12] About 1.37 billion (See United Nations, World Population Prospects 2019 < https://population.un.org/wpp/Download/Standard/Population/> visited on 15th August, 2019.

A major shortcoming and limitation of the work is the fact that there is no single comprehensive textbook on multinational insurance programmes and the available writings on this subject has been written largely by aspects that analyse issues more from an industry perspective and with an industry approach rather than an academic approach to analysis and writing. In addition, the research focuses primarily on Nigeria; however, Nigeria has an insurance sector that is still developing and evolving and there is a huge dearth of academic writings on insurance in Nigeria. In addition, there are very limited number of judicial decisions in Nigeria that directly interpret the insurance laws. As a result, this research is novel in many respects, especially in the context of insurance law and practice in Nigeria.

1.7 Outcome and Findings

As a result of this research, the following points will be made clear:

a. What multinational insurance programmes represent
b. The history of multinational insurance programmes;
c. The forms and types of multinational insurance programmes;
d. The legality of multinational insurance programmes in Nigeria;
e. The window(s) through which multinational insurance programmes can be conducted in Nigeria;
f. The legal challenges to anti-protectionist solutions (like cut-through clause, fronting arrangement and financial interest clause) adopted by insurers providing multinational insurance programmes in Nigeria;
g. The nature of and solutions to domestic tax restrictions contained in Nigerian laws that impede on multinational insurance programmes;
h. The nature and solutions to tax restrictions that arise from international regulations and which impact on multinational insurance programmes in Nigeria.

1.8 Introduction to Key Insurance Concepts Relevant To Multinational Insurance Programmes

The essence of this part of the work is to introduce important insurance concepts that will be reoccurring throughout the work; hence it is important for clarity and context to be established. As a result of the need to adopt this approach in this introductory part of the

work, this section of Chapter One will to some extent appear descriptive. However, the approach in other chapters will be largely different. This aspect of the work will start with the meaning of insurance.

1.8.1. Meaning of Insurance and Multinational Insurance Programme It is important to understand the meaning of insurance, key insurance concepts and the principles that underpin these concepts, before delving into the detailed and technical aspects of multinational insurance programmes. This approach is important because insurance is a regulated activity and there are a number of business arrangements/practices that can be likened to insurance business but are not insurance business, neither are they regulated by insurance law. Furthermore, in England and Nigeria, insurance is a regulated activity, hence, participation in this line of business is permissible only where due authorisation has been sought and obtained.[13]

Hence, unauthorised participation in insurance business is illegal; in most cases it is criminalised[14] and the contract stands the risk of not being enforced on the basis of illegality.[15] This reality, makes it expedient to clearly define the boundaries of insurance business in order to ascertain the activities that fall within and outside the scope of insurance regulation.[16] It had been argued in *MacGillivray on Insurance Law*, that it is elusive to attempt a satisfactory definition of insurance or contract of insurance[17]; however, some definitions of insurance will be attempted.

Defining the concept and scope of insurance has been herculean; no statute has attempted a definition, and reliance has therefore been placed on the courts and on academics to provide some suitable definitions.[18]

Generally, to describe insurance as a concept, it can be safely argued, that insurance creates a contractual obligation that becomes enforceable when a loss is suffered and the insurer

[13] See the relevant legislation in England - Financial Services and Markets Act 2000 (FSMA 2000) and Financial Services and Markets Act (2000) (Regulated Activities) Order 2001, SI 2001/544, art 10. The FSMA 2000 regulates all forms of insurance business in England.
[14] FSMA 2000, s 19 and 23.
[15] FSMA 2000, s 20 and 26. See also Robert Merkin, *Colinvaux's Law of Insurance* (Sweet & Maxwell, 11th Edition) 15 (Merkin's Colinvaux's).
[16] John Birds, *Bird's Modern Insurance Law* (Sweet & Maxwell, 8th Edition) 8. (Birds)
[17] John Birds, Lynch and Milnes, *MacGillivray on Insurance Law* (Sweet & Maxwell, 12th Edition) 5 (MacGillivray).
[18] ibid.

becomes obliged to restore the insured to its position prior to the loss.[19] Similarly, insurance is a contractual arrangement where consideration is given in exchange for the security that some benefits will accrue upon the happening of some events, but the occurrence of the event must be uncertain or the likely time of occurrence must be uncertain.[20] Furthermore, insurance is a contract, where a party furnishes consideration in exchange for security that he shall not suffer loss when a number of adverse events occur.[21]

The above definitions or descriptions of insurance are commendable; however, they appear too narrow because they are based on specific facts of cases placed before the courts.[22] An alternative approach will be to define insurance from an academic perspective. In this respect, insurance is a contract based on which a party called the insured transfers or shifts its risk(s) to another party called the insurer and the latter takes the responsibility of bearing the risk of the occurrence of an uncertain and unpredictable event, the occurrence of which will obligate the insurer to pay the insured or remedy effect of the event on the insured.[23]In some instances insurance has been likened to an institution that reduces risks.[24] Insurance has also been described as a contract where an insurer undertakes to pay the insured in exchange for a premium payment upon the occurrence of a specified event.[25]

Based on the above definitions of insurance, it can be safely argued that insurance is a regulated contract between the insurer and the insured, wherein, the insured receives an assurance or security, to be restored to an agreed state when agreed damage arises or to pay an agreed sum to a specified beneficiary (ies) upon the death of the insured, in return for the obligation to pay a consideration called premium.

It is also important to briefly examine the meaning of multinational insurance programme before delving into key insurance concepts. Multinational insurance means the conduct of insurance business across international boundaries. It involves cross–border supply of insurance services and involves parties and risks resident in more than one jurisdiction and

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[19] Robert Merkin, *Colinvaux's Law of Insurance* (Sweet & Maxwell, 11th Edition) 15 (Merkin Colinvaux's)
[20] *Prudential Insurance Co v. Inland Revenue Commissioners* [1904] 2 KB 650.
[21] *Lucena v. Craufurd* [1806] 2 Bos & PMR 269 at 301.
[22] The Perimeter Guidance Manual 2013, paragraph 6.3.3 (PERG).
[23] *Birds* (n 16) 9
[24] Greene, *Risk and Insurance* (4th Edition, Butterworth's, 1977).
[25] Hardy Ivamy, *General Principles of Insurance Law* (Butterworth's, 4th Edition, 1984)

occasionally, the risk(s) covered may be situated in more than one jurisdiction. A key hallmark of multinational insurance is that it involves more than one country. Any form of insurance that lacks this element of cross-border engagement cannot be classified as multinational insurance no matter how similar it appears. A good example is the United States of America, where each of its fifty States regulates the conduct of insurance business within its borders and inter-state insurance programmes are designed and implemented in a manner that can be likened to MIP; however, the absence of the cross-border element does bring it within the scope. Typically, multinational insurance programmes can take the form of either an admitted or non admitted insurance. An admitted insurance is a type of conver where the insurer is licenced to conduct insurance business in the jurisdiction where it provides cover, whereas, a non – admitted insurance refers to insurance services provided by insurers that are not licenced to provide such cover in a particular jurisdiction.[26]

Some key elements of insurance that can be identified from the above definition have been discussed briefly below:

- **Premium**: the definition of Channel J recognises the fact that payment of a premium is a usual but not a mandatory payment.[27] A situation where a premium is not payable until after an event arises, is funding of litigation and arbitration. In such situations the policy is purchased after a legal dispute arises, and the premium becomes payable only if the litigation is successful and recovery is made from the other party to the litigation. However, the applicability of such an arrangement under a multinational insurance programme will be highly dependent on the position of domestic regulation and legislation in each jurisdiction that the multinational programme covers. In a jurisdiction like Nigeria, after the event, policy will be illegal because Section 50 of the Insurance Act 2003 makes the payment of a premium a condition precedent for the creation of a valid insurance contract.[28] However, one question that begs for an answer is whether

[26] The Vermont Statute Online, Title 8, Chapter 147, Definition 12.

[27] In Collinvaux's Insurance Law, the point was made that "most forms of insurance entails money payment from the assured to the insurer" but points out to an exception contained in after the event policies applicable in for example litigation funding. The premium becomes payable only where the litigation was successful and recovery is made from the defendant through the cost mechanism (page 16. In *Dix v Townend* [2008] EWCH 90117 the Court pointed out that the possibility of perpetrating regulatory arbitrage would have been higher if cost was a regulatory requirement.

[28] Nigerian Insurance Act 2003, s 50.

parties to an insurance contract can waive this statutory condition precedent and decide to enter into a valid and legal insurance contract without the payment of a premium. If this option is tenable, the implication will be that contractually, after the event, insurance in a multinational insurance programme can be relevant and possible in Nigeria. Under Nigerian law, it is trite when a statutory or contractual right exists that accrues to the benefit of a party, that party is entitled to waive the right and proceed to contract, or engage as if the right does not exist.[29] If Section 50 of the Insurance Act 2003 is read in the context of this provision, then it can be argued that the requirement of premium before cover can be waived in Nigeria, and parties can also adopt the option of after the event insurance.

The above issue became the issue for consideration in the case of ***Corporate Ideal Insurance v Ajaokuta Steel Company*,**[30] the Plaintiff Insurer provided insurance cover to the Defendant Company but no premium was paid and subsequent attempts to compel the Defendant to pay the premium proved abortive. The Plaintiff therefore instituted an action at the High Court against the Defendant for the latter to be compelled to pay the arrears of premium. The High Court considered the position of the parties and concluded that by executing the insurance contract, parties have agreed to waive the requirement of Section 50 of the Insurance Act that required a premium before cover. However, on appeal to the Court of Appeal, the Court held that the requirement of payment of premium before cover is a mandatory requirement under Nigerian law that cannot be waived by agreement of parties because Section 50 of the Insurance Act applies the word ‘‘shall’’, which is a mandatory provision. The Court therefore affirmed the mandatory requirement of this provision and on appeal to the Supreme Court, the position was affirmed by the apex Court in Nigeria that held that the contract is ex facie illegal and therefore no party can take benefit under it.[31]

However, the decision of the Court of Appeal and the Supreme Court appears extreme, because, an insurance contract that does not satisfy the requirement of premium before cover is at best null and void, but that does not make it illegal. The wording of Section

[29] *Mobil Producing Nigeria Unlimited v LSEPA* (2003) FWLR (Pt. 137) 1029.
[30] *Ajaokuta Steel Company v Corporate Ideal Insurance* (2004) CA/A/62/M/2002.
[31] *Corporate Ideal Insurance v Ajaokuta Steel Company* (2014) 3 CLRN.

50 of the Insurance Act is very clear, *"The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of an insurance risk unless the premium is paid in advance"*. It does not in any way contemplate that the contract will be illegal, but it alludes to its invalidity, which presupposes that it will be unenforceable. It is important to point out the distinction between illegal and invalid, because an illegal contract is one that lacks legal foundation and there is also a penalty or punishment that accompanies the illegality and is imposed expressly by law; whereas an invalid contract is one which does not have any penalty that accompanies it and at best it will be unenforceable without any other sanction.[32] The wording of Section 50 of the Insurance Act 2003, contemplates a situation where the contract would simply have been void and not illegal. The implication of an illegal contract is that the court cannot enforce any right of any of the parties to the contract based on the strength of the legal principle of *ex turpi causa non – oritur actio* – no action can be founded on an illegal cause.[33] Thus, none of the parties can claim a right or a remedy under such a contract. However, under a void contract an injured or innocent party can still exercise some rights under the contract and obtain some remedies. Based on Section 50 of the Insurance Act and contrary to the position of the Supreme Court, an insurance contract concluded in breach of Section 50 should be void and not illegal.

The best approach that should be adopted under Nigerian law would be for the law to be amended to allow parties to opt out of the requirement of full payment of premium before cover. This approach will be in tandem with the doctrine of freedom of contract; however, there could be fears regarding consumer protection and the fact that parties with higher bargaining power could abuse this advantage by unduly influencing the other party to agree to an opt out arrangement. In this instance, the law could be amended to strengthen the consumer protection provisions of the Nigerian Insurance Act to address such concerns.

Where a premium is payable, it is important to note that it should not be equivalent to the value of performance provided or to be provided by the insurance. Thus, the value of the

[32] *Pan Bisbilder (Nig.) Ltd v. F.B.N. Ltd.* (2000) 1 NWLR (Pt.642) 684, (Dictum of Achike, JSC).
[33] *Pan Bisbilder (Nig.) Ltd v. F.B.N. Ltd*. (2000) 1 NWLR (Pt.642) 684.

premium ought to be less than the open market value of a similar service.[34] This aspect has been subjected to criticisms. Contrary to the position of Channel J, in jurisdictions like Nigeria, there cannot be an insurance contract in the absence of a clear premium and policy. In other words, there are certain instances where the insurance provided is introduced as an add-on or incentive for procuring another service or goods. Thus, it operates like a tag-along and serves more of a marketing purpose, thus it is brandished as free and there is no real mention of the premium that will be payable on it; under Nigerian law, this will not qualify as a premium and the contract can therefore not be classified as an insurance contract. With respect to English law, Professor Merkin in Collinvaux's Insurance Law points out that in such instances, "there is conflicting authority on whether an apportionment of an amount representing premium has to be paid in order to give rise to insurance."[35] In ***Hampton v Toxteth Co-operative Society***[36]where a membership of a local co-operative society entitled members to claim a particular sum upon the death of a spouse. The due sum will be calculated based on the member's contribution, which operates as a condition to claim a particular sum upon the death of a spouse. The sum due will then be calculated based on the member's contribution over a period of time. When a dispute arose, and an appeal was made to the Court of Appeal, it held that the absence of an insurance policy and the discretionary payment powers were fatal to it. In contrast, in ***Nelson v Board of Trade***[37] the court allowed an insurance contract to validly operate even though the consideration was not a distinct premium but was a part of another payment.

It is however important to note that based on section 31 of the Marine Insurance Act 1906, a premium in a marine insurance contract can be agreed or arranged at a later date or moment.[38]

It is important at this juncture to refer to the wording of Financial Conduct Authority Handbook, PERG 6.6.6, which states premium payment in an insurance contract must

[34] *MacGillivray* (n 17) 4
[35] Merkin Colinvaux's (n 19) 16
[36] [1915] 1 CH 721
[37] [1901] 84 L.T. 565.
[38] See footnote 14, where reference was made to after the event policies where premium is made at a much later stage.

not take the form of a distinct payment because it could be a part of some other payments, and consideration could take a non-monetary form.[39]

- **Obligation to Pay or Perform or Indemnify the Insured**: another element that can be identified from the definition of insurance is the obligation to pay or indemnify the insured upon the occurrence of an event. This is also known as the concept of 'assumption of risk' in that the insurer is placed under an obligation to respond in the form of monetary payment or provision of a service where an identified event occurs.[40] However, where the responsibility to pay or perform is discretionary and not mandatory, such an arrangement will not qualify as an insurance contract,[41] see ***Medical Defense Union v. Department of Trade and Industry*.**[42] Such discretionary options are included through clauses conferring absolute discretion on the insurer. The implication of which is that such an insurance contract will not fall under the regulatory supervisory regime of the Financial Conduct Authority (FCA) and Prudential Regulatory Authority (PRA) because the contract will not qualify as a contract of insurance and will therefore not be a regulated activity. Similarly, the contract will not attract insurance premium tax because it is not a regulated activity and is not a contract of insurance. It should be noted that authorised insurers can hardly enter into such because of strict regulatory standards, but such practices are common with small Friendly Societies, Medical Defense Union (MDU) among others.[43]
- **Money or Equivalent Benefit**: another important element that must be present before a contract can be categorised as an insurance contract is that of monetary payment or provision of corresponding benefits. This was taken further by the decision in ***Department of Trade and Industry v. St Christopher Motorists Association*,**[44] which endorsed arrangements that include services provided to the insured but to be paid for by the insurer. In this case, the insurer agreed to provide a car with a driver or a driver where

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[39] Financial Conduct Authority Handbook, PERG 6.6.6.
[40] The Perimeter Guidance Manual 2013, paragraph 6.6.2 (Perimeter Guidance Manual). In *Department of Trade and Industry v St. Christopher's Motorists Association* it was held that provision of a chauffeur where the insured was disqualified from driving was held to qualify as a suitable benefit. See *also Prudential Insurance v Inland Revenue Commissioners* [1904] 2 KB 650, *Everson v Flurry* [1999] 8 C.L. at 406.
[41] *The Prudential Insurance Case* [1904] 2 KB 650; *Hampton v Toxteth Co-Operative Provident Society* [1951] 1 Ch 721*; Department of Trade v St Christopher* [1974] 1 All E R 395.
[42] *Medical Defense Union v. Department of Trade and Industry* [1979] WLR 689.
[43] Victoria Sander, 'Insurance Payable at the Discretion of the Insurer' (2006) Linklaters Insurance Update October 5.
[44] *Department of Trade and Industry v. St Christopher Motorists Association* [1974] 1 Lloyd's Rep 557.

a member of a proprietary club is prevented from driving. The court held that the contract was one of insurance because it fell within the phrase "corresponding benefits" and it was immaterial that payment by cash or in monetary terms was not involved. In the recent decision of ***Re: Digital Satellite Warranty Cover Ltd & Anor v Financial Services Authority*** [45] appellants were in the business of selling and performing extended warranty satellite services. This entailed that their customers pay a periodic fee and they were obligated to repair or replace satellite television dishes, the digital boxes and other accessories that accompany satellite services. The appellants did not obtain authorisation from the Financial Services Authority as required by section 19 of the Financial Services and Markets Act 2000 and the Financial Service and Markets Act (Regulated Activities Order) 2001. In the light of the omission to obtain the mandatory authorisation, the Financial Services Authority (FSA) brought an application for the appellant companies to be wound up on grounds of public interest. The court of first instance and the Court of Appeal both granted the applications and relief sought by the FSA. Upon appeal to the Supreme Court, the Appellant argued that the FSMA (Regulated Activities) Order 2001 sets out the category of regulated insurance business, which are 18 non-life and 9 life insurance businesses. Within the category of non-life, the first 17 categories are distinct from the 18th category, because the latter covered benefits in kind or in cash. The argument of the appellants is that benefits in kind under the first 17 categories will not fall within the scope of regulated activities except in relation to travel assistance. One deduction that can be made from the argument of the appellant is that they did not deny nor argue against the fact that the activities undertaken fall within the definition of insurance business under the common law, rather they argued that any interpretation must be in conformity with EU law. In the final analysis, the Supreme Court held that the activities amounted to insurance business in England and it was in breach of the relevant laws, the orders sought by the FSA were granted and the appeal was dismissed.

- **An Uncertain Event**: the dictum of Channel J in **Prudential Insurance case**,[46] was emphatic as to the necessity for the existence of uncertainty of an event occurring for the contract to qualify as an insurance contract. Where an event lacks the ingredient of uncertainty of occurrence or time of occurrence, then it cannot be categorised as falling

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[45] *Re: Digital Satellite Warranty Cover Ltd & Anor v Financial Services Authority* [2013] UKSC.
[46] *Prudential Insurance Co v. Inland Revenue Commissioners* [1904] 2 KB 650.

within the scope of insurance contract.[47] Uncertainty with respect to when an event will occur deals with indemnity and property insurance and uncertainty over when the event will occur relates more with life insurance.[48]

- **Insurable Interest**: insurable interest is the interest or relationship that must exist between the insured and the subject matter of an insurance contract,*[49]* the requirement that a person taking out an insurance policy must be at risk of suffering a loss if the relevant event occurs. Under English law, for a contract to qualify as an insurance contract, it must be one in which the insured has insurable interest.[50] The position of the law is different in other jurisdictions, for example in Australia.[51]

1.9 Brief Analysis of other key Insurance Concepts

The focus of this work is on multinational insurance and some taxation relevant to multinational insurance, but it will be difficult to proceed into its very nucleus without first laying a foundation that focusses on key concepts in insurance law and practice. Concepts and principles that are germane to any real appreciation and analysis of any branch of insurance law. The first concept to be discussed and analysed is insurable interest, which at least for now remains a pillar in the corpus of the English and Nigerian common law of insurance and remains relevant in the structuring of multinational insurance programmes that normally will have footprints in numerous jurisdictions. However, while the law on insurable interest has remained consistent for many years, within the last decade, the Law Commission and the Scottish Law Commission have introduced a number of improvements in the law and have recently published an 'Updated Draft Insurable Interest Bill for Review'[52] and an Insurable Interest Bill. However, it is instructive to mention that the June 2018 Report and Bill focusses substantially on life and life related insurance, and less attention is placed on non-life insurance.

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[47] [1904] 2 KB 650.
[48] *Gould v Curtis* [1913] 3 KB 84. See the view expressed in Colinvaux's Insurance Law where it was argued that "The sum must be payable on the occurrence of an event which is uncertain in terms either of if it will happen (indemnity insurance) or when it will happen (life insurance). If the assured can control the event, there is no insurance, although this statement requires modification in the case of endowment insurance which pays out either on the death of the assured or on the happening of the earlier event. (Merkin Colinvaux's (n 19) 18)
[49] *Birds* (n 16) 41.
[50] *Birds* (n 16)10.
[51] Insurance (Consequential Amendments and Repeals Act) 1995, s 16.
[52] The Law Commission and Scottish Law Commission, Reforming Insurance Contract Law: Updated Draft Insurable Interest Bill for Review, June 2018.

1.9.1 Insurable Interest

There are numerous definitions on insurable interest, but it has been challenging to find a generally applicable definition in view of the fact that most existing definitions are more suitable for one form of insurable interest or another. An insurance is valid only if the person taking out the insurance has either a financial or legal interest in the insured subject matter.[53] In other words, it deals with the relationship between the insured and the subject matter of the insurance,[54] there must be a personal connection between the insured and the insured subject. It is for this reason that it is required that for an insurable interest to exist, there must be a subject matter, the insured must have an interest in that subject matter, either economic or financial, it must be an actual and a legal interest.[55] A simple attempt was made in a Report released by the Law Commission of England and the Scottish Law Commission where it described insurable interest as the insurance doctrine which requires that a prospective insured must have a benefit in the preservation of the insurance subject and will suffer if it is destroyed or lost.[56] In the recent June 2018 Report by the Law Commission and Scottish Law Commission, insurable interest was described as a case of a person must established that it will be affected by the subject matter of the insurance, in the sense that must gain from its preservation and suffer from its loss or damage.[57]

Professor John Birds describes insurable interest as the interest or relationship that must exist between the insured and the subject matter of an insurance contract.[58] In simpler terms, it is deducible that an insurable interest presupposes the existence of a benefit to be enjoyed or a detriment to be suffered in the event of a loss of the object of insurance.[59]

A statutory description of insurable interest from a marine insurance perspective is contained in Section 5(1) and (2) of the Marine Insurance Act 1906, which provides a doctrinal basis

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[53] John Wright, 'A Question of Insurable Interest' (2007) 18 9 Cons. 20.
[54] Franziska Arnold-Dwyer, 'Insurance Law Reform by Degrees: Late Payment and Insurable Interest' (2017) 80(3) MLR 489 – 509.
[55] John Wright, 'A Question of Insurable Interest' (2007) 18 9 Cons. 20.
[56] Law Commission, *Insurance Contract Law: Insurable Interest* (Law Commission, 2 January, 2008) <http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf> accessed 9 March, 2014 (Law Commission Report 2008).
[57] The Law Commission and Scottish Law Commission, Reforming Insurance Contract Law: Updated Draft Insurable Interest Bill for Review, June 2018.
[58] *Birds* (n 16) 41.
[59] John Birds, Lynch and Milnes, *MacGillivray on Insurance Law* (Sweet & Maxwell, 12th Edition) 5

for insurable interest.[60] Generally, the courts have been left to develop the meaning of insurable interest. A judicial definition was advanced in ***Lucena v Craufurd***[61] where the court stated that an insurable interest is a right in a property or a right derivable from a contract connected to a property, which could be affected by a loss.'[62]

In ***Lucena v Craufurd***[63] and ***Macaura v Northern Assurance Company***[64] the House of Lords established that with respect to property insurance, insurable interest will be present if the insured has either legal or equitable interest in the property. In Macaura's case, Macaura was the owner of a stock of timber and he sold the same to a company but was not paid in cash, rather the entire issued share capital in the company was allotted to him as consideration for the timber. After the transaction was concluded, the timber was destroyed in a fire and Macaura made a claim under an insurance cover he had taken out for the timber. The claim was refused by the insurers because Macaura no longer had an interest in the timber. The only interest in the timber was held by the company and even though Macaura was the sole shareholder, he was still not entitled to a claim because he insured the timber in his name.

The Macaura decision has huge implications for multinational insurance programmes and the restrictions imposed by non-admitted jurisdictions. Normally, a non-admitted insurance jurisdiction imposes restrictions on insurers that are not licenced to provide insurance services within that jurisdiction. Where such unlicenced services are provided, the local insurance authorities treat it as illegal and invalid. However, in order to circumvent these restrictions, multinational insurers have introduced a financial interest clause as a device adopted to provide cover for a foreign parent company having shares in a local company operating within a non-admitted jurisdiction. Based on this device, the interest of the parent company is treated as its financial interest in that company and consequent on it, an offshore insurance policy is obtained to protect this financial interest. Thus, where a loss is suffered by the local subsidiary, the offshore parent company will be deemed to have suffered a loss as a result of its financial interest in the local company, thus recognising a kind of indirect interest. However, the legality of the financial interest clause is in doubt in view of the

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[60] Marine Insurance Act 1906, s 5.
[61] *Lucena v Craufurd* [1806] 2 BOS & PNR 269.
[62] ibid.
[63] *Lucena v Craufurd* [1806] 2 BOS & PNR 269.
[64] *Macaura v Northern Assurance Company* [1925] AC 619.

decision in Macuara's case that states that a shareholder does not have an insurable interest in the company's property; in simple terms, the shareholders interest is in the company itself and not in the assets of the company.[65] An in-depth analysis of insurable interest will be considered in a separate chapter of this work.

The courts are beginning to give a flexible interpretation to insurable interest,[66] for example insurable interest has been held to cover a case in which an insured had only a duty to care over a property[67] and a case where the insured had close physical relationship to the property that was insured.[68] In ***National Oilwell (UK) Ltd v Davvy***[69], a sub-contractor was contracted for only the supply of goods in a project and was not involved in the other aspects of the project, but the court held that the sub-contractor had insurable interest in the entire contract because if the project was destroyed, the sub-contractors aspect of the work would be affected. This reasoning of the court has been followed in ***Deepak Fertilisers & Petrochemicals Corp Ltd v Davy McKee (London) Ltd***[70] The court held that a sub-contractor has insurable interest in the construction of a plant because any disruption or damage to the plant will affect the sub-contractor's contract.

This approach to interpreting insurable interests, distinct from the traditional approach, has been described as the ''pervasive insurable interest''.[71] One issue that has reoccurred is at what time must an insurable interest exist? In property and liability insurance, insurable interest must be present at the time of contract and at the time of claim, but in life insurance, insurable interest must be present at the time of contract but not necessarily at the time of claim.[72] In marine insurance, insurable interest is not mandatory at the time of contract, but it is expedient at the time of claim.[73]

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[65] Ellis Ferran and Look Chan Ho, *Principles of Corporate Finance Law* (Oxford University Press, 2nd Edition, 2014) 129.
[66] Franziska Arnold-Dwyer, 'Insurance Law Reform by Degrees: Late Payment and Insurable Interest' (2017) 80(3) MLR 489 – 509.
[67] *Sharp v Sphere Drake Insurance* [1992] 2 Lloyd's Rep 501.
[68] *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1994] CLY 4086.
[69] *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1994] CLY 4086.
[70] *Deepak Fertilisers & Petrochemicals Corp Ltd v Davy McKee (London) Ltd* [1999] 1 All E.R (Comm) 69
[71] David Abbot, Tony and Michelle, 'Insurable Interests' (2018) Insights Westlaw UK. See also Deepak Fertilisers v ICI Chemicals (1999) 1 Lloyd's Rep. 387.
[72] *Law Commission Report 2008* (n 48) 14.
[73] John Wright, 'A Question of Insurable Interest' (2007) 18 9 Cons. 20. See also Marine Insurance Act 1906.

It is therefore expedient to focus on insurable interest in specific situations.

1.9.1.1 Insurable Interest in Specific Situations

1.9.1.1.1 Insurable Interest based on Potential Financial Loss:

For insurable interest to exist in a business-based relationship there must be monetary or pecuniary interest on the part of the insured. For example, there are pecuniary interests in a creditor and a debtor; joint debtors have insurable interest in each other's lives and an employer has insurable interest in the life of his employee, especially where the employer is particularly crucial, or where it will take some cost to recruit and train another another employee to replace such an employee.[74] Conversely, an employee could have insurable interest in the life of his employer. An employee appointed on a fixed term contract has an insurable interest in the life of his employer, up to the value of the remuneration that should accrue from the fixed employment. ***Hebdon v West***[75] lends credence to the fact that employment contracts backed with a certain wage for a fixed period of time creates an insurable interest in favour of the employer or prospective employer.

Similarly, an employer has insurable interest and can only claim up to the value of his interest in the employee. MacGillivray had questioned the possibility of assessing the value of an employee in pecuniary terms.[76] In ***Hebdon v. West***[77], which involved a bank and its clerk employee who insured his employer's life with two separate insurance policies, the first for 5000 pounds and the second for 2500 pounds. He received an annual salary of 600 pounds and an employment contract for 7 years. The employer had granted him a loan of 4700 pounds with a promise not to call for it in his lifetime. Upon the death of the employer, he received 5000 pounds from the first insurer but the second refused to pay for the 2500 pounds on the grounds that his insurable interest was to the extent of the aggregate of his wage for 7 years, which amounts to 4,200 pounds but that he had no interest with respect to the promise because no consideration was furnished for that promise, and that in view of the fact that the

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[74] *Law Commission Report 2008* (n 48) 14.
[75] *Hebdon v West* [1863] 3 B&S 579.
[76] John Birds, Lynch and Milnes, *MacGillivray on Insurance Law* (Sweet & Maxwell, 12th Edition) 5
[77] *Hebdon v West* [1863] 3 B&S 579.

first interest had been satisfied under the first policy, they argued that they are not liable. The court upheld this argument.

This decision has been criticised for offending the principle that life insurance requires insurable interests only at the time of contract and not at the time of loss, which is typical for non-indemnity insurance. The decision in ***Dalby v India and London Life Assurance***,[78] which overruled ***Godsall v Boldero***,[79] clearly emphasised that insurable interest under section 3 of the Life Assurance Act 1774 was required only at the time of contract and not at the time of loss. This puts to question the basis for the decision in ***Hebdon v West*****,**[80] which apparently now appears unfair, in view of the fact that the contract was not a wager.[81]

1.9.1.1.2 Insurable Interest Based on Statute Law:

Certain English statutes either have the requirement of insurable interest or input it in certain situations. The first can be found under the *Civil Partnership Act 2004*, which extends and inputs the existence of insurable interest in civil partnership relationship. *Section 253 of the Civil Partnership Act 2004* is to the effect that two persons in civil partnership are presumed to have insurable interest in the life of each other and there is no limit on the value of insurable interest.[82]

Another example can be found in *section 11 of the Married Women Property Act 1822* that entitles a husband to obtain an insurance policy for the benefit of his wife or children and vice versa. The modus operandi of this arrangement is that the Act creates a trust of the policy held by a deceased policy-holder's executors, thus shielding the proceeds from the rest of the deceased's estate, thus making it directly available for the benefit of the respective beneficiary.[83] It is an easier way for parents to circumvent the requirement of insurable interest for the benefit of their children.

[78] *Dalby v India and London Life Assurance* [1854] 15 CB 365.
[79] *Godsall v Boldero* [1807] 9 East 72.
[80] *Hebdon v West* [1863] 3 B&S 579.
[81] *Law Commission Report 2008* (n 48) 15.
[82] Civil Partnership Act 2004, s 253.
[83] *Law Commission Report 2008* (n 48) 16.

Another statutorily created insurable interest is found in the *Local Government Act 1972*[84], which empowers local governments to insure members who are engaged in the business of the authority. Similarly, the *Land Drainage Act 1991* provides that the Board is empowered to go into a contract and to pay a premium in exchange for an undertaking by the recipient to pay to the Board an agreed sum in the event of a personal accident to any of its members while engaged in the business of the Board.[85] The Act proceeds to mandate the Board to pay such sums, less deduction of expenses, to a personal representative of the injured member.[86]

1.9.1.1.3 Insurable Interest Based on a Court's Judgment:

As mentioned earlier**,** the frontiers of insurable interest are being consistently expanded by the courts. In the 2003 case of ***Feasey v. Sun Life Assurance Co of Canada***.[87] The court held that Lloyd's syndicate had sufficient insurable interest in the welfare and wellbeing of personnel of a ship-owner who had taken cover from a protection and indemnity club for injury to his employees and the policy was reinsured with the Lloyd's syndicate as a personal accident policy. The Court of Appeal held that the Syndicate had sufficient interest in the lives of the employees and the defence of the insurer that the syndicate did not have insurable interest was rejected.

The details of the case are as follows - S Ltd, a P&I club, obtained cover for its members for personal injury or death. S ltd later entered into master line slip policy with the Syndicate to cover its liability to its members based on which fixed benefits were to be paid to qualifying members who suffer personal injuries or illness. The liability was reinsured by the syndicate with the defendant.

In 2000, the Defendant declined to honour claims made by the Syndicate, consequently the latter sued. The Defendant argued that S Ltd did not possess insurable interest in the lives and well-being of its members, which made the insurance illegal based on section 1(a) of the Life Assurance Act 1774. The court held that there was no such violation and that S Ltd possessed an insurable interest in the contract of insurance with the Syndicate. The court thus

[84] Local Government Act 1972.
[85] Land Drainage Act, schedule 2 (1).
[86] Land Drainage Act, schedule 2 (1).
[87] *Feasey v. Sun Life Assurance Co of Canada* [2003] ECWA Civ 885.

categorised insurance into four groupings: the first is straightforward insurance that strictly requires proof of insurable interest in a property,[88] the second is insurance dealing with life and the law in turn is strict in that the mandatory insurable interest is pecuniary based. The third category the court stated is one in which the subject matter is an adventure, not necessarily a property.[89] The fourth category relates to "policies in which the court has recognised interests that are not even strictly pecuniary" These are situations in which the interest is presumed under the law. This last group covers cases of love and affection among others, which are outside the bounds of strict doctrine of insurable interest.[90]

The implication of this decision is that in life insurance, the requirement of insurable interest in form of a pecuniary loss is not necessary where the policy is for several lives and for a substantial period of time.[91]

1.9.1.1.4 Insurable Interest in Property:

For a person to possess insurable interest in a property, the person must be connected to the property in a manner that if the property is lost or destroyed, the insured will suffer in a pecuniary sense. This position is evident in the decision of Lawrence J in ***Lucena v. Crauford***[92]. Furthermore, a condition that must exist in order for a person to possess insurable interest in a property, is that there must be the "existence of a legal relationship between the assured and the subject matter of the insurance"[93] this position has been reiterated by Lord Elder in Lucena's case.[94]

This approach towards insurable interest is founded on the principle of indemnity insurance that is to the effect that an insured should only be compensated for losses suffered. The approach identified above appears to be the strict legal interpretation of insurable interest in indemnity insurance.

1.9.1.1.5 Insurable Interest in Liability Insurance:

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[88] [1802] 3 Bos & P 75; *Macaura v. Northern Assurance* [1925] AC 619.
[89] *Wilson v. Jones* [1867] L.R 2 EX 139.
[90] *Feasey's Case* [2003] ECWA CIV 885.
[91] *Law Commission Report 2008* (n 48) 18.
[92] *Lucena v. Crauford* [1802] 3 Bos & P 75.
[93] John Birds, Lynch and Milnes, *MacGillivray on Insurance Law* (Sweet & Maxwell, 12th Edition 58.
[94] *Lucena v. Dauton* [1806] 2 BOS & FNR 269 @ 321.

Liability insurance provides cover with respect to liabilities that the insured will incur against third parties as against liabilities arising from damage to goods.[95] This is the nature that qualifies a liability insurance as an indemnity insurance.[96] Under a liability insurance policy, the insurer agrees to indemnify the insured against liabilities that may be incurred against third parties.[97]

The importance of insurable interest in the context of multinational insurance programmes and international insurance cannot be overemphasised. As will be discussed in extensive detail in later chapters, multinational insurance programmes are constantly faced with regulatory challenges, particularly in jurisdictions where foreign insurers are prohibited to participate in unlicensed insurance business.[98]

The issues arising from financial interest clause are discussed in extensive detail in later parts of this work.

Continuing from the above, it should be noted that Section 18 of the Gaming Act 1845 makes all wagers null, void and of no legal effect. Wagers are contractual arrangements wherein the parties do not have any insurable interest. Hence, based on the principles enunciated above, such contracts were unenforceable under the Gaming Act 1845. In 2005, the Gambling Act 2005 was enacted, it repealed Section 18 of the Gaming Act 1845, replaced same with Section 335 of the Gambling Act 2005 and legalised contracts that relate to gambling. The Gambling Act 2005 does not apply to life and accident insurance under the Life Assurance Act 1774, it does not also affect marine insurance policies, because under the Marine Insurance Act 1906, having insurable interest at the time of contract is immaterial, insofar as insurable interest exists at the time of the loss, as required by Section 6 of the Marine Insurance Act 1906.[99] However, it has been posited that based on the Gambling Act 2005, it seems that the absence of insurable interest in a contract of indemnity insurance does not render the contract void under English law.[100]

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[95] *Goddard & Smith v Frew* [1939] All. E.R. 358.
[96] Merkin Colinvaux's (n 19) 1052.
[97] ibid 1111.
[98] Logan Payne, 'Insurance Compliance and Tax Consideration for the Multinational Company' (2014) Lockton Global LLP Publication 5.
[99] David Abbot, Tony and Michelle, 'Insurable Interests' (2018) Insights Westlaw UK.
[100] David Abbot (n 75).

1.9.2 Utmost Good Faith, Duty of Disclosure and Duty Not to Misrepresent

As explained earlier, part of the focus of this chapter is to embark on scanty reviews of key insurance concepts. This is aimed at laying a proper foundation for analysis in latter parts of this work that will focus on the regulatory framework for insurance within the context of multinational insurance in Nigeria and England. Following, an in-depth analysis of multinational insurance will be conducted, after which another in depth analysis of taxation as it relates to insurance from a global perspective. In the first attempt, only insurable interest has been considered, but other key insurance concepts will be considered here.

As a general rule, all contracts are concluded on '*caveat emptor'* basis, meaning – "buyers be beware" of the risk likely to arise from a transaction, hence a party must exercise due diligence in investigating and appraising a contract in its entirety before accepting the terms and conditions. However, an insurance contract does not run on this principle, rather it is powered by the principle of '*umberima fides'* or utmost good faith.[101] A contract of insurance is founded on the principles of utmost good faith.[102] But this is distinct from the contract law principle of utmost good faith, because under the insurance law version of utmost good faith, parties are required to voluntarily disclose material facts prior to the execution of contract, whereas the contract law version of utmost good faith does not have such a requirement.[103]

This principle of insurance law has its roots in the decision of Lord Mansfield in ***Carter v Boehm***[104] where it was held that a contract of marine insurance is guided by the doctrine of utmost good faith; hence, if there is an absence of good faith, it will render the insurance contract null and void.[105] However, Section 14 of the *Insurance Act 2015*, has amended Section 17 of the *Marine Insurance Act 1906* by deleting the latter part of the provision which, deals with the fact that if a contract of marine insurance is not observed by a Party, the other Party may avoid the contract. In other words, it replaces the duty of disclosure with the duty of fair presentation.

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[101] ibid 174.
[102] Marine Insurance Act 1906, s. 17.
[103] Gurses Ozlem, 'What Does Utmost Good Faith Mean?' (2016) 27 Insurance Law Journal 124 – 134.
[104] Carter v Boehm (1766) 3 Burr 1905.
[105] English and Scottish Law Commission, *Insurance Contract Law: Issues paper 1, Misrepresentation and Non-Disclosure* (Law Commission September 2006) 5. See also Merkin R & Gurses O, 'The Insurance Act 2015: Rebalancing The Interests of Insurer and Assured' (2015) 78(6) Modern Law Review.

The implication of this is that the principle of utmost good faith has been divorced from the pre-contractual duty of disclosure imposed on the insured, with the consequence that non-compliance with the duty of utmost good faith can now be remedied with the award of damages.[106] This allows room for the courts to explore new horizons, including implying terms into an insurance contract[107] or even introducing new remedies like estoppel.[108]

In addition, the duty of good faith was illustrated by Sections 18, 19 and 20 of Marine Insurance Act 1906 which set out the duties of an insured and its agent to disclose all material facts. Material facts in this context were facts that would influence the decision of a prudent insurer on whether to insure or decline insuring a risk.[109] An agent was also obligated to disclose any material facts within his knowledge, even if the insured was not aware of them[110] and the insured was obligated not to misrepresent material facts.[111]

The position that can be gleaned from above, particularly, Sections 18 and 20 of the Marine Insurance Act 1906 is the duty not to misrepresent material facts and the duty to disclose material facts.[112] The duty of utmost good faith applies throughout the life of the insurance contract, from the pre-contractual stage to throughout the contractual relationship of the parties to the insurance contract that is the duty also applies as a post-contractual duty.[113] In ***Horwood v Land of Leather Ltd***[114] the insured suffered a loss and the party responsible for the loss entered into a settlement with the injured party (being the insured) and an agreement was executed to the effect that the party responsible for the loss will compensate the injured party and the later will not pursue any further claim. The injured party received the settlement sum from the insured and still proceeded to claim from its insurer, with the attendant implication that the insurer will not have a right of subrogation exercisable against the party responsible for the loss. The court held that the insured was in breach of its post contractual duty of good faith.

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[106] Merkin R & Gurses O, 'The Insurance Act 2015: Rebalancing The Interests of Insurer and Assured' (2015) 78(6) Modern Law Review.
[107] *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No. 2*) [2001] Lloyd's Rep IR 667.
[108] *Sherdley v Nordea Life & Pension SA* [2012] EWCA Civ 88.
[109] Marine Insurance Act 1906 s. 18.
[110] Marine Insurance Act 1906, s 19.
[111] Marine Insurance Act 1906, s 20.
[112] ibid.
[113] *The Star Sea* [2003] 1 AC 469.
[114] *Horwood v Land of Leather Ltd* [2010] Lloyd's Rep IR 453.

The provisions of sections 18 – 20 of the Marine Insurance Act 1906 were the subject of numerous criticisms, indicating that the law on utmost good faith was in itself unfair and unjust on the insured. Some of the obvious concerns were that it imposes the duty to disclose on the agent but does not clearly define who the agent of the insured is. Also, the knowledge of the agent is imputed to the insured, even if the insured is ignorant and the insured is made to suffer the consequence of such action or inaction. Furthermore, the only remedy for breach of the pre-contractual duties was for the contract to be avoided and no other remedies were permitted by the courts.[115] Where an insurer is responsible for the breach of a pre-contractual duty, it will not be practically desirable for the insured to exercise the option of voiding the contract, especially when the loss has arisen.[116]

The Consumer Insurance (Disclosure and Representations) Act 2012, abolished the application of the duty of utmost good faith to consumer insurance and introduced the duty to take reasonable care to avoid misrepresentation and effectively abolishing the duty of disclosure and imposing the obligation on the insurer to ask questions to which the insured is to provide accurate answers. With respect to commercial insurance, the Insurance Act 2015 addresses the concerns that arose under the Marine Insurance Act 1906 by excluding the remedy of nullification of an insurance contract for non-disclosure of material fact and renaming the pre-contractual duty of utmost good faith as the duty of fair presentation of risk. Section 3(3) of the Insurance Act 2015 describes a fair presentation of risk as a disclosure that is reasonably clear and accessible to a prudent insurer and every material representation is substantially correct and in good faith.

The category of disclosures to be made are those that the insured know or ought to know and/or disclosures that should put a prudent insurer on notice that there is the need to make further inquiries to ascertain material facts.[117] But the duty of fair presentation of risk does not apply where the circumstances diminishes the risk, the insurer is aware or ought to be aware or presumed to be aware of the risk or where the insurer waives the information.[118]

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[115] *Banque Financiere de law Cite SA v Westgate Insurance Co* [1991] 2 AC 249.
[116] Gurses Ozlem, 'What Does Utmost Good Faith Mean?' (2016) 27 Insurance Law Journal 124 – 134
[117] Insurance Act 2015, s 3(4).
[118] Insurance Act 2015, s 3(5).

The details of fair presentation of risk will be discussed extensively in subsequent parts of this work along with its interplay with multinational insurance programmes.

1.9.3 Subrogation

Subrogation has been defined differently by several scholars but with the same theme running through. According to MacGillivray,[119] subrogation literally means the substitution of one person for another.[120] Another definition is that the 'right of insurers, once they have paid the insurance money due, to exercise any rights or remedies of the insured arising out of the insured event to recover their outlay from a culpable third party.'[121] In essence, subrogation presupposes that once the insurer indemnifies the insured for the loss, he steps into the latter's shoes having taken his liabilities; the insurer also inherits his rights or the insured is expected to exercise his right in good faith and for the benefit of the insurer.

It is pertinent to state that subrogation, as a doctrine should not be mistaken with a similar doctrine of abandonment, which also applies the principles of indemnity. Abandonment presupposes that the insurer takes over all rights over the subject matter, including proprietary rights, and it means that he will be entitled to the profit that accrues therefrom.[122] Abandonment under marine insurance law arises from the property, which is the subject matter of an insurance is in a state where its loss or destruction is imminent or where its recovery will be unreasonably expensive; the insured relinquishes all its interest to the insurer in exchange for the whole amount of the insurance. Where the loss is an actual total loss, the insured would be entitled to recover the total amount of its subscription but will not be obliged to effect abandonment; however, where the loss is a constructive total loss, the insured will be entitled to recover the total amount on the condition that it will effect an abandonment.[123]

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[119] John Birds, Lynch and Milnes, *MacGillivray on Insurance Law* (Sweet & Maxwell, 12th Edition
[120] John Birds, Lynch and Milnes, *MacGillivray on Insurance Law* (Sweet & Maxwell, 12th Edition
[121] Paul Handy and Brendan McCarthy, 'Subrogation Principles and Practice' (2010) Beachcroft Training manual for Chartered Institute of Loss Adjusters. (Handy)
[122] *Lucas Ltd v Export Credit Guarantee Department* (1973) 1 WLR 914 at 924.
[123] Hebert Lord, 'The Hull Policy: Actual and Constructive Total Loss and Abandonment' (1967) 41 TUL L. Rev. 347.

For a vessel to be abandoned it must be in line with section 60(1) Marine Insurance Act 1906. In ***Lavington Court's*** **case**[124] the Court of Appeal held that for an abandonment to be valid, it must be done with the intention to never return to the vessel. This means that where an insured item was thought to be lost but later found but the owner had been paid for the total loss, he cannot assume title over it when it is found. Also, abandonment will exist only where the notice of abandonment has been given and accepted. Similarly, it is important to at this juncture, mention the constructive total loss, which arises when the vessel is to be abandoned on the basis of "actual total loss" appearing to be unavoidable.[125] In ***Lind v Mitchell***[126]a vessel was damaged by ice and it suffered leakages. The master of the vessel expected it to be lost and decided to both abandon the vessel and set it ablaze because he thought it to be a danger to navigation. The Court of Appeal held that the abandonment was unreasonable.

Subrogation on the other hand does not confer such a right, in that the insurer upon assumption of the insured's rights is entitled to recover only what he had paid to the insured, he remains obliged to return the excess back to the insured.[127]

Another concept that should not be mistaken for subrogation is assignment. Though it is not as closely similar to it as abandonment, it is important to clearly highlight its differences with subrogation. The right of subrogation arises simply by operation of law, while assignment arises on the basis of contract and agreement.

The right of subrogation does not entitle the insured to the excess after exercising the insured's rights against third parties.However, if it were an assignment, the insured will be able to exercise the rights against a third party and will be entitled to keep the entire proceed of such recovery.[128] Furthermore, an insurer who exercises his right of subrogation must do so in the name of the insured or where the insured refuses, he can join him as a defendant, whereas in the exercise of a right arising under an assignment, an insured can sue in his own name.[129]

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[124] *Lavington Court's* case [1945] 2 All ER 357, CA.
[125] Kyriaki Noussia, *The Principle of Indemnity in Marine Insurance Contracts: A Comparative Approach* (Springer, 2006).
[126] *Lind v Mitchell* [1928] 45 TLR 54 CA
[127] *Yorkshire Insurance v Nisbet Shipping Co Ltd* [1972] 2 QB 330.
[128] John Birds, Lynch and Milnes, *MacGillivray on Insurance Law* (Sweet & Maxwell, 12th Edition 692 – 693.
[129] *Re Ballast Plc*. (2007) Lloyd's Rep.

Scholars and legal historians have debated the origins and legal history of the doctrine of subrogation extensively, with little consensus. Some have traced its origin to Roman law and the continental codes of insurance from where it is believed to have been received into the common law.[130]

The doctrine of subrogation comprises of two major principles to wit: the insured must not profit from his own loss and an insurer upon indemnification of the insured is entitled to take action in the stead of the insured.[131]

Under English law, the right of subrogation is contained in section 79 of the Marine Insurance Act 1906 and under Nigerian law, the right of subrogation is contained in section 80 of the Marine Insurance Act.

The right of subrogation in the context of multinational insurance programmes is key, because, the specific provisions of the law of each jurisdiction is an important consideration in determining whether a foreign (non-admitted) insurer will be entitled to the right of subrogation. The insurer will have to ask and answer the question, against whom and where should the rights of subrogation be pursued. In Nigeria, an insurer must be admitted for it to be entitled to exercise the right of subrogation.[132] A possible reason could not be far from the long-established principle of *ex turpi causa non oritur actio*, which means that no action can arise from an illegal cause. The illegality in this context will be in the fact that the policy provided in the jurisdiction where the right of subrogation should be exercised was in itself illegal from the onset.

1.10 Conclusion

In this chapter, I have discussed the meaning of insurable insurance and the key ingredients that must be present for a contract to be considered as an insurance contract. Key insurance concepts have also been briefly discussed and analysed, particularly insurable interest, duty

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[130] Samuel Marshall, *Law of Marine Insurance*, (Shaw & sons, 4th Edition, 1861) 20.
[131] ibid.
[132] Nigeria Marine Insurance Act, s 80. See also British India Insurance Company Ltd v Alhaji Kalla (1965) NMLR 347.

of utmost good faith, duty of disclosure, duty not to misrepresent, duty of fair presentation of risk and subrogation.

The aim of this chapter was to introduce each of these concepts and a lay a foundation for a more detailed and critical analysis in later parts of the work and in the context of multinational insurance programmes.

CHAPTER TWO

THE MEANING, HISTORY AND REGULATION OF MULTINATIONAL INSURANCE PROGRAMMES: THE INTER-PLAY BETWEEN GLOBAL AND LOCAL REGULATIONS

2.0 Introduction

This chapter focuses on multinational insurance as a concept, its historical evolution and the role it plays as a modern vehicle for international insurance. It lays the foundation for the proper understanding of the more complex issues that characterise multinational insurance programmes.

Conducting insurance business in the form of multinational insurance programmes involves direct interactions between insurance laws, regulations and regulators in several jurisdictions. A number of jurisdictions readily permit foreign insurers and reinsurers to freely conduct insurance business within their jurisdiction; others impose either partial or total restrictions on foreign insurers and reinsurers. Generally, the insurance and tax regulations are the most potent tools available to governments to either permit non-admitted insurance businesses or to restrict them through protectionist measures.[1]

The problem posed by protectionism for the international insurance market is huge and raises the possibility of weakening competition in the global market through restrictive policies and practices that could give rise to a business crunch and shrinking of both global and domestic insurance markets.[2] Protectionism pre-supposes that governments and regulators within a country deliberately introduces or imposes laws, rules and regulations that tend to limit provision of services or importation of goods by persons and businesses outside that country.[3] Protectionism could also give rise to situations where countries try to protect insurance

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[1] Richard Senti, 'Protectionism in International Insurance Transaction' (1986) 21(5) Verlag Weltarchiv, Hambur 246-250; see also Will McCarthy, 'Protectionism Threatens to Destroy the Global Market Economy' (Diggy Insurance, 5 November 2016) < https://diggyinsurance.com/protectionist-policies-threaten-to-destroy-the-global-market-economy/> accessed 1 October 2018.
[2] Yonov Agah, 'An Insurance Policy Against Protectionism' (G7 Germany: The Schloss Elmau Summit, June 2015). Robert Lawrence and Robert Litan, 'Why Protectionism Doesn't Pay' (1987) Havard Business Review.
[3] Suhail Abboushi, 'Trade Protectionism: Reasons and Outcome' (2010) 20(5) Competitive Review 384 – 387.

companies within their borders from competition from non – admitted insurers in a manner that could give rise to over concentration of risks because all or most of the locally generated risks are placed with locally based insurers.[4] As a result of these fears, during the Uruguay Rounds, the World Trade Organization (WTO) initiated the General Agreement on Trade in Services (GATS), which came into force in January 1995. The objectives of the GATS as contained in its preamble include the need to establish a multilateral framework targeted at expanding trade in services in a transparent, progressive and growth focussed manner. The GATS also aims to promote and achieve higher levels of liberalisation of trade in services, and balances the rights and obligations of member nations, while at the same time according respect to their respective national policy objectives.[5]

This Chapter explores the regulatory architecture and framework for supervision of insurance business in Nigeria and England and ascertains whether or not it is protectionist and unfair in nature and the chapter also will highlight the implication of this findings. In other words, this chapter attempts to answer the question – ‘‘are the legal and regulatory criteria for participation of insurers in Nigeria protectionist towards non-admitted insurers providing multinational insurance programmes? This chapter further explores the interaction between Nigerian insurance laws and the GATS framework for trade in services, particularly insurance services. It analyses the GATS multilateral frameworks of principles and rules for trade in services, the extent to which Nigerian insurance laws conform to GATS, and measures the extent of progress Nigeria has made since it accedded the GATS. The chapter concludes with some of the lessons that Nigeria can learn from the England in its regulatory approach. This approach has been adopted because for now, GATS remains the global template for liberalisation in services and for systemically and progressively dismantling protectionism in trade in services including, insurance services.

2.0.1. Meaning and Nature of Multinational/International Insurance

Multinational insurance means the conduct of insurance business across national borders. It involves cross–border supply of insurance services and involves parties and risks resident in more than one jurisdiction and occasionally, the risk(s) covered may be situated in more than

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[4] Rosa Armesto, ‘Protectionism Creates Dangerous Risk Concentration’ (2017) Insurance Europe Insight Briefing.

[5] General Agreement on Trade in Services, Preamble 2 and 3.

one jurisdiction. A key hallmark of multinational insurance is that it involves more than one country. Any form of insurance that lacks this element of cross-border engagement cannot be classified as multinational insurance no matter how similar it appears. A good example is the United States of America, where each of its fifty States regulates the conduct of insurance business within its borders and inter-state insurance programmes are designed and implemented in a manner that can be likened to MIP; however, the absence of the cross-border element does bring it within the scope.[6]

Statutory definition for multinational insurance can be found in Section 2 of the International Insurance Act of Belize and in Section 2 of the Samoa International Insurance Act 1988 (as amended in 2005). The law of Belize defines multinational insurance as the conduct of insurance business wherein either the insured, the insurer or their agents are not domiciled or ordinarily resident in Belize, and where they are both corporate entities, one of the parties is not incorporated in Belize.[7] Similarly, Section 2 of the International Insurance Act of Samoa 1988, defines multinational insurance as one where each of the insured, the person to whom the policy moneys are payable and the event of the policy or any one or more of such person(s) are not domiciled or resident or incorporated in Samoa.[8]

The above definitions highlight some important features/elements of multinational insurance. These elements must exist before any contract of insurance can qualify as a multinational insurance contract. These key elements are discussed as follows:

- ***The Business Conducted must be an Insurance Business***: a vital condition for a business or service to qualify as a multinational insurance business is that the business must be wholly or partly an insurance business or service. If the business conducted is not an insurance business as described in Chapter 1 of this work, it will not fall within the definition of a multinational insurance. This will be the case where a service has an insurance or similar services as an add-on to the regular services offered.[9]

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[6] National Association of Insurance Commissioners, 'The United States Insurance Financial Solvency Framework' (2010) NAIC Publication 2 – 7; Martin Grace and Robert Klein, *The Future of Insurance Regulation in the United States* (Brookings Institution Press, 2009).
[7] ibid.
[8] ibid
[9] Robert Merkin, *Colinvaux's Law of Insurance* (Sweet & Maxwell, 11th Edition) 16 (Merkin's Colinvaux's)

- ***The Multinational Insurance Business may be Inbound or Outbound:*** this type of insurance could be either inbound or outbound, meaning that for a business to qualify as a multinational insurance business, it is not mandatory for the insurer, the insured and the insured risk to be resident in the same jurisdiction. It is possible for the insurer to be based in a jurisdiction distinct from where the insured is resident, likewise, it is possible for the insured and the insurer to be based in the same jurisdiction and the risk is based in a distinct jurisdiction; an example is an insurance cover purchased by a parent company in its country of residence to cover its financial interest in its subsidiaries that are resident in a foreign jurisdiction.[10] In this instance, the parent company and the insurer could be based in one jurisdiction, while the risk is based in another jurisdiction. The implication is that the flow of insurance service is outbound. Similarly, a business can be a multinational insurance business even where the insurance company is not resident within the same jurisdiction as the insured. In this instance the service will be inbound to the insured, and other considerations will usually have to be factored in before a conclusion can be reached as to the nature of the insurance business and whether it is a multinational insurance business.
- ***Either the Insured risk, the Insured or the Insurer must be Resident in Another Jurisdiction:*** for an insurance business to be treated as multinational in nature, at least one of the parties or object of the insurance contract or the risk, which is the subject matter of the insurance, must be resident in a different jurisdiction. In other words, the insurer or the insured or the risk being covered must be situated outside the territory or domicile or residence of one the parties. For example, where a parent company insures its financial interest in a subsidiary situated offshore. In such a situation, the subsidiary will not be a party to the insurance contract, even though its risk ultimately becomes the basis for the creation or enforcement of the multinational insurance contract.

2.0.2 Modern History of Multinational Insurance

To provide perspective of the work and to lay a background for deeper understanding of MIP, this aspect of this chapter, will focus briefly on its history and evolution.

[10] See later parts of this work, where Financial Interest Clause has been discussed in greater details.

The industrial revolution of the 19th century resulted in the proliferation of risks.[11] While the world was still adjusting and adapting to the reality of these new risks, further advances in technology gave rise to newer and more devastating risks.[12] For example, the introduction of the telegraph, the telephone, emails, the Internet, space and satellite technology, social media, among others.[13] Both the above positives and negatives eventually became beneficial to the interest of the insurance industry because it boosted insurance business and at the same time it reduced business costs and increased considerably the speed in rating and loss adjustment.[14] In addition, other reasons for the 20th century explosion of multinational insurance business are –

First is the business strategy called "*client following strategy*" adopted by a number of firms. This meant that as businesses expanded overseas and began to situate operations, services and factories offshore, their insurers considered it expedient to closely follow their clients to new and uncharted territories.[15] Such firms believed that this strategy would enable them to preserve existing customer networks.[16]

Second, some firms adopt a "*follow your competitor approach*" which has led to them expanding offshore. This approach and strategy are based on the belief that for an insurance company to remain a going concern and profitable, it must follow its competitors whenever they go. Robin Pearson calls this the "follow the leader" approach,[17] and was the trend in the late 19th century when several insurance companies went into the American insurance market because of earlier success of some British and German fire insurance companies; hence, this can also be called the herding or flocking business mentality.[18]

A third approach that had driven the expansion and internationalisation of insurance businesses was more initiative based and inventive because companies expanded offshore of

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[11] Robin Pearson, 'Towards an International History of Insurance: What we Know and Terra Incognita' (Advanced Research Seminar University of Geneva, Geneva, April 2011).
[12] ibid.
[13] Robin Pearson, 'Growth, Crisis and Change in the Insurance Industry: A Retrospect' (2002) 12 Accounting History Review 1-18.
[14] ibid 15.
[15] John Cantwell, 'A Survey of Theories in International Production' in Pitelis C and Sugden (eds), *The Nature of Transnational Firms* (Routledge, 1991).
[16] ibid 15.
[17] ibid
[18] ibid.

their own accord,[19] this approach is called “market seeking strategy.” These expansions were significantly enhanced by the advancement in both communication and transaction, especially the telegraph, insurance firms realised they could move easily, quickly and communicate faster with the head offices.[20]

In addition to the above, the protectionism of the late 19th century and early 20th century ironically played a key role in promoting multinational insurance. The protectionist and highly nationalistic posturing of most countries prompted insurance firms to invent legitimate strategies to circumvent restrictive measures. The most effective strategy adopted was to float a local subsidiary or to acquire an existing firm and retain its name, staff and clients.[21] Such firms usually, reinsured their risk with their foreign parent company. This meant that most foreign firms did not only circumvent the barriers but they also became beneficiaries of the protectionist measures,[22] particularly because of the ‘early movers’ advantage’, which they enjoyed.[23] But the later innovations, like the introduction of multinational insurance programme became a more sophisticated technique, adopted in an attempt to deal with protectionist barriers.

The internationalisation of insurance business witnessed a setback in the years leading up to the First World War. This was due to excessive tightening of barriers as a protectionist tool. Across Europe there was rapid, sharp and significant decline in the ratio of foreign premiums to local premiums. This led foreign insurance companies to retreat from certain insurance markets; the period was dubbed, “the globalization backlash”,[24] this state of the market was worsened by the First World War of 1914 to 1918. The cause of this global backlash has been clearly documented by Berscheid, who argued that discriminatory protectionist regulations by authorities and targeted taxation were employed as tools for economic nationalism. These raised the cost of doing business for the foreign companies. To worsen matters, while the

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[19] Krishna Eramilli, ‘The Experience Factor in Foreign Market Entry Behaviour of Service Firms’ (1991) 22 Journal of International Business Studies 479-503.
[20] Pearson (n 6) 16.
[21] Peter Dickson, *The Sun Insurance Office 1710-1960* (OUP 1960) 226 – 230.
[22] Richard Caves, *Multinational Enterprises and Economic Analysis* (Cambridge Press, 2nd Edition, 1996) 108.
[23] ibid
[24] Peter Berscheid, ‘A Globalization Backlash in the Inter-War Period? In Peter Berscheid and Robert Pearson, *Internationalization and Globalization of the Insurance Industry in the 19th and 20th Centuries* (Zurich 2007) 129-141.

capacity of foreign firms was being deliberately depleted, most states began to set up publicly owned insurance business and on occasions some businesses were nationalised. In New Zealand as early as 1904 the state reinsurance scheme accounted for more than 50% of all life insurance policies. The state also introduced state-controlled schemes for both accident and fire insurance business.[25] In 1912 Italy nationalised its life insurance business and India took the same measure in 1956. Another sad development was the introduction of state monopolies in many countries after the First World War. In Latin America, Chile and Uruguay introduced State monopolies in 1927, while Argentina introduced its in 1952.[26] In the Asian-European Corridor, Turkey created a public–private reinsurance monopoly in 1929. In Spain, the government nationalised accident insurance business in 1963.[27]

The economic turmoil of the inter-war and post war years caused unimaginable strains on the entire global insurance industry, leading to the failure of some insurance firms. The German currency the Reich-mark, suffered from severe hyperinflation with huge damage on German insurance companies. This did not only affect Germans but other Europeans who held life insurance policies issued by German companies. These were notably citizens of Denmark, Netherlands and Switzerland. The reaction of the Swiss government and regulators was the introduction of a requirement that three-quarters of the reserves of foreign life insurance offices operating in Switzerland must be held in Swiss Francs. All of the above complications led citizens of countries in the Western hemisphere to repose confidence only in policies emanating from within their borders. This indeed was a huge set back to multinational insurance business.[28]

Peter Berscheid and Niels Viggo argued that the period between 1914 and 1973 was one of backlash for multinational insurance business.[29] They identified three key features that characterised this era, which are: isolation of domestic insurance markets, growth in both the number of domestic insurance companies and premiums accruing domestically and an

[25] Peter Reeves, 'State Insurance in New Zealand' (1906) 182 North American Review 62-73.
[26] Pearson (n 6) 18 – 19.
[27] Jeronia Pons Pons, 'Multinational Enterprises and Institutional Regulation in the Life Market in Spain 1880-1935' (2008) 82 Business History Review 87 – 117.
[28] Pearson (n 6) 19.
[29] Peter Borscheid and Neils Haueter, 'Global Insurance: The Global Expansion of the Concept of Modern Insurance' (2012) European Financial Review.

increase in inter-dependence of insurance markets through the instrumentality of reinsurance.[30]

While the First World War rolled back most of the gains in multinational insurance, the great depression of the 1930s worsened the already bad state of affairs. During the depression, international trade almost ceased and the standard of international and political relations stifled. The accompanying protectionist measures taken by countries, gave rise to the emergence of economic blocs designed to insure and insulate their economies from the global economy. Countries like Japan, Germany and Italy systematically reduced the market shares of foreign companies within their economies including foreign insurance companies.[31]

Britain engaged in more multinational insurance business with its commonwealth territories, while China and large parts of Sub-Saharan Africa encouraged reliance on community solidarity and brotherliness. Notwithstanding these setbacks, domestic insurance within many developed economies remained strong and viable, having been re-engineered to frustrate foreign companies, while domestic companies were systematically strengthened. In territories occupied by Japan after the First World War, the assets of insurance companies were seized or expropriated and the proceeds used to finance the war. Similarly, in Germany during the Second World War, the Nazi regime led by Hitler diverted assets from the insurance industry and re-assigned them for the prosecution of the Second World War. The insurance industry was completely banned in the following communist countries - China, Cuba, North Vietnam, North Korea, while foreign insurance firms were prohibited from operating in East Germany and Czech-Slovakia.[32]

After the World Wars, a new set of challenges emerged, which crippled efforts to better the lot of multinational insurance companies. The first was the effect on independent movement and newly independent nations; such movements had always been very critical of foreign participation in the insurance business. The effect of which was upon the attainment of independence some countries with huge market potential, shut their doors to foreign

[30] ibid.
[31] ibid.
[32] ibid.

insurance companies; these countries include India, Indonesia, South Korea, some Gulf States and several Third World countries including Nigeria.

These challenges were further aggravated by restriction in the transfer of capital across jurisdictions, while multinational insurance was shrinking globally, the domestic market in some jurisdictions, particularly in the Western hemisphere was blossoming. This was occasioned by the economic booms of the 1950s and 1960s, but this domestic prosperity further dampened the multinational insurance market because it led to the introduction of government controlled social insurance schemes. This in turn led to a reduction in the available areas of business for foreign insurance companies. Consequently, most insurance companies began to concentrate more on the domestic market; the only exceptions to this were British companies that retained significant market control and dominance in most of their overseas and commonwealth territories, this meant that such companies continued to generate premiums from overseas.[33]

Despite these setbacks, by the 1970s, the fortunes of multinational insurance began to improve. These promising stages started with reinsurers that developed dependable networks and began to benefit from underwriting surplus risks, which were above the capacity of domestic insurance firms. This meant that most of the protectionist barriers could now be legitimately circumvented for business and commercial reasons. It presented a middle ground for both the national interest of a country where the risk is resident and the interest of the multinational reinsurer(s).

It is recorded that in the 1950s and 1960s, leading up to the recoveries of the 1970s, reinsurers began to experience growth in premiums at an annual rate of 11 percent; this was to increase with the oil boom in Middle East and later in other Organization of Oil Producing Countries (O.P.E.C) countries. However, these successes were not shared by the entire spectrum of the insurance industry, while reinsurance blossomed, primary insurers did not witness the same levels of success and continued to experience dwindling premium returns, and this was worsened by the oil crisis of 1973. This made the mid–1970s very distressing for multinational insurance.[34]

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[33] ibid.
[34] ibid.

However, on a more real basis, the fortunes of multinational insurance lightened up in the late 1970s and later with many countries adopting and implementing liberal economic reforms that required them to open up their markets, including the primary insurance market. These reforms were a direct reaction to the economic collapse of the Eastern communist bloc and the debt crisis of Latin American and some European countries. These crises along with the 1970s oil crises led to high inflation rates leading, to severe economic damage to these countries. Consequently, the reforms were designed based on the free market economic principles, which open markets and lower trade barriers.

These successes in opening up the markets were further advanced by the GATT talks and with the establishment of the World Trade Organization (WTO). These reforms speeded up the liberalisation of the informational exchange system; hence cross border payments and monetary transfers could be easily achieved, it also introduced a system of rights and obligations that must be respected by all members of the WTO. These changes led to an almost immediate rebound of both reinsurance and primary insurance industries, creating sudden access to previously unreached markets.[35]

In addition to the above, insurance companies also had more capital and liquidity because of the increase in the value of their shares. The available extra capital was deployed into their international and global business portfolios; hence entering markets like Japan, which were hitherto inaccessible.[36] The increased capital and opportunities was matched with a partial privatisation of the social security schemes of countries, this meant that the domestic market was not only open, but foreign players could plunge into such a previously protected space.[37] The 1980s onwards has ushered in a real era of globalisation, characterised by exponential growth in world trade, increase in foreign direct investment (FDI) and portfolio investment and increase in the production and supply of goods and services.[38]

This has had a direct impact on insurance markets, giving rise to rapid demand for insurance in emerging markets and the resulting demand for cover from foreign insurance companies because of their capacity and proven competence, which realistically cannot be matched by

[35] ibid.
[36] Klime Poposki, 'Globalization of the Insurance Industry and Emerging Markets' < http://isi.cbs.nl/iamamember/CD2/pdf/925.PDF> accessed 3 November 2014.
[37] ibid.
[38] ibid 1.

domestic insurance firms. This globalisation has turned as a blessing for international insurance businesses. This has also been beneficial to domestic firms because it has led to a transfer of both technology and know-how. The entry of foreign firms into domestic markets has also encouraged healthy competition in hither monopolistic markets and has brought benefits of increased efficiency/improvement in service delivery to customers.[39] Globalisation and liberalization have also been beneficial to the domestic economies of these countries in that they have led to mobilisation of domestic savings, improvement in financial stability and introduction of more efficient systems for capital allocation.[40]

In addition to the above, it can be observed that both globalisation and liberalisation have led to the creation of strategic alliances between insurance companies and reinsurance companies on the one hand, and the alliance between banks, insurance companies and other financial institution to create large global financial service firms on the other.[41] The competition mentioned above, along with innovation and adaptation has led to the re-engineering of traditional models for conducting insurance business. New insurance products have been created and securitisation has been introduced into the insurance market, linking it with the pension systems.[42]

In Germany in particular, around 1980, German insurance firms began to expand into new markets, through either creation of subsidiaries or acquisition of other foreign or domestic insurance firms. A notable example is the 1986 takeover of Cornhill Insurance of London by Allianz.[43]

A notable impetus in the restoration of multinational insurance was the promulgation of the regulatory framework, anchoring the single market for life and non-life insurance within the European Union.[44] This opened up the EU market to other European Players leading to a

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[39] ibid. See also Garcia Ruiz and Caruana, 'The Internationalization of the Business of Insurance in Spain, 1939 – 2005' in Peter Berscheid and Robert Pearson, *Internationalization and Globalization of the Insurance Industry in the 19th and 20th Centuries* (Zurich 2007) 129-141.

[40] Emmet Vaughan and Therese Vaughan, *Fundamentals of Risk and Insurance* (John Wilwy & Sons, 8th Edition, 1999).

[41] Suny Levin Institute, 'Globalization and the Insurance Industry' (*Globalization 101*, 23 October 2008) < http://www.globalization101.org/globalization-and-the-insurance-industry-2/> accessed 3 November 2013.

[42] ibid.

[43] Pearson (n 6) 19.

[44] Capital Requirements Directive (2013/36/EU); Third Non-Life Insurance Directive (92/49/EEC); Consolidated Life Assurance Directive(2002/83/EC); Reinsurance Directive (2005/68/EC); Insurance

rapid increase in the market share held by foreign companies. An often-cited example is the Spanish experience as in 1954, foreign insurance firms controlled only 15% of the market share in Spain, but by 1993 market share had increased to 37%.[45] These policies and the joing of the EU were also beneficial to Spain because Spanish companies like Mapro began to explore businesses and opportunities in other markets. Similarly, in Germany in 1984, foreign insurers controlled only about 12% of the German primary insurance market, but by 2008 the control had grown to about 25%.[46] Some of the leading foreign firms within the German market are AXA, General and Zurich.

On the other hand, German firms have also expanded overseas, both in Europe and beyond. Leading German firms earn a huge percentage of their turnover from overseas; for example, 70% of the premium that accrued to Allianz came from overseas, while the respective percentage for ERGO and Talanx are 27% and 30% respectively in 2009.[47]

The implication of an open and more liberal international market appears to be more apparent in the relationship and interdependence of the US and EU insurance industry. As at 2002, there were above 4000 foreign insurance companies operating in the United States and they made over $46.3billion in premium income. These foreign insurance companies represent over 96 jurisdictions.[48] However, the major companies were from jurisdictions like Bermuda, the UK, Ireland and Switzerland, with the UK companies making an annual premium income of about $3.9billion.[49] This trend has not been restricted to only the reinsurance market because foreign insurance companies operating within the US direct insurance market account for about a third of premium income, with Lloyd's of London benefitting the most

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Mediation Directive (2002/92/EC); Markets in Financial Instruments Directive (2004/39/ EC); Undertaking Collective Investment Scheme Directive (85/611/EEC); Payment Services Directive (2007/64/EC); Second Electronic Money Directive (2009/110/EC) Capital Requirements Directive (2013/36/EU); Third Non-Life Insurance Directive (92/49/EEC); Consolidated Life Assurance Directive(2002/83/EC); Reinsurance Directive (2005/68/EC).

[45] Pearson (n 11) 19; see also Garcia Ruiz and Caruana, 'The Internationalization of the Business of Insurance in Spain, 1939 – 2005' in Peter Berscheid and Robert Pearson, *Internationalization and Globalization of the Insurance Industry in the 19th and 20th Centuries* (Zurich 2007) 129-141.

[46] Theis Wolgast, 'Globalization of Insurance Markets: Presentation and the Trends in the German Market' (2011) GDV Publication.

[47] ibid.

[48] Reinsurance Association of America, 'Alien Reinsurance in the US Market' in Lord Levene, 'The Road to Globalization – the Interdependence of the US and European Insurance Industries' (European Insurance Summit, October 2003).

[49] ibid.

from the surplus lines premium.[50] In fact, Lloyd's of London underwrites for above 93% of companies listed on the Dow Jones industrial average.[51]

The extent of the interdependence of the US insurance and reinsurance markets on foreign companies was revealed in the wake of the September 11, 2001 terrorist attacks. The largest losses arising from the attacks were borne by 10 insurers, comprising two US companies with five European Companies, one Bermudan insurer and two Japanese firms.[52] These statistics underscore the extent to which multinational insurance has penetrated the global economy, finding deeper roots in traditionally liberal markets and breaking through otherwise closed markets.

China represents a promising example for progress that has been made so far; whereas in 1978, there was only one insurance company, the People's Insurance Company of China (PICC) but the tide has since changed, especially with China's ascension into the WTO on 11 December, 2001. Part of the conditionality for the ascension included removal of the barrier for foreign participation in insurance business, phasing out geographic restrictions on foreign insurers; liberalising the product lines that can be explored by foreign insurance firms.[53] Today, the Chinese market is comprised of state-owned companies, foreign companies and other insurance companies.[54]

2.1 The General Agreement on Trade in Services (GATS) and Liberalisation of Insurance Services

As pointed out earlier, one of the objectives of the GATS as provided in the preamble to the GATS is the achievement of higher levels of liberalisation of trade in services as opposed to protectionism and trade restrictions, it becomes expedient to understand the concept of liberalisation. Liberalisation is the ''*opening up of markets to the free flow of goods and*

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[50] ibid.
[51] Lord Peter Levens, 'The Insurance Industry at Crossroads' (Lloyds Seminar for the North-East Asia Market, February 2003).
[52] Lord Peter Levens, 'The Insurance Industry at Crossroads' (Lloyds Seminar for the North-East Asia Market, February 2003).
[53] Chao Feng Li and Andrew McGee, 'The View on Chinese Licence Regulations for Insurance Company' 8 (2009) JITLP 25 – 39.
[54] Helen Hayden, 'Global Insurance Compliance: Arranging Multinational Insurance Programs' (2008) Airmic Publications <http://www.airmic.com/sites/default/files/global_insurance_compliance_helen_hayden.pdf> accessed 3 November 2013.

services''.[55] Liberalisation involves removal of all forms of restrictions, barriers and anti-competition tools.[56] Liberalisation is the removal of legal and regulatory hurdles imposed to stifle competition and free market. The ultimate aim of liberalisation is to achieve trade openness.[57]

Countries can achieve liberalisation either through unilateral efforts or under a multilateral scheme like the WTO /GATS Framework.[58] The former involves a country taking reform steps and voluntarily changing its laws and unbundling protectionist legislation; whereas, the latter option, involves several countries and is normally backed up by a legal instrument in the form of a treaty or an agreement and involves some form of reciprocity on the part of other signatories and member countries. As part of global liberalisation efforts and as a push back against protectionism, a multilateral trading system was established in 1994, the Marrakesh Agreement was executed establishing the WTO and effectively replacing the General Agreement on Trade and Tariffs (GATT).[59]

In a bid to achieve its foundational objectives, the WTO administers a number of multilateral trade agreements, to wit – The General Agreement on Trade in Services (GATS), Trade Related Investment Measures (TRIMS) and Trade Related Intellectual Property Rights (TRIPS). The WTO focusses on achieving global trade liberalisation through successive rounds of negotiation.[60] GATS is contained in Annex 1 of the Marrakesh Agreement and is the first multilateral agreement applicable to trade in international services.

The GATS which is of relevance to this thesis is the major liberalisation tool of the WTO which aims to achieve trade liberalisation in services like insurance, but, it still retains the rights of members to regulate qualifying services and also to introduce policies geared

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[55] Joseph Stiglitz, *Making Globalization Work* (Penguin, 2006) 15.
[56] Jan Wouters and Dominic Coppens, 'GATS and Domestic Regulation: Balancing the Right to Regulate and Trade Liberalisation' in Kern Alexander and Mads Andenas (eds) *The World Trade Organization and Trade in Services* (Martinus Nijhoff, 2008) 209.
[57] Neil McCulloch, L Alan Winters and Xavier Cirera, *Trade Liberalisation and Poverty: A Handbook (*Centre for Policy Research, 2001).
[58] Daniel Coates and Rodney Rudena, 'Unilateral Trade Liberalizationas Leadership in Trade Negotiations' (1997) < https://pdfs.semanticscholar.org/8b92/ef9c44974bce73ae90c08d6c459cfed45857.pdf> accessed 1st October 2018.
[59] Rorden Wilkinson, *Multilateralism and the World Trade Organization: The Architecture and Extension of International Trade Regulation* (Routledge 2000).
[60] General Agreement on Trade in Services 1994, Preamble

towards meeting national objectives and by extension conferring on them the powers to adopt some level of protectionist regulation. This situation remains a major setback for the WTO and GATS because such a gap creates room for the very objectives and fundamental principles of GATS to be breached and defeated. The fundamental principles at the heart of the WTO multilateral framework are – Non-Discrimination, Transparency and Reciprocity, Market Access, Predictability and Fair Competition. These principles are the evaluative criteria that will be utilised to examine the extent to which Nigerian law is protectionist or liberalised. Some of these principles will be analysed briefly below:

a. **Market Access** – this is an aspect of liberalisation which promotes openness of domestic markets to foreign goods and services and involves the lowering of domestic measures and other forms of restrictions that distort the markets. As stated, this is a fundamental principle of GATS and the WTO system, but it must be mentioned that market access has been a lofty goal of the system and significant progress has been recorded in its implementation, and recognition by global actors in the past and significant progress had been recorded in the past in terms of growth recorded by many countries from the implementation of market access under GATS.[61] However, market access is beginning to come under significant threats and push backs in the current global order as evident in the country centric and nationalistic trade policy approach being adopted by the Trump administration in the United States of America with the attendant backlash from other countries.[62]
b. **Non-Discrimination** – this principle is at the heart of the campaign against protectionism as it emphasises the approach towards removal of discriminatory domestic protection of domestic producers and service providers. This principle is made up of two sub concepts – Most Favoured Nation (MFN) and National Treatment (NT). MFN requires WTO member nations to grant other member countries most favourable treatment that it grants to any other country; hence, prohibiting any form of discrimination between foreign suppliers of services within its local insurance market. In other words, all foreign suppliers of goods and services must be treated

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[61] Harry Garretsen and Maarten Bosker, 'Market Access: A Key Determinant of Economic Development in Sub-Saharan Africa'' (2012) World Bank Publication < https://blogs.worldbank.org/developmenttalk/market-access-a-key-determinant-of-economic-development-in-sub-saharan-africa> accessed 10 June 2018.
[62] --'The WTO is Under Threat from the Trump Administration' *The Economist* (London, 7 December, 2017)

equally if they are members of the WTO, thus all advantages and privileges granted to one country must be accorded to all other member countries, effectively prohibiting discriminations based on the source of origin[63] and nationality.[64] In the context of multinational insurance, it presupposes that international insurers from other jurisdictions must be treated equally, in so far as they are all members of the WTO. Hence, no form of discrimination can be meted to insurers from one country, which is not applied to insurers from other countries.[65] Ascertaining the level of protectionism in any particular jurisdiction is dependent on the extent of recognition and inclusion of the MFN principles in its regulatory framework. But even at that, the MFN principle is not sacrosanct because countries are permitted to enter into regional agreements and bilateral trade agreements, which to some extent gives them the right and basis to circumvent the MFN principles. It means that the MFN principles create a situation that is akin to giving a gift with the right arm and taking it back with the left arm,[66] hence, it creates a semblance of a mirage and a picture of a lack of real commitment to set hard lines for the unbundling of protectionism. In fact, the MFN creates another level of protectionism that could be even more pervasive than the normal discrimination that would have existed, because in this instance, a select group of countries could get preferential treatment because they fall within the exceptions to MFN.[67]

The second element of Non-Discrimination is NT, which requires that both local and foreign goods and services must be treated equally and alike. Hence, WTO members are by this obligation prevented from applying internal policy measures towards protecting domestic players. It therefore prohibits any form of direct or indirect protectionism and obliges members to permit fair competition between foreign and domestic goods and services.[68] This is the principle that under-pins the framework for removal of measures, approvals, laws, regulations, taxes and charges that stifle

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[63] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III),* WT/DS27/AB/R.

[64] Prabhash Ranjan, 'Bilateralism, MTN and TRIPS: Exploring Possibilities of Alternative Interpretation' (2007) 13 Intl. TLR 67.

[65] General Agreement on Trade in Services 1994

[66] Annex on Article II Exemptions to GATS

[67] Rudolf Adlung, 'MFN Exemptions under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?' (2009) 12(2) Journal of International Economic Law 357 – 392.

[68] Appellate Body Report on Japan-Taxes on Alcoholic Beverages, AB-1996-2,WT/DS11/AB/R 16.

fair competition and restrict foreign participation.[69] However, the theory and practice are two different realities, because the WTO GATS obligations operate as a pseudo soft-law and lack real enforcement mechanisms (despite the Dispute Settlement Understanding); hence, there is no strong enforcement for NT obligations. But it cannot be taken that for now, GATS remains the strongest and most reliable framework to push for an agenda of liberalisation of trade in services and the systematic but gradual unbundling of protectionism in trade in services.

c. **Predictability and Transparency** – part of the implication of acceding to the WTO and to its Covered Agreements is that each member makes binding commitments to remove or reduce restrictions on market access.[70] Often, these commitments are tagged with timelines for compliance in a manner that provides guarantees to trading partners. This approach towards liberalisation allows for predictability of policies and policy direction of member states as it relates to trade in goods and services. The transparency aspect of these principles requires that all laws, regulations, rules and measures must be readily available and accessible to any person needing access to it.[71] These principles seek to erase and eliminate any doubts or conjecture over the provisions of the laws of other member states by availing other trading partners the opportunity to finding and reviewing published laws. On the flip side, transparency promotes trade because it reveals opportunities in other markets to trading partners and provides a platform for compliance of member states to be monitored.[72]

   However, transparency on its own is not a magic wand, in fact, transparency alone without the other principles will be ineffectual in promoting and achieving some level of liberalisation. For a country to make progress in liberalisation of trade in services, transparency is an ancillary element, but it cannot be taken away even though it is an ancillary element, it is a very important element in the matrix for promoting trade liberalisation.

d. **Fair-Competition** – this principle is complementary to the MFN and NT of the Non-Discrimination principle. The kernel of this principle is that member states should not

[69] Alice Landau, *The International Trading System* (Routledge, 2005) 10.
[70] GATT, Art. I, II and III.
[71] GATS 1994, Art II. See also Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* (Oxford University Press, 2007) 255.
[72] Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* (Oxford University Press, 2007) 261.

adopt economic policies that could hurt other nations; for example, dumping of goods or services, selling products or services below cost price in order to gain an unhealthy market share in another economy.

This aspect of this chapter focuses on various forms of GATS obligations and will lay a foundation for the next aspect of the chapter, which will examine Nigerian laws and regulations and mirror them against these obligations to ascertain the level of compliance or non-compliance. A major feature of the GATS, distinct from other WTO Covered Agreements is that it is flexible in the sense that countries can adopt it in a progressive manner, which reflects their peculiar economic, political and cultural circumstances. Thus, the obligations under GATS take two forms – conditional and unconditional obligations.[73] The conditions obligations are those that must be adhered to by members in all sectors, while the unconditional obligations are those by which members can make specific commitments. This approach by the WTO to create a distinction between obligations that are conditional and unconditional is completely unnecessary because it is like sowing the seed for its own failure. There should simply not have been conditional obligations, because it shows a lack of commitment for the WTO to push through with its agenda to liberalisation of trade in services through GATS. In a situation where obligations are conditional, member States will voluntarily opt for the easier alternative, which is to act in a manner they deem to be completely in tune with their national interest, as opposed to the global trade architecture. A more suitable approach, would have been for WTO to impose a timeline for countries to fully comply with these obligations. The current approach by WTO has created a lax space and attitude and could partly be blamed for the recent approach wherein there is a pushback on trade liberalisation and a resurgence of protectionism in international trade in goods and services.

GATS recognises four modes of supply services; it is based on this that binding commitments and the limitation on market access and national treatment are scheduled. These modes of supply of service are as follows:

[73] World Trade Organization, *Trade in Services in the WTO* (WTO E-Learning, 2014) (WTO).

a. cross-border supply from the territory of one member country to the territory of another member country e.g provision of non-admitted insurance or reinsurance cover.[74]
b. consumption abroad, which involves movement of the insured to the location of the insurer to enjoy the service, for example travel insurance, health insurance, large volume insurance for marine, aviation and oil and gas base risks.[75]
c. commercial presence, which involves an insurer providing some form of corporate presence in another jurisdiction and providing services through its presence, which could take the form of a local affiliate, subsidiary, representative office or a branch office;[76] The branch office model was the common form adopted by UK insurers to provide cover in Nigeria in the 1950s and 1960s before the introduction of the indigenisation policy.[77]
d. presence of natural persons, this could take the form of service provided through a natural person from one member state into another member state to provide service, for example insurance agents and intermediaries.[78]

As mentioned earlier, under GATS there are general obligations that are unconditional, such as MFN and other measures, which apply only to sectors where individual members have made specific commitments, these are the conditional obligations.[79] The unconditional obligations cover the MFN, transparency, availability of legal remedies, compliance of monopolies with MFN, among others.[80]

The MFN being a cornerstone of the WTO framework applies to all measures involving trade in services, notwithstanding whether or not specific commitments have been made with respect to a sector. As a result of the flexibility of the GATS framework, a member state can apply for exemption for the first 10 years and the exemption will be reviewed every 5 years. Even though, it can be argued that some member states might need a transition period, the duration for review and renewal could have been pegged to a maximum number of possible

[74] General Agreement on Trade in Services Annex 1B, paragraph 1(2)(a).
[75] General Agreement on Trade in Services Annex 1B, paragraph 1(2)(b).
[76] General Agreement on Trade in Services Annex 1B, paragraph 1(2)(c).
[77] Olusegun Yerokun, *Insurance Law in Nigeria,* (Princeton Publishing Co., 1st Edition, 2013).
[78] General Agreement on Trade in Services Annex 1B, paragraph 1(2)(d).
[79] World Trade Organization, *Trade in Services in the WTO* (WTO E-Learning, 2014) 101.
[80] ibid (n 28) 101.

renewals depending on the category of country. For example, least developed states, could be entitled to 5 renewals, developing states could be entitled to 4 renewals and developed states, could be entitled to 1 renewal. Other circumstances that can entitle a member state to depart from the MFN obligations are: existence or conclusions of economic integration agreements,[81] labour markets integration agreements,[82] recognition agreements,[83] general exceptions,[84] security exceptions[85] and the prudential carve out detailed in the Annex to GATS on Financial Services. The prudential carve out will be discussed in greater detail later in this chapter.

The conditional obligations under GATS require that members must be transparent by publishing all regulatory changes and notifying the Council for Trade in Services when this is done.[86] Indeed, the weakness in the regulatory transparency index of most developing countries has been a historic reason for the low level of foreign investment in the insurance sector.[87] In addition, members are to ensure that all measures are administered in a reasonable, objective and impartial manner in sectors where it has made specific commitments.[88]

With respect to developing countries, there is a very interesting provision of GATS, Article III bis (1), which deals with increasing participation of developing countries. It requires that the participation of developing countries in trade in services should be encouraged by strengthening local capacity, efficiency and competitiveness. It further requires improved access to distribution channels and information networks, in addition to the liberalisation of market access in sectors where they show interest. Article III bis (2) further requires developed countries to establish contact points for developing country members to source information on technical and commercial aspects in the supply of services, registration and obtaining professional qualifications and availability of technology. These obligations

[81] General Agreement on Trade in Services 1994, Art IV
[82] General Agreement on Trade in Services 1994, Art V bis
[83] General Agreement on Trade in Services 1994, Art VII
[84] General Agreement on Trade in Services 1994, Art XIV
[85] General Agreement on Trade in Services 1994, Art XIV bis
[86] General Agreement on Trade in Services 1994, Art III
[87] Harold Skipper, 'Insurance in the General Agreement on Trade in Services' in Cluade E (ed) *AEI Studies on Services Trade Negotiations* (AEI, 2001) 18.
[88] General Agreement on Trade in Services 1994, Art VI.1

imposed on developed countries are very clear but compliance on their part has been so poor that developing countries have not benefitted significantly from these provisions.[89] This window originally should have provided a platform for multinational insurance to be promoted in a manner to allow traffic, namely services coming from developing and least developed countries to developed countries. It would have been a platform to create some form of balance and fairness that would have provided a moral basis for developing and least developed countries to further liberalise because they would have seen the system as fair and one that provides an opportunity to build capacity, compete and at the same time recognise that they are a category of member countries that need special encouragement in a manner that can be likened to the United States law, The African Growth and Opportunity Act 2000 grants market access to the US for qualifying Sub-Saharan African countries. Unfortunately, this has not been managed well and has therefore not achieved the desired outcome. It is however, expected that if the GATS framework is followed through by developing countries, by lowering their protectionists barriers and opening up their markets, foreign capital and expertise will flow into their markets and they in-turn can build the required capacity that will enable them to compete favourably amongst nations.

Although, the GATS framework has been heavily criticized for being too flexible and creating too many loopholes, the flexibility of the GATS framework is still highly commendable particularly for the fact that it was balanced enough to recognize the fact that each member country is peculiar in its own way, hence the need to allow them draw up domestic regulation which details prudential measures that are targeted at protecting investors, depositors, insurance policy holders our customers owed fiduciary duties by financial services providers or for systemic integrity and market stability.[90] On the other hand, Part III of GATS contains specific commitments that member states are required to commit to and to draw up a schedule for their commitments. It is the commitments with respect to market access and National Treatment that a member state enters into which will form the basis for assessing the extent of its compliance with GATS. Regarding market access, countries can adopt both quantitative and qualitative restrictions, with respect to the number of permitted supplies, maximum value of permissible service transactions, maximum

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[89] Ahmad Altaer, *The WTO and Developing Countries: The Missing Link of International Distributive Justice* (University of Portsmouth, PhD Thesis, 2010) 36.
[90] General Agreement on Trade in Services Annex 1B, paragraph 2.

number of suppliers, maximum number of services, total number of natural persons, et cetera.[91] Similarly, with respect to National Treatment, all members of the WTO are mandated to apply it, but only in the sectors they have committed to, hence, they may adopt discriminatory regulations in sectors that specific commitments have not been made.

By way of a check on the flexibilities built into GATS and in order for the above prerogatives of members not to be abused through the indirect imposition of trade barriers in services under the pretext of exercising rights under GATS flexible exceptions, GATS requires that the domestic regulations must at the minimum satisfy the standards set out in Article VI of GATS which requires that all domestic regulations must comply with the following: reasonableness, objectivity and impartiality, existence of a remedial process in the form of a judicial, arbitral or administrative processes for dispute resolution and seeking legal redress, a system that guarantees prompt authorization of applications by foreign supplies, transparent and objective licensing requirements and the application of international standards in relation to licensing, qualification and technical requirements.

Without doubt, in some respect, Nigeria has exercised some of its rights under GATS to appropriate these exceptions and make them applicable locally. However, it is essential to critically examine whether the exercise of these options has been consistent with the above requirements. On a more general note, it is essential to examine whether the general insurance regulatory framework is consistent with the GATS framework and the principles that underlies WTO's liberalisation agenda.

In this light that the next aspects of this chapter will focus on the domestic regulation of insurance in Nigeria, the prudential measures contained therein and it assesses the extent of its compliance with the GATS Framework.

2.2 Regulation of Insurance Business in Nigeria and GATS Obligations

To be able to adequately analyse the extent to which Nigerian law comply or detracts from GATS, it is essential to properly understand the insurance regulatory framework in Nigeria. There are two principal legislations that regulate the conduct of insurance business in Nigeria;

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[91] The General Agreement on Trade in Services, Art XI(1).

they are the Insurance Act 2003[92] and the National Insurance Commission Act 1997 (NAICOM Act).[93] The sole regulator for the conduct of insurance business in Nigeria is the National Insurance Commission of Nigeria (''NAICOM'' or ''the Commission''), which is statutorily created by section 1 of the NAICOM Act. NAICOM as a regulatory body, has one principal object, which is 'to ensure the effective administration supervision, regulation and control of insurance business in Nigeria.'[94]

Even though the various categories of insurance businesses are available for insurers to participate in, Nigerian law appears to have introduced protectionist restrictions that systematically limit and/or excludes foreign insurers from participating in insurance business(s). As a general rule, under Nigerian insurance law a company cannot participate in insurance business if it is not locally incorporated in Nigeria.[95] Registration of companies is strictly the responsibility of the Corporate Affairs Commission (CAC) as provided in the Companies and Allied Matters Act (CAMA)[96]. In addition to the issue of incorporation, a company must be registered with NAICOM as a condition precedent for participation in insurance or reinsurance business in Nigeria.[97] This requirement comparatively, is becoming old fashioned because the world has become digitised in the sense that services can be rendered without any physical connection or presence in a particular jurisdiction. For example, an insurer can remotely and via the Internet conclude insurance transactions with a Nigerian resident or domiciled company. Such transactions could take place in significant numbers without the regulators ever knowing and without any dispute ever arising in such situations. The question then will be; who is the loser in this instance? Without doubt, it would be the local authority because they would have lost the opportunity to impose and collect tax on the transaction. This therefore means that the requirement for a company to be physically registered in Nigeria before it can provide services, and must be registered with NAICOM before it can provide insurance service, is completely unreasonable in the digital age. At the time these laws were enacted, there were neither internet nor high speed real time communication, but in today's world, all these have changed. Thus, it will be unreasonable

[92] Insurance Act 2003
[93] National Insurance Commission Act 1997
[94] National Insurance Commission Act 1997, s 6.
[95] Insurance Act 2003, s 3.
[96] Companies and Allied Matters Act 1990
[97] Insurance Act 2003, s 4(1). See also Insurance Act 2003 s. 72(4).

to apply the rule books of several decades ago to solve a problem that arose and/or exists in today's world, a better option will be to remove the requirement for local incorporation for business.

Similarly, it is mandatory for any insurer looking to reinsure a risk outside Nigeria to apply for a Letter of Attestation/Certificate to Reinsure Abroad (LRO/CRA) or an Approval in Principle to Reinsure Abroad.[98] Normally, an Approval in Principle must be obtained before an insurer can even initiate steps to find an insurer abroad, and a Certificate or Attestation must be obtained after placement of the risk; this acts as a confirmation of the overseas placement of the risk. This is a general rule, which is subject to some exceptions; the exceptions will be analysed in later parts of this work. This requirement is unnecessary and is just a means of preventing the system from being efficient and responding to issues, problems and market needs as soon as they arise. There is no justification for an insurer planning to place a risk overseas to first of all seek regulatory approval in the form of Approval in Principle before any steps can be taken to begin searching for an insurer to place some risks overseas. Such decisions for business purposes may require speed and a quick turnaround time; but without doubt, the regulatory bureaucracy in Nigeria and within NAICOM will impede it. If this requirement is looked at from another angle, it can be determined that the objective is obviously highly protectionist in nature because of the obvious advantage it grants to local insurers/reinsurers and imposes conditions for foreign insurers interested in participating in the Nigerian insurance market.

In addition to the restrictions contained in the Insurance Act, the conduct of reinsurance business is also controlled by the Nigerian government through the Nigeria Reinsurance Corporation, which enjoys monopolistic protection under the *Nigeria Reinsurance Corporation Act 1977* (Nigeria Re Act). Based on *Section 7 of the Nigeria Re Act*, obligates all insurers providing cover in Nigeria to reinsure twenty percent of their insured risks with Nigeria Re and equally pay twenty percent of the premium received to Nigeria Re[99], and the commission to be paid to the insurer is to be determined by Nigeria Re. The Nigeria Re is also entitled to first refusal over the remaining eighty percent of the insured risks before it

[98] National Insurance Commission of Nigeria, 'Circular on Reinsurance/Retrocession Arrangements in Respect of Domesticated and Special Risks Insurance' 7 August 2012 (NAICOM/OCT/RE-CIR/01/08/2012) (NAICOM 2012).
[99] Nigeria Reinsurance Corporation Act 1977, S. 7(1).

can be placed with any other reinsurer, local or foreign.[100] Where such an offer is made to Nigeria Re and declined, it must issue a certificate before the risk can be placed with another reinsurer.[101] Admittedly, monopolies like Nigeria Re were established based on the 1972 and 1973 recommendations of the UNCTAD to the effect that developing countries should establish national insurance companies in order for them to stem the tide of capital flight through reinsurance cover provided by non-admitted reinsurance companies.[102] In addition, the law establishing Nigeria Re was useful in the 1970s; however, it has lost its relevance in modern times, particularly in view of the existence of other indigenous reinsurance companies and in view of the trade liberalisation regime of the WTO and the GATS Framework, to which Nigeria is a signatory. The monopolistic structure of the reinsurance (and insurance) market has stifled the growth of the reinsurance sub-sector in Nigeria, and other local reinsurance companies have remained stunted as a result of this provision.[103] In Nigeria, the insurance sector historically contribution has always been very low, for example, in the mid 1980s, it was recorded that the contribution of the insurance sector from 1975 to 1985 was very small.[104] As at 2007, the contribution of the insurance sector to GDP stood at 0.32%.[105] By 2012, things had not changed significantly because the insurance sector was contributing only 0.72% of Nigeria's GDP, which is relatively small compared to other developing countries.[106] For example as at 2010, South Africa the contribution of the insurance sector to GDP stood at 16%, Namibia as at 2007 stood at 8.9% and Botswana stood at 3.5%.[107] As at 2017, the contribution of the insurance sector to GDP in Nigeria had shrinked to 0.4%[108]. Numerous reasons have been advanced for the state of stuntendness in the insurance industry, one notable reason is the absence of expertise of persons that participate in insurance business and run insurance companies in Nigeria which flows from the restriction of foreign players to participate in the market which could lead to transfer of

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[100] Nigeria Reinsurance Corporation Act 1977, S. 7(3).
[101] Nigeria Reinsurance Corporation Act 1977, S. 7(4).
[102] UNCTAD Resolution 42/III of 1972 and 7/VII of 1973
[103] Chibuike Uche and B Chikeleze, 'Reinsurance in Nigeria: The Issue of Compulsory Cession' (2001) 26 The Geneva Papers on Risk and Insurance 490 – 504.
[104] Olaseni Akintola-Bello, 'Insurance Industry and the Nigerian Economy' (1985) 9(1) Savings and Development Journal 57 – 77.
[105] Yemi Soladoye, 'Insurance Sector Presentation' (FSS 2020 International Conference, June 2007).
[106106] Denis Dias, Garand and Swiderek, 'Towards Inclusive Insurance in Nigeria: An Analysis of the Market and Regulations' (2013) Access to Insurance Initiative Publication 26.
[107] Swiss Re, 'SIGMA World Insurance' (2011).
[108] - -, 'Insurance Sector Contribution to Nigeria's GDP Poorest in Africa' (15 October 2017, The Nation, Lagos,).

skill and expertise.[109] Another commonly cited reason is that of very weak solvency and liquidity which in turn flows a lack of investment. The volume of investment capable of transforming the Nigerian insurance industry can be sourced from foreign markets, however, the protectionists position of the law makes investing in the sector unattractive and it must be stated that Nigeria has little or nothing to show for its protectionist stance and legacy.[110]

It must be pointed out that this delicate arrangement is further complicated by the establishment of the African Reinsurance Company, also known as Africa Re based on the Agreement Establishing African Reinsurance Corporation.[111] Based on *Article 27(2) of the Agreement Establishing African Reinsurance Corporation*, a minimum of five percent of all insurance risks must be reinsured with the Corporation. It can be argued that this regulatory model has not proven itself to be successful in Nigeria in the sense that despite the protection accorded to these local reinsurance corporations, none have evolved into a Multinational Corporation and none have grown to a level where they are strong, reliable and able to absorb the reinsurance risks within the Nigerian market. In other words, despite the protection accorded to these reinsurance corporations, they have not built capacity and at the same time they do not have the competition that will drive the discipline, innovation and growth. Growth can hardly arise in an environment that is not sufficiently competitive.

The restrictive approach of Nigerian insurance regulation is a major contributor to the weakness and slow growth of the sector in Nigeria particularly because the current approach restrains trade and stifles competition, the implication of which is complacency on the part of local insurers, especially because they have been indirectly deterred from innovating and improving as a result of the domestic monopoly created. Such monopolistic situations could give rise to systemic problems like over-concentration of risk in a market. Where a market is over concentrated with its domestic risks and inadequate provision is made to spread the risks to other markets, it then raises the danger of an implosion and market collapse or poor records in claims payment thus setting a cycle of mistrust for insurers, low patronage of local insurance companies and a redundant market. On the flip side, the monopoly of Nigeria Re, by implication, makes the Nigerian reinsurance market unattractive to foreign reinsurance

[109] Yemi Soladoye, 'Insurance Sector Presentation' (FSS 2020 International Conference, June 2007) 44.
[110] Dianna Games, 'Can Nigeria's CFTA Move undo Its Protectionist Legacy?' *African Business* (16 August 2019).
[111] Agreement Establishing African Reinsurance Corporation 1976.

because there is the assumption that when Nigeria Re exercises its right of refusal, it takes the most juicy and profitable part of any transaction and leaves the residue for others to deal with and retain.[112]

Historically, as pointed out above, Nigerian regulators impose restrictions on foreign insurers, and that has accounted for the low capacity, poor records and weak insurance market that has bedevilled the Nigerian insurance sector. Unfortunately, the thinking and regulatory approach from NAICOM does reflect a willingness to depart from protectionism. On 1st January, 2018, the Guidelines for Micro-Insurance Operation in Nigeria (Micro-Insurance Guidelines) was issued by NAICOM for the regulation of micro-insurance business. The Micro-Insurance Guidelines state that no person can participate in micro-insurance business without registration with NAICOM.[113]

The question then that arises, is the extent to which Nigerian law has been GATS compliant? In line with GATS, in 1994 and 1998, Nigeria made specific commitments under the GATS schedule, specifying sectors it commits to and the particular mode of supply of service it authorises. With respect to financial services, Nigeria made market access commitments to cross-border supply and consumption abroad. In addition, foreign insurers can establish subsidiaries in Nigeria only if they incorporate them as local subsidiaries; hence, the option to supply service through commercial presence in the form of a representative office or branch office is not permissible under Nigerian law. Furthermore, foreign insurers can incorporate local subsidiaries in Nigeria and own up to 100 per cent equity in such an enterprise.[114]

Nigeria also accords the MFN treatment to all countries, but as a member of Economic Community of West African States (ECOWAS) Nigeria gives some preferential treatment to its ECOWAS member states,[115] it also provides investment guarantees against

[112] Chibuike (n 51) 502.
[113] Guidelines on Micro-Insurance in Nigeria 2018, para 1.0.
[114] General Agreements on Trade in Services, Nigerian Schedule of Specific Commitments 1998.
[115] Economic Community of West African States Treaty.

expropriation.[116] Nigeria openly declined permitting transfer of information containing personal data and secrets involving banks, securities and businesses.[117]

Regarding insurance services, Nigeria, has expressly specified certain exemptions, to wit – all Nigerian government properties must be insured with the National Insurance Corporation (NICON), except where Nigeria's President issues a written authorisation for another insurer to provide cover.[118] Furthermore, the Schedule specifies that imports into Nigeria must be insured locally[119] and an insurance broker must obtain approval before contracting with a non-admitted insurer.[120]

In Nigeria's GATS Schedule on Specific Commitments, the scope of insurance services provided for are life, accident and health, non-life insurance, reinsurance and retrocession and services auxiliary to insurance. For each of these categories of insurance services, Nigeria does not impose limitations on any of them in relation to Market Access and National Treatment, however, remains unbound in the following category –

- **Life, Accident and Health Insurance**: regarding market access, it remains unbound for cross-border supply and consumption abroad and for National Treatment;
- **Non-Life Insurance**: regarding Market Access and National Treatment, Nigeria is unbound for consumption abroad and presence of natural persons;
- **Reinsurance and Retrocession**: Nigeria is unbound only with respect to presence of natural presence for Market Access;
- **Auxiliary Services**: Nigeria is unbound with respect to presence of natural persons under Market Access and Natural Treatment.

Having reviewed the provisions of Nigeria's insurance laws and Nigeria's general and specific GATS commitments, this aspect of the work will analyse the extent of Nigeria's compliance or non-compliance with its GATS obligations.

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116 Nigerian Investment Promotion Act 1995.
117 General Agreements on Trade in Services, Nigerian Schedule of Specific Commitments 1998.
118 General Agreements on Trade in Services, Nigerian Schedule of Specific Commitments 1998, paragraph b(a).
119 General Agreements on Trade in Services, Nigerian Schedule of Specific Commitments 1998, paragraph b(b).
120 General Agreements on Trade in Services, Nigerian Schedule of Specific Commitments 1998, paragraph b(c).

Under the modes of supply of services recognised under GATS, any of the following corporate presence can be utilised in entering a domestic insurance market, local affiliate, subsidiary, representative office or a branch office. In addition, Article XVI(2)(e) of the GATS Annex B prohibits any measure taken by a member that restricts or requires a specific type of corporate legal entity or joint venture for supply of services.[121] This approach adopted in GATS is quite smart, particularly because different countries have distinct corporate and legal structures that businesses are required to adopt when operating within their local environment. Despite this binding obligation under GATS, Nigeria's insurance laws permit only limited liability companies or statutory corporations to apply for licences for insurance and related services.[122] This limitation in the permissible corporate and legal forms that businesses can adopt in supplying insurance services in Nigeria clearly breaches Nigeria's GATS commitments. The contemplation under GATS is that if insurance services can be provided through a local affiliate, subsidiary, representative office or a branch office, it then means that a non-admitted insurer has the choice to decide whether or not it will be suitable to establish more local subsidiaries in other jurisdictions, or it may be best to just establish a branch office in such jurisdictions. From a corporate perspective, such a decision will be determined by a number of factors, including a company's willingness to recruit and train more staff, to commit resources in setting up an offshore office and incurring all the attendant costs, the size and likely profitability of the market it intends to venture into, the security situation in a new jurisdiction it intends to enter into, the frequency of the businesses and the services it provides or will be providing in such a jurisdiction, the company's preference and appetite to expand either on a country by country basis or on a region by region basis. The options provided by GATS allows this level of flexibility in the vehicles that can be adopted in entering or operating in any country; however, the approach adopted under Nigerian law is such that compels a non-admitted insurer to adopt only the option to provide cover through a local subsidiary. This approach is a hard one because it may not be in agreement with the corporate strategy and needs of a particular non-admitted insurer; hence, the mere realisation that Nigerian law makes it mandatory to adopt the option of a local subsidiary to gain market access may automatically discourage them from entering into the market and they may channel their investment capital into another market that is more receptive and permits

[121] General Agreements on Trade in Services Annex B, Art XVI(2)(e).
[122] Insurance Act 2003, s. 3(a)&(b).

flexible market entry and access channels. In Chapter Four, the approaches adopted in jurisdictions like South Africa and India will be analysed, because they have moved from the Nigerian-like approach to one that now allows non-admitted insurers to operate through branch offices or a representative. Thus, Nigeria is not only breaching its GATS obligations, it is also adopting an approach that is counter-productive and may not attract the required level of foreign investment in the Insurance Sector.

In addition to the above, NAICOM has GATS obligations on transparency, which requires it to publish all laws, policies, guidelines, decisions and subsidiary legislations so that regulators and insurance stakeholders in other jurisdictions can be aware of these positions. However, NAICOM has consistently breached these GATS obligations by operating in a non-transparent manner as evident in the examples that are sighted hereafter. NAICOM imposed a tacit embargo on the issuing of new licences to insurers.[123] This ban was silently imposed by NAICOM because no official position or document was issued, rather, it was an internal confidential administrative policy that was introduced. The basis for this move by NAICOM is that that it will prevent proliferation of insurance companies and will also reduce market abuses by insurers. The implication of this intervention is that any application for fresh insurance licence will be denied on frivolous and pretentious grounds. As a result of the secrecy surrounding the measure, it was not published, neither was it communicated to the public and to insurance stakeholders. Similarly, NAICOM released several circulars that impacted on local and foreign insurers and these circulars were not published online, neither are they on the website of NAICOM, even though other laws and regulations are on the NAICOM website. Some of these unpublished circulars are – Review of Requirements for Approval in Principle, Letter of Attestation and Certificate of Offshore Reinsurance Request, Circular on the Requirement for Aviation Insurance Placement and Returns and Circular on Reinsurance Retrocession Arrangement in Respect of Domesticated and Special Risks Insurance. The non-publication of the tacit embargo and the failure to make these circulars readily available offends the requirement of Transparency in GATS[124], which is a general commitment and by implication it restricts trade and liberalisation. Nigeria's GATS Schedule does not contain any provision to exclude its commitments to transparency. This regulatory approach by Nigeria violates its WTO and GATS obligations. It is suggested that in order to

[123] Nike Popoola, 'NAICOM Lifts Ban on New Licence Issuance' *Punch* (Lagos, 5 September 2018).
[124] General Agreement on Trade in Services, Art III.

be compliant, NAICOM should either expunge any non-compliant law or it should do the necessary by simply publishing them.

Furthermore, with respect to market access and national treatment, Nigeria's commitments under its GATS Schedule states that there is no limitation or restriction; however, this is not the reality on the ground because there are clear restrictions to non-admitted insurers gaining market access in Nigeria. Any insurer seeking to reinsure abroad, is required to obtain a mandatory Approval in Principle authorising it to seek non-admitted reinsurers. If this is granted, it will eventually apply for a Letter or Attestation/Certificate to Reinsure Abroad, which will confirm that the risk has been placed with a foreign reinsurer. Normally, NAICOM will issue these approvals only after it has been convinced by the applicant that the reinsurance cover cannot be provided by a local reinsurer. In a very clear manner, this is a market access restriction, which Nigeria has not specifically exempted from its GATS commitment and at the same time, local laws and regulations make it mandatory to obtain both Approval in Principle and Letter or Attestation/Certificate to Reinsure Abroad. It can therefore be safely argued that Nigeria is in breach of its GATS obligations regarding market access and national treatment. This point is discussed in greater detail in Chapter Four.

Similarly, regarding market access, GATS provides that other than specific contrary commitments, member states are prohibited from imposing quotas on the number of natural persons that may be permitted for employment by a supplier of services in their jurisdiction; member states are also prohibited from imposing any requirement for the supplier to satisfy economic needs.[125] This is a commitment that Nigeria did not exempt itself from in its application, while at the same time Nigerian laws violate those same obligations. Immigration laws in Nigeria require that for a foreigner to work in Nigeria, its sponsoring organisation must obtain an expatriate quota, which will be issued by the Minister of Interior.[126] These requirements run counter to the general GATS obligations on market access and are apparently restrictive in nature. In fact, there are even more stringent requirements for the issuance of expatriate quotas to companies that are wholly foreign owned. One such requirement is that they must show evidence of capital importation in Nigeria; this requirement violates the GATS obligation on National Treatment and does not fall within the

[125] General Agreement on Trade in Services, Art XVI(2)(d).
[126] Nigerian Immigration Act, s 8.

scope of the exceptions recognised under the *GATS Annex on Movement of Natural Persons Supplying Services under the Agreement*. The National Treatment obligations is further breached through the mandatory requirement for Nigerian staff to understudy the expatriates and the requirement that supporting evidence establishing that Nigerian staff actually understudied the expatriates must be provided before an expatriate quota can be renewed for a wholly owned foreign firms.[127] This requirement is extremely aggressive because domestic suppliers are not required to furnish this supporting evidence as a condition for renewal of expatriate quotas. These measures are tantamount to institutional discrimination and are in breach of Nigeria's National Treatment obligations

Still in relation to GATS National Treatment obligations and licencing of insurance firms, the requirements for processing insurance and reinsurance licences are exactly the same for local firms and wholly foreign owned firms incorporated in Nigeria. It should be noted that GATS Article XVII (3) stipulates that even though identical requirement are imposed on local and foreign suppliers, it will fall short of the National Treatment requirement if it modifies the conditions of competition in favour of local service supplies. With respect to this point, Nigerian law appears to offend the National Treatment standards of GATS, because even though the requirement for licencing of insurance services is the same for foreign owned and local firms, the licencing requirement before an applicant can be issued an insurance licence, is to have a fully functional office in Nigeria with all requisite staff in place;[128] a completely herculean and onerous condition to be satisfied by a foreign non-admitted insurer that is just trying to enter into the Nigerian insurance market. It could be risky for a non-admitted insurer to take the step to establish an office and proceed to employ all requisite staff before even obtaining a licence to operate in Nigeria. The question to be asked is what happens if all this investment is made and the insurance licence is not approved by NAICOM. In fact, any insurer that would have taken such a step in Nigeria within the last ten years when an unannounced banwas imposed on the issuance new insurance licences,[129] would have suffered such a fate. Taking such a step will be highly risky for any foreign insurer seeking to establish commercial presence in Nigeria. This may account for the fact

[127] Nigeria Immigration Service Revised Guidelines on Business Permit and Expatriate Quota, Paragraph B and C.

[128] Nigerian Insurance Act 2003, 6(1)(e).

[129] Nike Popoola, 'NAICOM Lifts Ban on New Licence Issuance' Punch (Lagos, 5th September, 2018)

that no foreign insurer has incorporated a wholly owned subsidiary in Nigeria, rather, they have exercised the option of simply buying shares in existing insurance companies. If Nigeria, desires to change the fortunes of its insurance industry, it must expunge requirements like this that are capable of causing hardship and discourage investment from markets that have both human and financial capacity.

Furthermore, with respect to market access, the *Nigerian Insurance Act 2003* prohibits any insurance or reinsurance transaction with any foreign insurer or reinsurer that is not licenced in Nigeria.[130] This restriction applies where the transaction falls under those categorised as domestic insurance business. The businesses categorised as domestic insurance or reinsurance businesses are - fire insurance and reinsurance business, motor insurance and reinsurance business, liability insurance and reinsurance, life insurance and reinsurance business, accident insurance and reinsurance business and such other insurance and reinsurance business as NAICOM may insert.[131] Previously, this meant that other categories of insurance business (like Marine, Aviation, Oil and Gas, etc) that were not specified were exempted from application for mandatory written permission. Unfortunately, in the exercise of its powers to expand the listed insurance businesses, NAICOM expanded the list through its Annual Directive of 2008 and 2010, to include – marine hull insurance and reinsurance business and aviation insurance and reinsurance business.[132] These provisions, effectively closed the window for all forms of cross-border supply of insurance and reinsurance services, except if a written authorisation is obtained and an authorisation will not be issued unless and until the applicant satisfies NAICOM that local capacity has been exhausted and no local service supplier can provide the service. Apparently, this provision is highly restrictive and constrains trade liberalisation and imposes undue hardship on an applicant, because for each transaction a different application will be made and the applicant will be subjected to the rigour, bureaucracy and delay that characterise the process.

One of the restrictive provisions contained in the Nigerian Insurance legal framework, which is complaints with the GATS regarding the 5% compulsory reinsurance cession to the African Re, which is applied based on *Article 27(2) of the Agreement Establishing African*

[130] Insurance Act, s 72(1).
[131] Insurance Act, s 72(2).
[132] National Insurance Commission Annual Directives 2008 and National Insurance Commission Annual Directives 2010.

Reinsurance Corporation. This is in line with Article V of GATS, which prescribes regional trade commitment as an exception to the Most Favoured Nation obligation. While this is a restrictive provision, it is commendable, because it is aimed at promoting regional trade within the African continent. Another restrictive provision that does not violate the GATS framework is the requirement that all imports into Nigeria must be insured by a Nigerian licenced insurer.[133] This provision is highly restrictive and is a typical example of an unreasonable imposition, particularly because some companies purchase marine insurance cover on an annual basis for all their global shipments and possibly cover all their subsidiaries. Thus, for such companies dealing with such an obligation, it will be difficulty and could result in wastage. In addition, arrangements for insurance are often made in the country where the goods or services are supplied from as opposed to the country where they are received or enjoyed. Hence, compelling a person to obtain insurance from Nigeria for imports is highly unreasonable and is overtly a restraint on trade. Unfortunately, as onerous as this provision is, by inserting it in its laws, Nigeria does not violate its GATS obligations, because in its commitments as detailed in its GATS Schedule, it was expressly stated that all imports into Nigeria must be insured with Nigerian insurers.[134]

One more measure in the Nigerian insurance laws that supports trade liberalisation is the permission for foreigners to own 100% of the shares of any company in Nigeria including an insurance company.[135] The law also contains provision that provides guarantees for unrestricted transferability of funds in the form of dividend income and remittance of investment proceeds.[136] Nigerian laws including the Nigerian Investment Promotion Commission Act 1995[137] also provide further investment guarantees that where a foreign investor makes investments in Nigeria, the assets and business will not be expropriated by the Nigerian government. .[138] This is a very positive and WTO compliant provision of Nigerian law. Another WTO compliant provision of Nigerian law is the establishment of the Nigerian Agricultural Insurance Corporation (NAIC), which is a government owned corporation and provides insurance cover for all agricultural projects under the Federal

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[133] Nigerian Insurance Act, s 67.
[134] General Agreements on Trade in Services, Nigeria's Schedule.
[135] Insurance Act, s 17 and 21.
[136] Insurance Act, s 24.
[137] Nigerian Investment Promotion Commission Act 1995, s 25.
[138] Insurance Act, s. 26.

Government Agricultural Scheme. NAIC provides insurance cover at a subsidised rate to promote organic development in the agricultural sector. Other companies are permitted to provide insurance cover for agricultural risks and compete freely with NAIC. This arrangement is in line with WTO standards, particularly, *Article XV (1) of GATS***,** which permits developing countries to provide subsidies for such development-based programmes.

In light of the above analysis, one can safely conclude that there is a mismatch between the protectionist and the liberal provisions of Nigerian insurance law. It appears that the protectionist provisions far out weigh the liberalisation provisions of the laws and the most import provisions of the laws are protectionist in nature. The implication of this has reduced foreign participation in the Nigeria market and this also accounts for the slow pace of growth of the Nigerian insurance system. Nigerian insurance regulators will have to address this mismatch if they seek any change in fortunes for the local market and importantly,[139] a great deal will need to be learnt from other jurisdictions like the United Kingdom, South Africa and India in terms of finding the right balance for protectionisms and liberalism of insurance sector regulation.

2.3 Insurance Regulation in the United Kingdom

This aspect of this chapter x-rays the regulatory approach adopted in the United Kingdom (UK) in a bid to seek out lessons that can be learnt by Nigerian insurance regulators and stakeholders.

At least for now, the United Kingdom is still a member of the European Union (EU), until it formally exits the EU, the laws of the latter continue to apply to the UK. This therefore makes it expedient to mention again that GATS recognises four models for supply of service, to wit – cross-border supply, consumption abroad, commercial presence and presence of natural persons.[140] Again, it was pointed out earlier that GATS contains general obligations; however, members are permitted to make specific obligations that will be applicable to them and any exceptions specified will equally not apply to them. In this regard, the EU has stated

[139] Chibuike Uche, 'Government Ownership of Insurance Companies in Nigeria: A Critque' (1999) 24(2) The Geneva Papers on Risk and Insurance Issues and Practice 216 – 227. Rayfeld Associates, 'Utilizing Foreign Direct Investment in the Nigerian Insurance Sector' (2015) Rayfield Publications.

[140] General Agreement on Trade in Services Annex 1B, paragraph 1(2)(a)(b)(c).

that with respect to supply of insurance services on a cross-border basis, non-EU members of the WTO can supply within the EU Marine, Aviation and Transport insurance (MAT) services through an intermediary or as an intermediary.[141] With respect to reinsurance, non-EU members of the WTO are entitled to supply the same by establishing a commercial presence within the EU, subject to such terms and conditions specified by each EU member state. However, any limitation introduced by any EU member State must be stated in its national law.

As stated earlier, GATS authorises member countries to adopt prudential measures that are targeted at protecting investors, depositors, insurance policy holders and customers owed fiduciary duties by financial services providers or for systemic integrity and market stability. Thus, with respect to the supply of non-MAT insurance services, the EU Directives[142] were issued and it requires an authorisation and supervisory regime to be put in place for all direct insurers and for any reinsurer that simultaneously conducts insurance business. However, insurance companies that have their headquarters within the EU are entitled to passport rights, which enable them to provide services within the EU.

Based on these directives and contrary to the commitments under GATS, reinsurers are now required to comply with the local authorisation and regulatory requirements and obligations. In addition, Article 49 of the EU Directives prohibits EU member states from according MFN treatment to non-EU insurance companies, which presupposes that at the least non-EU and EU insurance companies must enjoy equal treatment; however, through the passport regime, EU members enjoy a significant advantage over non-EU companies that ordinarily satisfy the prudential and conduct of business requirements of the EU.

In light of the above and the EU Insurance Directives, the UK has its own insurance authorisation regime and insurance regulations.Insurers capable of providing services within the UK fall into seven categories, which are as follows:

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[141] Commitments of the EC an its Members contained in the Understanding on Commitments in Financial Services.

[142] Directive 73/239/EEC, 88/357/EEC and 92/49/EEC.

(a) insurance companies licenced pursuant to the Financial Services and Markets Act 2000 (FSMA 2000);[143]
(b) mutual insurance companies licenced pursuant to the FSMA 2000;[144]
(c) friendly societies and similar bodies regulated based on the FSMA 2000, Friendly Societies Act 1974 and 1992;[145]
(d) Lloyd's of London regulated based on the FSMA 2000 and the Lloyd's Act 1982;[146]
(e) underwriting agents acting on behalf of admitted and non-admitted insurers;[147]
(f) insurance companies operating based on the passport regime;[148]
(g) non-admitted insurers providing cover without having residence in the UK.[149]

Before 2012, the insurance sector regulatory authority was the now-defunct Financial Services Authority (FSA). The FSA was the sole regulator in the sector, apart from the partial self-regulatory activities of some entities like Lloyd's of London. The FSA was established pursuant to the provisions of the FSMA 2000 and was charged with the responsibility of issuing licences to insurers permitted to operate within the UK.

In 2012, following the passage of the Financial Services Act (2012), the regulatory structure in the UK financial services industry was changed from the tripartite regulatory structure involving the Bank of England, the Treasury and FSA to a twin peak structure involving both

[143] Financial Services and Markets Act 2000, s 19
[144] Financial Services and Markets Act 2000, s 138k.
[145] Financial Services and Markets Act 2000, s 334 and 335.
[146] ibid.
[147] Financial Services and Markets Act 2000, Part XIX.
[148] ibid. Based on the EU Passport regime, an insurer that is licensed in any of the Member States is entitled to provide insurance services and sell insurance products within any other State of the EU. This process has been made possible through series of directives, including the First Non-Life Directive (Council Directive 73/239/EEC), First Life Directive (Council Directive 73/239/EEC), the Second Non-Life Directive (Council Directive 88/357/EEC), Second Life Directive (Council Directive 90/619/EEC), the Third Non-Life Insurance Directive (Council Directive 92/49/EEC) and the Third Life Insurance Directive (Council Directive 92/96/EEC), which were all later repealed and re-enacted as the European Parliament and Council Directive 2002/83/EC. With respect to the protection of policyholders, EU authorities repealed the various Insurance and Reinsurance Directives and enacted the European Parliament and Council Directive 2009/138/EC, also known as the Solvency II Directive. The Directive like the previous once, imposes solvency requirements on insurers licenced across the EU. Some of the key features of the Solvency II Directive are the risked-based capital regime it introduces, also the introduction of the Solvency Capital requirement and the Minimum Capital requirement. An important component for multinational insurance programmes is that non EU based reinsurers must be rated at least BBB and they must collaterise the reinsurance, before they can provide reinsurance service for EU based risks. Where their rating is below this requirement and the risk is not collaterised, then the jurisdiction of their residence must satisfy the requirement of equivalence.
[149] ibid.

the Financial Conduct and the Prudential Regulation Authority.[150] Consequently, it is correct to state that the insurance industry in the United Kingdom is jointly regulated by the PRA and the FCA. As a general rule, in line with the first category of insurers operating in the UK, no person can participate in insurance business without first obtaining the authorisation of the regulator. Section 19 of the FSMA provides as follows - *"No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is— (a) an authorised person; or (b) an exempt person."*

Non-compliance with the above provision is a crime and punishable upon conviction by way of a fine or imprisonment.[151] The only exception is where the party shows that it took all reasonable precautions and exercised all due diligence.[152]

This situation raises the important question of what is a regulated activity. The applicable legislation on regulated activities is the Financial Service and Markets Act 2000 (Regulated Activities) Order 2001 (the 2001 Order).[153] The exception for EU Passport rights mentioned above, is contained in section 39 of the FSMA 2000.

On the basis of sections 19 and 22 of the FSMA 2000, the Second Schedule to the FSMA 2000 specifies the category of activities that qualify as regulated activities. Paragraphs 20 and 21 of the Second Schedule to the Act, identifies insurance business and the business conducted by Lloyds of London as regulated activities.

Article 2 of the 2001 Order categorises insurance business into general (non-life) and long term (life). In the UK, within the context of the Insurance Companies Act 1982, Insurance Business will either be a long-term or general insurance business.[154] Based on schedule 1 of the Insurance Companies Act 1982, 7 items are listed as falling under long-term insurance business, while 18 items are listed as falling under general insurance business. The items listed as falling under long-term insurance business are as follows - Life and annuity, Marriage and birth, Linked long term, Permanent health, Tontines, Capital redemption, Pension fund management. The items listed under general insurance business are as follows

[150] Financial Services Act 2012, Section 6.
[151] FSMA 2000, s 23.
[152] Merkin Colinvaux's (n 19) 759.
[153] SI 2001/544.
[154] Insurance Companies Act 1982, s 1(1).

– Accident, Sickness, Land vehicles, Railway rolling stock, Aircraft, Ships, Goods in transit, Fire and natural forces, Damage to property, Motor vehicle liability, Aircraft liability, Liability for ships, General liability, Credit, Suretyship, Miscellaneous financial loss and Legal expenses.

A number of activities categorised as regulated insurance businesses, are – mixed contracts, breakdown insurance, retailers' and manufacturers guarantees, mutual insurance – club benefits, friendly societies, industrial assurance and reinsurance.[155]

A very important point that must be mentioned is the consequence for non-compliance with the obligation for authorisation before insurance business can be conducted. As mentioned above, section 19 of the FSMA 2000 criminalises unauthorised conduct of insurance business. But another dimension is introduced into the equation, which is as raised in Colinvaux's Law of Insurance – "The criminality raises the question whether either party to an insurance contract entered into by an unauthorised insurer has any right under it."[156] The initial approach was to apply the illegality principle founded on the maxim of *ex turpi causa non oritur actio*, which is that no action can arise from an illegal cause. In ***Bedford Insurance Co v Instituto de Ressaguros do Brasil***[157] the court held that illegal acts cannot be ratified and are *void abi nitio*, thus no party can claim any right under the contract. However, in ***Stewart v Oriental Fire and Marine Insurance Co Ltd***[158] a contrary position was taken, but the Bedford position was again re-affirmed in ***Phoenix General Assurance of Greece v ADAS.***[159] However, based on ***Re Cavalier Insurance Co Ltd***[160] the court held that even though the parties will be unable to exercise any right under the contract, the insured will at least be entitled to recover premiums paid under the illegal contract.

The above treatment of unauthorised insurance was reversed statutorily[161] by section 132 of the Financial Services Act 1986 and later sections 26 to 28 of the FSMA 2000, which is to the effect that despite the fact that a policy cover was unauthorised and illegal, an insured

[155] Merkin Colinvaux's (n 19) 763 – 767.
[156] ibid 769.
[157] *Bedford Insurance Co v Instituto de Ressaguros do Brasil* [1984] 3 All. E.R. 777.
[158] *Stewart v Oriental Fire and Marine Insurance Co Ltd* [1984] 3 All. E.R. 777.
[159] *Phoenix General Assurance of Greece v ADAS* [1987] 2 All. E.R. 152.
[160] *Re Cavalier Insurance Co Ltd* [1989] 2 Lloyd's Rep 430.
[161] Robert Merkin, *A Guide to Reinsurance Law* (Taylor & Francis, 2013) 81.

reserved the right to exercise it at its option and the insurer can likewise enforce it if it is proven to the satisfaction of the court that the insurer reasonably believed that authorisation was unnecessary or that it was authorised and the court is also satisfied that enforcing the contract will be just and equitable.[162] Thus, where such an insurer pays out a claim paid by an insured, it will be entitled to likewise claim from its reinsurers.[163]

An important dimension to the illegality conundrum, are situations where an authorised insurer provides cover but exceeds the scope of the authorisation. As a general rule and based on section 20(2) (c) FSMA 2000, the insured does not have a cause of action against the insurer for breach of statutory duty. However, section 20(3) FSMA 2000 creates an exception, where in prescribed cases, the insured will have a right of action against the insurer and a private policyholder is imputed with a cause of action by the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001.[164]

2.4 Practical Application of the Twin Peak Regulatory Model in the UK Insurance Sector

The regulatory structure of the UK, which is twin peak based and has a lot of inter-agency collaboration and synergy, is one of the lessons that should be learned by Nigeria in a bid to improve its regulatory system and its compliance with recommended WTO prudential approach. In the UK, each of the regulatory bodies perform distinct but interlinked roles. A brief on each of the regulatory authorities is detailed below.

2.4.1 The Prudential Regulation Authority

The Financial Services Act 2012 renamed the Financial Services Authority Limited as the Prudential Regulation Authority.[165] The Prudential Regulation Authority was originally incorporated as a limited company. The PRA is required to have a Constitution, which in turn must create three arms, that is the Chairperson, who must be the Governor of the Bank of

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[162] Financial Services Act 1986, s 132 and FSMA 2000, s 26 – 28.
[163] Merkin Colinvaux's (n 19) 770.
[164] SI 2001/2256. See *Re Whitley Insurance Consultants* [2009] Lloyd's Rep. I.R. 212.
[165] Financial Services Act 2012, s 2A.

England (BOE), a Chief Executive who must be the Deputy Governor of the BOE responsible for the BOE's prudential regulation, and a Governing Body.[166]

The PRA publishes its rules through a number of windows, particularly, the PRA Handbook, which contains the prudential rules applicable to insurers. As a part of its statutory duties, the PRA exercises controls over firms and individuals, thus ensuring that the insurer is a fit and proper person[167] and even in periods of transition of the managers of insurance entities, the PRA is empowered to ensure that the new persons are fit and proper[168] and where certain persons do not meet the minimum requirement, the PRA is empowered to issue orders prohibiting such persons from performing roles in certain aspects of the insurance business.[169]

2.4.2 Financial Conduct Authority

The Financial Conduct Authority and the Prudential Regulation Authority (PRA) replaced the Financial Services Authority (FSA). This new arrangement was affected by the passage of the Financial Services Act 2012 and both institutions became fully operational on 1 April 2013.[170] The FCA is responsible for the proper functioning of the market; it is also responsible for the conduct supervision of all firms within the UK financial services industry and for prudential supervision of firms not supervised by the PRA.

At present, a total of 26,000 firms [171]fall within the regulatory sphere of the FCA, 23,000 of which are subject to both its prudential and conduct supervisory jurisdiction, while over 2000 firms fall solely within its conduct supervisory jurisdiction, which are usually systemically important firms, like banks, building societies, credit unions, general insurers, life insurers, Lloyd's and Lloyd's agents.[172] The FCA, based on powers contained in other legislation, regulates about 1000 firms and this includes firms like electronic institutions and payment institutions.[173] The conduct regulation of insurance business in the UK is within the

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[166]Financial Services Act 2012, para. 1(2)(a-c) Part 1, Schedule 12B
[167] See FSMA 2000, s 61 for meaning of fit and proper persons.
[168] FSMA 2000, s 178 – 192.
[169] FSMA 2000, s 56 – 58.
[170] CII, 'The UK's New Financial Services Regulatory Landscape' (2013) CII Policy Briefing, 5
[171] Allen & Overy, 'The Financial Conduct Authority: An Overview' (2013) Allen & Overy Publication 4.
[172] CII (n 241) 2
[173] ibid

jurisdiction of the FCA; hence, advertising and promotions rules, Conduct of Business Source Books (COBS) and Insurance Conduct of Business Sourcebook (ICOBS) are to be enforced by the FCA.[174]

In line with the lessons learnt from the failure of the FSA, the PRA and the FCA are conferred with enforcement powers by Part XI, FSMA 2000 and reinforced by the Decision Procedure and Penalty Manual. Some of the sanctions that can be imposed by both the PRA and the FCA are as follows:

- withdrawal of authorisation;
- public censure;
- imposition of financial penalty;
- application for a court order or an injunction;
- application for a court's order of restitution;
- Issuance of a prohibition order.[175]

2.4.2.1 The FCA'S Ten Supervisory Principles

Following the lessons learnt from the failures of the FSA, the FCA has drawn up 10 key principles to be applied as foundational principles for its supervisory approach for all categories of firms. Nigeria, has suffered several systemic market failures in the insurance sector, and it has led to several increased capital requirements.[176] However, these have not provided any clear solution; hence, the reoccurring increase in capital requirement, which has also not attracted foreign investment in the market, this, Nigeria needs to learn from the UK supervisory principles. These principles are as follows:[177]

- ensure fair outcomes for consumers and markets;
- forward looking and pre-emptive actions;
- judgment-based approach to supervision;

[174] Merkin Colinvaux's (n 19) 774.
[175] Merkin Colinvaux's (n 19) 779.
[176] Agusto & Co, 'The Nigeria Insurance Industry: Will It Cross the Crossroads?' (2019) Agusto & Co Publication.
[177] The FCA's Approach to Supervision – FCA Handbook, SUP 1A.3.

- ensure firms act in line with the spirit of the law and not just the letter, emphasising the shift from box ticking compliance;
- examination of business models and firms' cultures and its impact on consumers and market outcomes;
- a shift and inclusion of individual accountability, particularly senior management who will be held responsible for actions and decisions that go wrong;
- ensuring firms' robustness even when things go wrong;
- supervising focus on big issues and on root causes of the problems;
- open communication with industry, firms and consumers in order to get adequate feedback.
- a joined-up and integrated supervisory approach by all supervisors.[178]

[178] FCA C1

2.6 Conclusion

This chapter has discussed the global architecture under the WTO framework that aims to dismantle protectionism in all its forms in international trade and supply of services. The chapter analysed the WTO framework on liberalisation and the provisions of Nigerian law; it further highlights the protectionist stance under Nigerian law and the steps that have been taken under Nigerian law towards complying with the WTO framework. The chapter highlights that though Nigeria has made huge progress towards liberalisation and towards complying with the WTO Framework, the balance still tilts more towards protectionism as opposed to liberalisation. While protectionism, is a sure path for market stagnation, liberalism is a guarantee for an increase in proficiency and expertise because of the interaction between a developing market and developed players that will come from abroad. This is in addition to the foreign investment that will flow into the market through foreign capital. Nigeria has many lessons to learn, not from the WTO alone but from the UK regulatory architecture, which is more forward looking and risk based.

Finally, the global approach towards liberalising the insurance market has not made the required progress. Analysis has shown that even advanced markets like the EU and the UK still have some level of protectionisms, including distortion of the Most Favoured Nation and National Treatment principles, as can be seen from the discrimination introduced by the EU passport regime. The conclusion that can be reached, is that even if the world seems to eulogise liberalism, there is still a strong preference for protectionism at a national level; hence, hurting the global insurance market. There is therefore the need for another solution that is market and industry based as opposed to one that is government based. By this, I refer to a solution that is to be utilised by the market to make progress in terms of supply of trade. The only viable non-state option to deal with protectionism and trade restrictions is the use of Multinational Insurance Programmes.

Therefore, the next chapter and chapters will examine the nature and workings of Multinational Insurance Programme and subsequent chapters will explore how it deals with

the protectionism problem and further explores the legality of Multinational Insurance Programme and the solutions that it brings.[179]

[179] By way of pre-emption, an area that could be of interest in further research work should be a comparism of the regulatory approach under the EU Framework and the ECOWAS framework aimed towards at drawing lessons that ECOWAS countries can learn from the EU.

CHAPTER THREE

MULTINATIONAL INSURANCE

AN INDEPTH STUDY OF MULTINATIONAL INSURANCE PROGRAMMES

3.0. Introduction

The preceding chapter focused on the regulation of insurance business in Nigeria and England; it also analysed protectionism in the provision of services, including insurance services and the efforts of the WTO through its General Agreement on Trade in Services ('GATS'), which is aimed at unbundling protectionism in a progressive manner and enthroning trade liberalism. The chapter argued that the anti-protectionist solutions that have been offered by the WTO under GATS are not sufficient to liberalise the insurance market; in addition, State actors and regulators have not shown sufficient political will in pushing for further reforms. Thus, in dealing with protectionism and restrictions in the insurance market, it may be hopeless to wait for a global reform to be pushed through by the WTO. Rather, a more assured and dependable path to deal with protectionism and market restriction, in the insurance sector lies in the hands of market players and not state actors, particularly, through the design and implementation of Multinational Insurance Programmes ('MIP').

The chapter analyses its nature, including its meaning, types, forms, general market problems and solutions it introduces. The chapter then focus on Nigerian law; however, occasional reference will be made to English law and US law to compare the approaches from each jurisdiction and to draw lessons that can be drawn from these other laws with the possibility of pushing for a reform of Nigerian law. The objective of this chapter is to ensure that MIP is clearly explained and analysed in all its ramifications, and it will form the basis for exploring the legal and tax issues that affect it. An absence of a sufficiently clear understanding of its workings will make subsequent chapters difficult to appreciate.

Finally, this chapter will attempt to answer the question on the effect the current incoherent insurance, investment and tax laws have on the Nigerian insurance industry, especially insurers providing multinational insurance programmes in Nigeria in the form of admitted and non-admitted insurance cover.

3.3. Multinational Insurance Programmes

It is clear from the above that multinational insurance has had a challenging rise through the decades. Even though its rise was challenging, much success and progress have been recorded over the years. On the business, legal and operational side of things, these successes have been made possible through the instrumentality of multinational insurance policies, which is known by a plethora of names including: multinational insurance programmes, international insurance programmes or worldwide insurance programmes. It is important to note that despite its common usage amongst insurers, exporters and regulators, very little effort has been invested in clearly defining its meaning. It is my view that this omission has festered for so long because of the assumption that this concept is self-explanatory or self-defining. Robin Federici made an attempt to define multinational insurance programme as "an international insurance programme with a policy territory consisting of the entire world including the country where the insured is domiciled."[1]

This in effect means that multinational insurance programme is a special insurance policy that is issued in one territory but is designed to cover insurable risks in other parts of the world. Though this definition is a good attempt, it has some short comings. Firstly, it states that a multinational programme can cover the 'entire world;' however,global policies are not designed to be unlimited in their coverage of geographical territories, rather their application is limited to clearly defined territories beyond which they will be inapplicable. The reason for such restrictions is understandable because each State or Nation has its own clearly defined rules, regulations and laws, setting standards relating to the conduct of certain businesses. Robin Federici distinguishes multinational or global insurance programmes from worldwide insurance programmes, wherein she defined the latter as an international insurance programme with a policy territory consisting of the entire world, except the country where the insured is domiciled and global policy as as an insurance programme which covers potentially losses arising in any part of the whole world including the jurisdiction or country where the insured is domiciled or resident[2]

[1] Robin Federici, 'International Insurance – Controlled Master Packages' (2012) Insurance Educations and Training Associates Materials.
[2] ibid.

Both definitions are apparently exact, except for the fact that in his words, worldwide policies do not cover the insured's jurisdiction of domicile, whereas in the case of a global or international insurance policy, it covers the country or jurisdiction where the insured is domiciled. But this distinction appears irrelevant in the entire scheme of things because multinational insurance programme does not have an ideal one size fit all approach.[3] Rather, it is designed based on exigencies in relations to the need of a programme, factoring in regulatory and tax concerns.

It is expedient at this point to attempt a definition of a multinational insurance programme. It is a purpose-built insurance policy, designed by a primary insurer or a reinsurer for a company with direct and indirect risks in more than one jurisdiction, aimed at covering the risks in both the host jurisdiction and other jurisdictions. With the rise of multinational insurance business, which has been boosted by the force of globalisation, companies now have numerous risks in several jurisdictions. Some risks have arisen from the presence of operational assets in other jurisdictions, while other risks have arisen as a result of the presence of personnel, agents or subsidiaries. This has warranted the need to invent an insurance programme, capable of covering all these diverse categories of risks and equally capable of dealing with any form of protectionism.

Two broad forms of multinational policies have been identified. They are the 'single tower' and the "twin tower'' programmes. Under the single tower policy, a global policy is issued that comprises a master policy and local policies. Typically, the master policy is included that will specify the claims limit for the entire policy, including claims made in any jurisdiction via the local policy within the programme. When a claim is made, the available claim on the master policy is reduced by an equivalent amount of the settlement. In the event that the total policy runs out, the policy will be deemed to have been spent, and technically some jurisdictions will be left without cover.[4]

On the other hand, a twin tower international or multinational policy ring fences the limit on the master policy from the limits of the local policies in a manner that one does not diminish or extinguish the other. This means that a locally issued policy operates as a stand-alone

[3] Sue Copeman, 'Global Insurance Programs' *Risk Specialist Magazine* (August 2000).
[4] Thomas Brunner, Richard Ifft and Karalee Morell, 'Issues Arising Under Global Insurance Programs' (2009) Wiley Rein Publication.

policy and resort or recourse will be made to the master policy only when the limits of the local policy has been reached. Details of the application of this approach in some forms of multinational programmes will be considered in the later parts of this work.'[5]

Having considered the two broad forms of multinational insurance programmes, it is expedient to proceed to consider the various types of international insurance programmes. The creation of multinational insurance programmes and their various forms/products has been largely borne out of business and economic necessity. This is a clear demonstration of the common English adage, which says, 'necessity is the mother of invention.'[6]

This has without doubt, proven to be true in the insurance sector; following the rise of international trade and business, there was an equal expansion and multiplication of business and enterprise related risks. The need to cover such business-based risks has contributed to the rise of multinational insurance programmes. Insurance experts and companies have invented different types of insurances policies over the years. The inventive activities and processes have become sophisticated to the point where some of the products have been patented.[7] The most notable of the multinational insurance programmes are:

- Exporters Package;
- Admitted Insurance Policy;
- Non-admitted Insurance Policy;
- Controlled Master Policies;
- Difference in Coverage/Difference in Limits Policy;
- Policies Designed on Network Partners and Fronting Agents;
- Reinsurance
- Captive Insurance

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[5] Brunner (n 53)
[6] Richard Franck, *Northern Memoirs, Calculated for the Meridian Scotland* (Nabu Press, 2011)
[7] Martin Stmad, Hertmaton, Gitsham, Buckley and Luthy, 'Methods for Underwriting Multinational Insurance Business in Accordance with National and International Laws' (Patent Number: US 8078482 B2)

Some of these programmes and policies may be similar or even share a lot in common, but in order to properly analyse multinational insurance programmes, some of these types of programmes will be treated in depth:

3.3.1. Exporter's Package

The exporter's policy was invented in the United States of America and has remained popular within the North American region; it is used more widely by US based insurance companies. An exporter's package is a type of multinational insurance programme used largely for property and casualty, taken out by companies for the benefit of their personnel and their products in transit to foreign territories where they have no fixed assets or physical presence.[8] In addition, in this era of e-commerce, companies sell their products to overseas markets with the greatest ease and convenience that normally will need an exporter's package to cover the risks that arise from these types of sale transactions that are usually not covered under their normal insurance policies.[9]

Traditionally, an exporter package is originally designed for smaller companies involved in the business of exporting products or services, which usually include companies without any "bricks and mortar," that is companies without any tangible/physical overseas presence.[10] Exporter's package policies have been used more frequently to provide insurance cover for property and casualty risks and usually where the insured requires travel accident cover, kidnap/ransom cover, personal/property covers. A company that is involved in export of products or services, without necessarily having a corporate presence in its destination market, may be required to purchase additional insurance cover over and above its normal coverage limits under extant domestic insurance policies.[11]

Additional cover that can be purchased as a top-up includes Accidental Death and Dismemberment (AD & D), crime coverage, foreign inland transit coverage, auto-non-owned and hired coverage, international employee coverage among others.[12] An export

[8] Zurich, 'International Solutions: Exporter Package' < http://www.zurichna.com/zna/international/internationalmidsize/products/exporterpackage.htm> accessed June 7 2014.
[9] Kathleen Ellis, '(2007) Insurance Journal
[10] Federici (n 50) 1.
[11] ibid.
[12] Zurich (n 57).

package is usually issued because the normal domestic insurance policy does not cover overseas business exposures;[13] it is an acceptable fact that in the course of export trade, a manufacturer of a product could be held liable for loss, damage or injury arising from use or consumption of the product overseas. An apt description of this fact was made thus – "*your legal liability travels with every product you sell*."[14]

The use of this type of multinational insurance programme is becoming popular because a current regulatory trend indicates that many countries are beginning to introduce product liability laws in a bid to protect domestic consumers against harms that can arise from consumption of foreign goods. On the other side, this increased regulation of foreign products could also give rise to an increase in the likelihood of overseas claims emanating against exporters or manufacturers or suppliers of product, notwithstanding the fact that such entities are resident overseas.[15] In a United States' case involving a Hong Kong manufacturer of shirts, the shirts were sold to a Wisconsin based store that in turn sold it to the parent of a child. The child suffered burns in the course of wearing the shirt and the parents sued both the manufacturer and the Wisconsin store. The manufacturer challenged the jurisdiction of the US court but it was overruled, with the court affirming its jurisdiction to hear the case. The matter was finally settled with the sum of US$1.3million. This clearly points out the risk hanging over manufactures in both their home jurisdictions and overseas because even where a judgment is obtained overseas, the likelihood of succeeding to enforce it domestically is also very high, particularly with the accession of many countries to the WTO.[16]

A typical claim that can arise under an exporter's package multinational insurance arrangement is a product liability claim. Product liability is one that arises from damage or injury suffered by a consumer of a product or service, or bystander arising from an inherent defect in a product.[17] A claim for product liability can be based on the following likely areas, or the cause(s) of action could revolve around the following key aspects of the law, to wit:

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[13] Chubb, 'Exporters Package Portfolio: Does your Global Insurance Go Where You Go? Chubb Publication < http://www.chubb.com/businesses/cci/chubb1151.pdf> accessed 7 June 2014.
[14] ACE Insurance, 'Exporters Product Liability Insurance' (2010) ACE Brochure < http://www.acegroup.com/vn-vn/assets/ace-exporters-product-liability-brochureen.pdf> accessed 7 June 2014.
[15] ibid.
[16] ibid.
[17] Gbade Akinrimade, 'The Jurisprudence of Product Liability in Nigeria: A Need to Complement the Existing Fault Theory' 2 (2016) Journal of Sustainable Development, Law and Policy 188 – 210.

negligence[18] under the law of tort, breach of warranty in contract, strict liability and even a criminal claim**.**[19]

Under Nigerian law, the design of a multinational insurance programme, in the form of an exporter's package, could be a bit challenging because the law dealing with product liability has been uncertain and ambiguous. The Nigerian law on negligence, as it relates to product liability, is strictly fault based, that is, a claimant or an injured party is required to establish fault as a condition for a manufacturer or service provider to be liable for an injury caused by a product or service supplied.[20] The law applies the principles of the tort of negligence that were enunciated in ***Donoghue v Stevenson***[21] to the effect that where a manufacturer owes a duty of care to a consumer and the duty is breached, resulting in injury to the consumer, the manufacturer will be liable for damages; however, Nigerian law equally recognises the defence of fool-proof systems of production. Under the defence of fool-proof, even where an injured party establishes that injury arose from the consumption of a particular product or service, the manufacturer or service provider will be exonerated if it can be established that the processes adopted in the manufacturing processes conformed with all required standards and procedures. If this defence is established, then the burden of proof shifts to claimant or plaintiff to fault on the part of the manufacturer. This approach is highly insensitive and over-reliant on technicalities because the consumer is not likely to understand the manufacturing processes of a producer and will be unable to establish fault for a process that is likely secretive.[22] Normally, the manufacturing processes of any producer of goods and services are often within the realm of intellectual property, hence, a lot of secrecy and confidentiality characterise it. An injured party is very unlikely to have the kind of

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[18] A negligence claim will lie where it can be established that a manufacturer failed in exercising reasonable care in the design and/or manufacture of a product or in the delivery of a service which resulted into an injury or damage to another. The injured party may also contend that it was reasonably foreseeable that an injury would result from a risky situation but little or no efforts was made by the manufacturer or a service provider to prevent such occurrence. Other basis for a claim in negligence could be the provision by the manufacture, supplier or the defendants of misleading instruction or information.
[19] Edith Oni-Ojo and Oluwole Iyiola, 'Legal Implications of Manufacturers' Negligence and Its Effect on Consumers: A Study of South West Nigeria (1)1 (2014) Global Journal of Marketing. See also Gbade Akinrimade, 'The Jurisprudence of Product Liability in Nigeria: A Need to Complement the Existing Fault Theory' 2 (2016) Journal of Sustainable Development, Law and Policy 188 – 210.
[20] Felicia Monye, 'Product Liability in Nigeria: Okwejiminor v Gbakeji & Nigerian Bottling Co Plc (2009) 35 (4) Commonwealth Law Bulletin.
[21] *Donoghue v Stevenson* [1932] AC 562.
[22] Dennis Odigie v Job Odion, 'Implication of Consumers' Protection Laws and The Regulatory Schemes in Nigeria' (2011) 2(1) International Journal of Advanced Legal Studies and Governance 142.

information that is needed to prove culpability or negligence on the part of a manufacturer. This realistically, becomes a highly onerous burden that is placed on an injured party in Nigeria and does not serve the end of justice for consumers and makes it almost impossible for injured parties to obtain justice in the courts.[23] A myriad of cases lend credence to this positon, for example in ***Nigerian Bottling Company v Olarewaju***[24] the Respondent purchased two bottles of Coca-Cola from a retailer, after drinking some Coke from the 1st bottle he noticed that some particles were in the 1st bottle and similar particles were in the second bottle. The respondent alleged that he became ill about two hours after drinking the first bottle and was taken to the Epidemiology Unit of a health facility. Subsequently, he allegedly wrote a letter to the appellant and thereafter instituted a legal action. At the trial court, he tendered both the un-opened bottle of the coke and a medical report. Medical evidence was given by the doctor who treated him, confirming that he treated him but he could not confirm that the coke caused the ailment. In deciding on the facts and evidence, the Trial Judge gave judgment in favour of the appellant on the ground that there was a causal link between the coke and the ailment. Upon appeal to the Court of Appeal, the judgment was set aside on the ground that the respondent could not establish any direct link between the coke and the ailment and the appellant had adduced evidence showing that its manufacturing system was based on the highest health and safety standards. The Court of Appeal therefore concluded that the burden placed on the respondent was not sufficiently discharged.

This case which presents a clear situation of product liability and the response from a Nigerian court, brings into question the approach adopted by Nigerian courts to product liability, which is anachronistic and does not reflect a fair and pragmatic approach to problem solving. Consumers do not have the sophistication to ascertain and establish details of lapses in the processes of manufacturing. The burden placed on the consumer is tantamount to the law asking for the doing of an impossibility. The jurisprudence of product liability is expected to be protective of the weaker party and place more burden on a more advantaged party. It is expected that courts should be conscious of realities on the ground and should ensure that their judgment reflects public policy. In Nigeria, imported counterfeit and substandard

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[23] Felicia Monye, 'Product Liability in Nigeria: Okwejiminor v Gbakeji & Nigerian Bottling Co Plc (2009) 35 (4) Commonwealth Law Bulletin.
[24] *Nigerian Bottling Company v Olarewaju* (2007) Suit No.CA/IL/43/2004.

products are common place and yet the injuries from the consumption of these products are much more common place. The regulatory system for consumer protection is broken down and the legal framework is weak; hence, the last home for redress and protection is the courts.[25] Hence, adopting the fault-based approach is unhelpful and does not reflect the social realities of Nigeria. Areas of social management like this require flexibility and Nigerian courts need to learn from the approach adopted in other jurisdictions; for example, in South Africa, the strict liability approach has been adopted and consequently where injury arises from any defective product, their presumption is that the manufacturer or supplier is liable, until it can be proven otherwise. Thus, the burden of proof is imposed on the manufacturer or supplier.

As mentioned earlier, Nigerian law with respect to product liability appears to be uncertain and ambiguous, especially because in some instances, similar cases, with similar set of facts come before the courts and different decisions are reached. In ***Nigerian Bottling Company v Constance Ngonadi***[26] the respondent purchased a kerosene powered refrigerator that exploded after delivery. The appellants sent a technician to repair the refrigerator but after a few months it exploded in the respondent's business premises and caused severe injuries to her and to her business assets. As a result, the respondent instituted legal action against the appellants, who were not the manufacturers but local retailers. The appellants contended that they were not liable because they were not the manufacturers of the product and they further argued that the product was imported. At the trial court the respondent's (as plaintiff) claim succeeded and was awarded general and special damages. Further appeals to the Court of Appeal and the Supreme Court were not successful. The Supreme Court in reaching its verdict, held that there is an implied warranty that the product was fit for purpose and that from the angle of the common law on negligence, the appellant owed the respondent a duty of care, which had been breached by selling a defective product. The court held that it was not a defence that the appellant was not the manufacturer of the product, and that a retailer owes a purchaser an implied warranty that a product is fit for purpose.

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[25] Edith Oni-Ojo and Oluwole Iyiola, 'Legal Implications of Manufacturers' Negligence and Its Effect on Consumers: A Study of South West Nigeria (1)1 (2014) Global Journal of Marketing.
[26] *Nigerian Bottling Company v Constance Ngonadi* [1985] 1 NWLR (Pt 4) 739.

Similarly, in ***Okwejiminor v Gbakeji & Nigerian Bottling Co. Plc***[27] the appellant returned from work and took a bottle of Fanta from a crate of drinks he bought earlier from the respondent. While drinking the drink, he noticed some hard particles passing through his throat; he stopped drinking half-way and observed the content of the bottle, noticing that a dead cockroach was in the bottle. The appellant was subsequently rushed to the hospital and a test was conducted. The result of the test indicated food-poisoning from a common bacteria present in the bottle, which was noticed in his stools. As a result, the appellant instituted a claim for damages and got judgment at the Trial court on the basis that the food-poisoning was caused by the bacteria in the Fanta drink; however, on appeal to the Court of Appeal, the decision was set aside on the grounds that the appellant has not shown sufficient causal link between the Fanta and the ailment, the court held that something else could have been responsible for the ailment. Upon further appeal to the Supreme Court, the Court reversed the decision of the Court of Appeal and held that the manufacturer had a duty of care, which was breached. It also held that there was sufficient causal link between the Fanta and the ailment because there was a balance of probability that should be resolved in favour of the injured party.

This decision of the Supreme Court of Nigeria is laudable as it introduces clarity to the law in terms of the liability of retailers in product liability cases. A retailer cannot hide under the cover of ignorance or in the fact that it was not responsible for the manufacture of a defective product. This is further reinforced by the fact that an injured consumer who wants to sue in contract will normally have no privity of contract to bring a claim directly against the manufacturer,[28] hence, the only option available in that instance will be to bring a direct claim against the retailer, who in turn can bring a claim against the manufacturer. In order to be indemnified, the retailer should have joined the manufacturer as a party to the suit but it has to be a claim in breach of contract. Various court rules in Nigeria contain elaborate provisions on procedure that permit a defendant to join another party to a suit.[29] This procedure is akin to the Third-Party Proceedings (Part 20 Proceedings) under English Civil Procedure Rules

[27] *Okwejiminor v Gbakeji & Nigerian Bottling Co. Plc* [2008] 5 NWLR (Pt 1079) 172.
[28] John Adams and Hector Macqueen, *Atiyah's Sale of Goods* (12th Edition, Longman Publishers) 256.
[29] High Court of the Federal Capital Territory Rules 2018, Order 10 Rules 3.

1998 which entitles a seller of a defective product to claim indemnity from his supplier and the latter from his manufacturer.[30]

It is events like that, that underscore the need for multinational insurance cover like exporters package for both manufacturers and suppliers of products and services because they will have little control over their products and they may not be able to determine the extent of harm such products could cause in other countries. For example, a product may be manufactured in China for the Nigerian market, but a user may travel to the US with such a product which has been bought in Nigeria and harm may result from its use while the user is in the US. This could automatically trigger the application of US laws because the injury had occurred on US territory. Such a harm may even be occasioned not on the purchaser of the product but on another user that has lawful access to the product. A positive for product liability claims in negligence in Nigeria is that they are not restricted by the requirement of privity of contract and a party that has no direct connection with a retailer or a manufacturer of a defective product can bring a claim for damages.[31] It is in situations like this that MIP in the form of exporter's package kicks in because it will protect the manufacturer in the event that the retailer is sued and obtains an order of court to join the foreign non-resident manufacturer to the suit. The exporter's package will indemnify the manufacturer and by implication the exporter's package will eventually cover the ultimate liability that will arise from such a claim.

In a product liability claim, another likely cause of action for an injured party is a claim for breach of warranty that a product is fit for purpose. Regarding claims for breach of warranty, they arise because under the laws of most countries there is an implied warranty that products are fit and suitable for the purpose for which they are supplied. In Nigeria, these implied warranties are applicable based on Section 32(1) of the Interpretation Act that permits the application in Nigeria of the common law of England and Statute of General Application which were in force in England on 1st January 1900. It is on the strength of the above that the provisions of the Sales of Goods Act 1893, a repealed English law, applies in Nigeria.[32] The Federal Parliament in Nigeria has not enacted a new or updated legislation to replace the Sale

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[30] *Dodd v Wilson* [1946] 2 All ER 691.
[31] *Okwejiminor v Gbakeji & Nigerian Bottling Co Plc* [2008] 5 NWLR (Pt 1079) 172.
[32] Etefia Ekanem, 'Institutional Framework for Consumers Protection in Nigeria' 2(1) (2011) International Journal for Advanced Legal Studies and Governance

of Goods Act 1893, but some States for example, Anambra state and Lagos state has passed their own versions of the Act.[33] Nigerian law with respect to the implied warranty of fitness for purpose is highly un-developed, thus reliance will be placed on the position of English law, for which the applicable law in England is the Sale of Goods Act 1979 as amended by the Sale and Supply of Goods Act 1994.

The relevant provision of the Sale of Goods Act 1979 under consideration is Section 14 that contains the implied terms that the goods shall be of satisfactory quality and where a buyer makes known the particular purpose for which goods are purchased and an implied warranty that the goods supplied will be reasonably fit for purpose. It is these implied warranties that are the essence to a multinational insurance programme because a programme in the form of an exporters package deals in part with supply of products to an overseas market, and that carries with it the burden and risk of defects in the product that could give rise to an injury and most probably a civil claim. As discussed above, such a claim could be found in the tort of negligence, but there is also the possibility for a claim in contract. Where that arises, an injured party may have the benefit of the implied warranty that the product is of satisfactory quality and is fit for purpose. Where such a claim arises, the overseas manufacturer or supplier will have to deal with these legal issues and also place reliance on its exporters package cover. Where such a party (in this instance a supplier or exporter) successfully invokes an exporter package cover, then by virtue of the right of subrogation the foreign insurer that issued the exporters package will inherit the right to initiate or continue a acclaim against the manufacturer of the product. In other words, after indemnifying the foreign manufacturer or supplier, the non-admitted insurer will be entitled in such an instance to step into the shoes of the insured and exercise any right of action that accrues to them. This fact makes a discussion and commentary on these warranties essential.

The opening wording of Section 14(2) of the Sales of Goods Act 1979 appears to suggest that for a warranty of satisfactory quality and fitness for a particular purpose to arise, the sale transaction must be one that has been done in the course of business. This presupposes that a sale that is not in the ordinary course of business will not be entitled to this warranty; for example, where multinational oil exploration decides to sell its Floating Production and

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[33] Adejoke Oyewunmi and Abiola Sanni, 'Challenges for the Development of Unfair Contract Terms in Nigeria' (2013) 37 U.W. Austl. L. Rev 86.

Storage Vessel (FPSV) in order to reinvest the proceed in another venture, it will not qualify as a sale in the ordinary course of business, because the company is not involved in the business of sale of FPSV, rather it is involved in the business of oil exploration. This narrow approach to the interpretation and application of the warranty is highly discriminatory because it exposes buyers to dangers where they are procuring goods from non-trading entities. This distinction indeed is unnecessary and artificial, the same standards should be expected from everyone involved in the sale of any form of goods, the rule should be caveat venditor (sellers beware) and not caveat emptor (buyers beware). It is this reality that must have informed the decision in ***Stevenson v Rogers***[34] where the meaning ascribed to the wording was expanded to cover all sales by those in business. It should however be noted that this decision conflicts with the Court of Appeal *Decision in* ***R & B Customs Brokers Co Ltd v United Dominions Trusts Ltd***[35] where the same phrase was interpreted narrowly by the court.

Liabilities under Section 14 are strict liability offences, hence, where an injury arises from a defective product, the inquiry will not be fault based and the court will not attempt to make an inquiry into whether the product defect would have been discoverable by the application of reasonable skill or care.[36] This is the best approach to adopt in all forms of product liability actions because fault based approach, requiring an injured party to establish that the injury was caused as a result of the fault of the manufacturer or supplier is automatically given a very difficult burden of proof to discharge. Often, this burden is hard to discharge because of a disparity in skills and in access to the internal workings of the other parties manufacturing or supply system. This strict liability approach should be adopted by Nigeria with respect to product liability actions. It is an approach that is in tandem with the need for public safety, public order and public wellbeing, which should override any form of personal or private interests.

Strict liability civil claims heighten the risks of an exporter to product liabilities; hence, it raises the need for multinational insurance programme in the form of an exporter package.[37]

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[34] *Stevenson v Rogers* [1999] 1 All ER 613.
[35] *R & B Customs Brokers v United Dominion Trust* [1988] 1 WLR 321.
[36] *Randall v Newsom* [1876] 45 LJQB 364.
[37] ACE Insurance (n 63)

In such a where a claim emanates from a strict liability wrong , an injured party will not be required to prove fault on the part of the manufacturer, seller or supplier, they will only have to prove that an injury resulted from the use of a particular defective product; hence, they will only be required them to prove a nexus between the injury and a defect in a product in order to show that the condition of the product gave rise to the injury.[38]

Having discussed the nature and legal issues confronting exporter's package, the following paragraphs in this section of the thesis will focus on problems confronting international insurance and solutions to these problems offered by an exporter's package. One problem that confronts international businesses is that conventional multinational insurance programmes are always too complex, sophisticated and expensive for them. Thus, it will be uneconomical for such businesses to opt for these regular covers that may also be too bogus for them and it is in this context that an exporter's package comes in handy. As pointed out earlier, an exporter package is most suitable for small companies (which do not have not an offshore subsidiary or subsidiaries), non-governmental organisations (non-profits) and institutions of learning with students or staff travelling overseas, etc.[39] Without doubt, despite the limited usage of an exporter's package, it has some benefits which makes it both relevant and attractive to these categories of users. One of the benefits is that it includes multiple coverage in a single insurance policy, making it easy and simple to manage. This eliminates the cumbersome nature that arises from having several insurance policies to cover a broad spectrum of risks, and overall, reduces the cost of administrating and operating such policies. In addition to the above, an exporter's package gives great comfort to policyholders, especially businesses that may not have the capability to handle or procure other more robust international insurance cover.[40]

Furthermore, companies that provide cross-border services interact advertently and inadvertently with regulations and regulatory bodies in multiple countries. These interactions will be in the form of corporate compliances, tax compliances and insurance compliances. A typical example of corporate compliance in Nigeria is the requirement for all companies

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[38] *Donoghue v Stevenson* [1932] UKHL 100.
[39] Marianne Bonner, 'Foreign Liability Coverage – Who Needs It?' Money Business Insurance< http://businessinsure.about.com/od/liabilityinsurance/fl/Foreign-Liability-Coverage-Who-Needs-it.htm> accessed 17 June 2014.
[40] ACE, 'International Advantage Package' (2014) ACE Publication < http://www.acegroup.com/us-en/businesses/international-advantage-package.aspx> accessed 17 June 2014.

operating in Nigeria to file an annual return each year.[41] Typically, complying with this requirement will entail a company engaging the services of both a licenced accountant and a lawyer and payments will be made to the Companies Registry. This same requirement of annual returns is replicated in the tax laws in the form of mandatory filing of tax returns annually.[42] Similarly, all providers of insurance service in the Nigerian market are required to file their returns and accounts.[43] These compliance obligations are expensive, time wasting and consume significant man hours. An insurer that provides cover in several jurisdictions could be overwhelmed if these requirements become applicable in each market it provides services in; for non-insurance companies operating in Nigeria, corporate and tax compliances are mandatory and the same costs concerns apply to them. It is these problems that are addressed through an exporter's package because it does not come with this regulatory baggage and burden that characterise other multinational insurance programmes. Under an exporter's package, the insured and the insurer will be required to deal more with the regulators in their jurisdiction of domicile and avoid the possibility of inter-phasing with multiple regulators. These reductions in the compliance chain could lead to a decrease in the cost of administering the policy and general decrease in other costs and man-hour loss.

Another major problem that confronts insurers and the insured is the tax treatment of their revenue and the deductibility of their expenses. Thus, where a multinational insurer issues a policy for a risk in Nigeria and for an insured in Nigeria, there is the likelihood that the insurer will be deemed as conducting insurance business in Nigeria and will become liable to corporate tax in Nigeria, even though it does not have a taxable presence in Nigeria. An exporter's package eliminates the confusion that arises from the tax treatment of cross-border insurance policies. An exporter's package is a locally issued policy designed to cover foreign risks, it cannot be seen as one that creates any real or tangible tax attachment to the offshore jurisdiction; hence, the issue of insurance tax and premium tax cannot be raised by any foreign tax authority. This is particularly important because recent regulatory trends reveal a tightening of the global tax regimes that are targeted at multinational companies and international businesses. Under Nigeria tax law, any income that accrues in Nigeria, or is derived in Nigeria or brought into Nigeria or received in Nigeria, will be subject to income

[41] Companies and Allied Matters Act 1990, s 370 and 372.
[42] Companies Income Tax Act LFN 2004, s. 55 and 56.
[43] Insurance Act 2003, s 26(1).

tax in Nigeria.[44] Normally, under Section 13(2)(a) of the Nigerian Companies Income Tax Act, the income of a foreign company, in this instance, a foreign insurance will be deemed to have arisen or derived in Nigeria, if it can be shown that the foreign insurance company has a fixed base in Nigeria.[45] A fixed base implies any connection to Nigeria that is easily identifiable or creates some form of permanence like an office, a branch, or service activities in Nigeria.[46] Insurance services in the form of an exporter's package will not fall within the category of a fixed base; hence, the insurer will not be exposed to taxation in Nigeria. This is an advantage that an exporter's package confers on the multinational insurer (of course it is a disadvantage for Nigeria because it loses tax revenue). Similarly, the exporter by purchasing an exporters package from its home country, would have eliminated any possibility of creating a fixed base in Nigeria.

Most exporters'package policies are designed to cover the following types of risks - legal expenses, expenses associated with the cost of investigating the cause of a loss or injury, the cost of defending a claim against a consumer of goods or services in a foreign jurisdiction and the costs of product recall among others.[47] The reliance by businesses on an exporter's package has grown in importance more recently, and it is now a standard practice for some major international buyers to insist that sellers, manufacturers or suppliers of products and services must produce evidence of an exporter's package based insurance cover. This trend is increasing because of the tightening of product safety laws in some import destination countries.[48]

An important benefit of an exporter's package is that even though it protects the manufacturer, supplier and distributors of products and services, it enhances their business and trade opportunities overseas.[49] The pricing of an exporter's package is usually determined by a number of factors such as, the nature of the insured products and the likelihood of hazards occurring within the relevant jurisdiction(s) covered and the stringency of the laws within such jurisdiction, the parties to be involved, particularly with respect to

[44] Companies Income Tax Act LFN 2004, s. 9(1).
[45] Companies Income Tax Act LFN 2004, s. 13(2)(a).
[46] Federal Inland Revenue Service, 'Taxation of Non-Residents in Nigeria' (1993) Information Circular 9302.
[47] ACE Insurance (n 63) 5.
[48] ibid.
[49] ibid.

the supply and distribution chain and the need to cover overseas based assets and personnel.[50] An exporter's package can be either country specific or a comprehensive policy. A country specific policy is usually designed to cover just one foreign jurisdiction and can be purchased from a broker within the manufacturer or supplier's jurisdiction or a broker based in a foreign jurisdiction.[51] Using a local broker presents some advantages like familiarity with the risk and possible reduction in cost of the coverage.[52] A comprehensive exporter's package covers more than one foreign jurisdiction and will be a little more complex than the country specific coverage. This is because the local needs and demands of certain jurisdictions may require specific inclusions in the entire policy document.

It is advisable for a comprehensive policy to cover all foreign jurisdictions to avoid situations where a product is meant for a particular foreign market but ends up in a third country's market. Where injuries occur from use of the product in the third country, it could result in claims which can raise serious issues on the foreseeability of the injury. It is advisable that products not covering all foreign jurisdiction should be backed by an indemnity (and/or hold-harmless) agreement executed between manufacturers and their sales partners and distributors in these foreign jurisdictions. Additionally, the products could be branded with a specification indicating jurisdictions where the product(s) can be sold or used. The agreement should contain provisions that indemnify the manufacturer or supplier against injuries arising from the use of the product in a third jurisdiction. However, a key legal issue will be whether a manufacturer or supplier can exclude or limit liability in both contract and negligence by relying on an indemnity or hold-harmless agreement? In the Nigerian case of ***Adel Boshalli v Allied Commercial Exporters Ltd***[53] that was appealed to the Privy Council, the Council held that where a party breaches a fundamental term, the same party cannot rely on an exclusion clause or an exemption provision to limit its liability. The case involved a contract for sale of goods by sample and description. However, upon delivery, the goods did not conform to the samples and descriptions. The seller sort to rely on an exemption clause, but the court was quick to intervene in defence of the consumer. This decision has been followed

[50] Aneesha Marwa, 'International Product Liability for Small Business' International Trade Center Brief < http://www.industrialcouncil.com/uploads/1/4/2/8/14286161/itc_at_icnc_brief_-_product_liability_for_exporters.pdf> accessed 17 June 2014.
[51] ibid.
[52] ibid.
[53] *Adel Boshalli v Allied Commercial Exporters Ltd* [1961] 1 All NLR 917.

in subsequent decisions like ***Ogwu v Leventis Motors***[54] where a lorry was purchased but it did not match the description that was agreed, the court held that an exemption clause will not be operational because it involved the breach of a fundamental term. Similarly, in ***DHL v Chidi***[55] DHL failed to deliver a parcel as required, the Court of Appeal held that the non-delivery of the parcel was a fundamental breach and an exclusion clause could not come to the aid of the courier company.

It has not been established that an indemnity or hold-harmless agreement will not apply in limiting a contractual obligation. Whether it can exclude a liability in the tort of negligence, Nigerian law is silent on this issue, but it is basic that a claim in negligence is founded on common law and not contract; thus, a contractual exclusion clause cannot restrict a claim or cause of action in negligence. The decision of courts in Nigeria with respect to indemnity or hold-harmless agreement are courageous and should be commended because Nigeria does not have a strong consumer protection regime and there is no specific legislation that is targeted at protection of consumers from consumption of unwholesome goods and services. This accounts for the widespread incidences of injuries to consumers from consumption of sub-standard, fake and expired products. These incidences have continued unabated without significant pro-active response from the government and from regulators. There is a clear absence of legislative intervention in addressing these problems. Thus, the only proactive intervention has been from the courts.

In England, an indemnity or exclusion clause cannot restrict a claim in negligence, this has been settled in the case of ***White v. John Warrick & Co. Ltd***.[56] Similarly, in England, an indemnity or hold-harmless clause is further limited by the Unfair Contract Terms Act 1977 (UCTA),[57] particularly, sections 2, 3 and 4 of the Act. Section 2 of UCTA 1977 invalidates any contractual term that excludes or reduces liability for death or injury arising from negligence.[58] Regarding losses other than death or personal injury, a limitation clause will only be applicable if it is reasonable.[59] Section 2(3) UCTA 1977 brings into focus the issue of voluntariness in the execution of an agreement; this therefore makes it implicitly

[54] *Ogwu v Leventis Motors* [1963] NNLR 115.
[55] *DHL v Chidi* [1994] 2 NWLR (Pt 329) 720 at 742.
[56] *White* v. *John Warrick & Co. Ltd. (1953) 2 All ER 1021*
[57] Unfair Contract Terms Act 1977 (UCTA 1977)
[58] UCTA 1977, s 2.
[59] UCTA 1977, 2(1&2) and 3.

mandatory for free will/voluntariness to be proven as a perquisite for an exclusion clause to be enforced. The absence of this ingredient can be exploited when contesting the validity of a policy or agreement on the grounds of economic duress or undue influence.[60]

A juxtaposition of a hold-harmless clause and section 3 of the Act leads to very shocking outcomes. Section 3 of UCTA 1977 requires that where a contracting party transacts using a written standard form of business, which is akin to a standard form contract, then an exclusion or indemnity clause will not be applicable if the party seeking to rely on the provision is in breach of the contract. This ground can be relied upon as a basis to contest the enforceability of a hold harmless provision in a court in England and in a transaction governed by English law. The implication is that a manufacturer may not be able to rely on an indemnity or hold-harmless clause against other parties where the manufacturer is responsible for breaching the contract, perhaps through a defect in the product. Thus, the only legal recourse that such a manufacturer or supplier can make is to any available exporter's package insurance.

In view of the above points, foreign manufacturers and suppliers of products and services will have to, in addition to their exporters package policy, take adequate measures across their entire value chain to reduce or eliminate the likelihood of risk, hazards and losses occurring. A measure that can be taken is regular improvement in quality control procedures (if well documented), this can constitute a defense by way of establishing or proving of reasonable care. Another important measure is the creation and operation of a system that is sensitive and responsive to field complaints, in a prompt, swift and efficient manner. In addition, regular reviews and audits of product literature, documentation retention of policies and training and effective risk management will constitute alternative measures that can help prevent or reduce risks.[61] They need to invest significantly in quality controls and risk management in the form of export complaint user manuals and product instructions, proper labelling and warnings must be affixed and must be sufficiently visible.[62] While these are all initial lines of defence, an exporter's package cover should be the final and ultimate line of defence.

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[60] Ewan McKendrick, *Contract Law: Text, Cases and Materials* (OUP, 6th edition, 2014).
[61] UK Trade and Investment, 'US Product Liability Law: UKTI Trade Service' UK Trade and Investment
[62] Marc Bruel, 'Exporters: Managing Product – Liability Exposures

3.3.2. Admitted Insurance Policy

This chapter will discuss admitted insurance as a component of multinational insurance programmes. The essence of this approach is to analyse the nature of admitted insurance policy in the context of multinational insurance programmes, in a manner that it fits into the overall objective of this chapter.

Admitted insurance policy is an insurance cover issued by an insurer that is licenced in the jurisdiction where the insured is domiciled or resident.[63] Admitted insurance policy is another form of a multinational insurance programme and it lends credence to the assertion that multinational insurance programmes can be structured in a number of ways and can therefore be in various forms, shapes and sizes. Traditionally, multinational insurance programmes can be a combination of standalone policies in the form of locally admitted policies, non-admitted policies, difference in conditions/differences in limits (DIC/DIL) and controlled master policies or programmes.[64] In recent times, due to specific challenges, which will be discussed extensively in the next chapter of this work, newer policy structures and designs have been invented and applied in the insurance industry. The approach will therefore involve analysing each of these structures in turn.

An admitted policy is an insurance cover, which is issued by an insurer, holding a license to operate within a local territory wherein the insured and/or the risk is domiciled. It contemplates situations where the insurance cover is purchased from a local insurer based on local customs, laws and regulations.[65] According to Robin Federici, admitted insurance means 'coverage purchased from an insurer in the host country'[66] According to the United States Non-admitted and Re-insurance Reform Act 2010, an admitted insurer means 'An insurer licensed to engage in the business of insurance in such state.'[67] The core feature of an

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[63] International Risk Management Institute < https://www.irmi.com/term/insurance-definitions/admitted-insurance> accessed 14 August 2018

[64] Claude Gallello, Martin, Strnad and Adrea Koroluk, 'Is Non-Admitted a Non-Starter? Global Program and Staying Legal in the 21st Century' (RIMS Conference, April 2008).

[65] Helen Hayden, 'Global Insurance Compliance: Arranging Multinational Insurance Programs' (2008) Airmic Publications < http://www.airmic.com/sites/default/files/global_insurance_compliance_helen_hayden.pdf> accessed 3 November 2013 (n 1) 30.

[66] Federici (n 50) 2.

[67] US Non-Admitted and Reinsurance Act 2010, s 527.

admitted insurance policy is that the insurer is both resident and licensed in the jurisdiction where the risk is situated and often where the insured is also domiciled and/or resident.

A practical and key feature of an admitted policy is that premiums are paid in the local currency and claims payments are also made in the currency of the relevant home jurisdiction. These policies are designed with practical awareness of the position of domestic laws, regulations, taxes, tariffs and are based on statutory, regulatory or customary standard forms. It is important to note that an admitted insurance policy should not be confused as a policy issued by an indigenous insurer because an admitted insurer does not necessarily mean the same thing as an indigineous insurer. This is particularly important because a foreign insurer can assume the status of an admitted insurer if it incorporates a local subsidiary and obtains the required license and authorisation to operate within a local market. In such a case, it becomes an admitted insurer but may not qualify as an indigenous or domestically owned insurer.[68] An admitted policy can also exist where it is not issued directly by a foreign insurance company but by one of its network partners operating in a local market. Insurance through network partners and fronting arrangement will be discussed in later parts of the work.

In analysing admitted policies in the context of multinational insurance programmes, Anup Seth, clearly identified the five key features of such policies, namely:

- The policy must be issued in the country;
- The policy must be designed to insure a local risk(s);
- Premium payments are allocated and often made in the local country;
- Taxes on the policy, premium and claim payment are covered by the tax laws of the local country; and
- Payments or Indemnities are also made in the local country and often in the local currency.[69]

Many countries operate admitted insurance systems, notable amongst them are: Netherlands, Germany, Finland, India, South Africa, Malaysia, Nigeria, Brazil, Hong Kong, Mexico,

[68] Hayden (n 115) 26.
[69] Anup Seth, 'Global Insurance Programs' (GIRO Conference and Exhibition, Liverpool, 14 October 2011).

Turkey, Switzerland, Thailand, China, and the Russian Federation. Considering the importance of admitted insurance to the design and structure of multinational insurance programmes, the provisions of the relevant laws in Nigeria are discussed briefly below.

Nigeria is a jurisdiction that operates an admitted insurance system, in the sense that any person conducting insurance business is required to be licenced in Nigeria, except where the required exemption from licencing is obtained. Generally, Nigerian law does not prohibit a foreign entity from participating in business in Nigeria, in so far as they are willing and ready to incorporate a local company through which the business will be conducted in Nigeria.[70] In addition, where a foreign company interested in conducting business in Nigeria, incorporates a local company, that company is required to register with the Nigerian Investment Promotion Commission as specified by section 17 of the Nigerian Investment Promotion Commission Act.[71] This entitles such a registered company to participate in any kind of business in Nigeria, except businesses detailed in the negative list,[72] which include production of arms, ammunition, businesses involving narcotic drugs and businesses involving production of military and paramilitary wear and accoutrement.[73]

Further to the above, a foreigner or foreign entity interested in doing business is required to register and obtain the requisite permit from the Nigerian Investment Promotion Commission (NIPC).[74] A foreign entity is also required to register with the Corporate Affairs Commission, because section 19 of CAMA 2004 requires the registration with CAC as a prerequisite for conducting business in Nigeria.

A close perusal of the Nigerian regulatory framework for participation of foreign entities in its economy, indicates that even though the laws and regulations in the insurance sector is protectionist in nature, the general corporate legal framework is comparatively liberal in the sense that foreigners can own 100 percent equity in most sectors of the economy and there are no special bottlenecks that will obstruct access to participate in a business. Apart from the requirement to register with the NIPC, the process and cost for registering a company is

[70] Companies and Allied Matters Act 2004, s 1 (CAMA).
[71] CAMA, s 20(4).
[72] Nigerian Investment Promotion Commission Act 1995, s 17 (NIPC Act).
[73] NIPC Act, s 17.
[74] NIPC Act, s 31.

the same for both a company which is totally Nigerian owned and a foreign owned company. As discussed in earlier parts of this work, Nigerian law in this respect is compliant with the trade liberalisation objectives of the World Trade Organization (WTO). One can safely argue that the first hurdles to overcome for an insurance company planning to operate in an admitted form within Nigeria, will be simply to satisfy the twin registration requirements with the Nigerian Promotion Investment Commission and the Corporate Affairs Commission.[75] After both registrations, the foreign insurer will be expected to focus on the applicable insurance registration and licensing under Nigeria law. In addition to the above requirement, a company is expected to register and obtain approval from the National Insurance Commission (NAICOM).[76] NAICOM is empowered to refuse an implication, if it considers it to be against public interest or the interest of current or prospective policyholders.[77]

3.3.3. Solutions Provided by Admitted Insurance Policy in a Multinational Insurance Programme

Having discussed the meaning, nature and the application of admitted insurance system in Nigeria, including its mode of operation, I will now attempt a further analysis of the nature and workings of admitted insurance policy by exploring the solutions provided by admitted insurance policies in a multinational insurance programme.

3.3.3.1. Compliance with Domestic Laws:

Despite the push by the WTO for the global economy to be liberalised, only a handful of countries have opened up their territory un-hindered to non-admitted insurers, the vast majority of countries are either strictly admitted or quasi admitted jurisdictions. One major benefit derived from designing multinational programmes with admitted policies included is that they are almost always compliant with local laws and regulations.[78] For example in Nigeria, it is mandatory for prior approval to be obtained from NAICOM before a new type of insurance policy is released into the market- this is Nigeria's

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[75] NIPC, s 17, 20, 31 and CAMA 2004, s 19.
[76] Insurance Act 2003, s 4 (Insurance Act).

[77] Insurance Act, s 4(2).
[78] Hayden (n 115) 26.

product approval regime.[79] NAICOM in turn is required to communicate its approval within 30 days of receiving an application.[80] The implication of this in the context of multinational insurance programme is that any local policy issued in Nigeria is automatically compliant with the local laws and regulations. This automatically eliminates the danger of admitted policies running afoul of local laws, and by extension it means that the multinational policy would have, to some extent, further reduce the likelihood of attracting civil and criminal penalties, because like other provisions of the Nigerian Insurance Act, non-compliance with the provisions of the Insurance Act 2003 is a criminal offence and is punishable upon conviction with a fine of N10, 000.[81]

Hence, the mode of compliance is simple for admitted insurance policies, when a multinational company or a local subsidiary purchase insurance cover from a domestic insurance firm, then automatically the requirement for a mandatory use of locally licensed insurer would have been satisfied. In other words, admitted policies ensure that the local policy and by extension the multinational programme satisfies local regulations.[82] This is particularly important because in some jurisdictions, non-compliance with the mandatory requirement is treated as a criminal offence committed by both the insurer and the insured, and sometimes other professionals, like insurance intermediaries among others, can be treated as secondary parties to the offence. In addition to the risk of a likely criminal investigation and prosecution, non-compliance with domestic laws, could give rise to non-criminal regulatory actions that can attract penalties in the form of fines, damages, higher compliance cost.[83] Consequently, an admitted policy, unlike a non-admitted policy, eliminates the risk of fines and penalties and will significantly reduce the risk of a policyholder suddenly losing insurance cover due to illegality or insolvency of the insurer.[84]

3.3.3.2. Access to Local Pools:

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[79] Insurance Act 2003, s 16(1).
[80] Insurance Act 2003, s 16(2).
[81] Insurance Act 2003, s 16(4).
[82] Allianz, 'International Insurance Programs: Tailored Solutions for Multinational Insurance' (2008) Allianz Publication.
[83] Zurich, 'Pitfalls of Not Having a Local Policy when Doing Business Globally' (2011) Zurich Publications.
[84] Hayden (n 115) 27. Some penalties specified in the Nigerian Insurance Act are – failure to issue a policy document within 60 days attracts N5, 000, introduction of an insurance product without prior approval from NAICOM attracts N10, 000, failure to keep statutory records attracts N25, 000.

A general problem that confronts insurance business is that of collapse and inability to meet claims when losses arise. This challenge is far more prone when insurance covers are obtained in markets in developing countries. The danger of collapse of an insurance company is a threat to domestic insureds as well as foreigners that obtain insurance cover for risks that are locally domiciled in such markets. Even where such foreigners are reluctant to obtain local cover, they may be compelled to by local laws that require compulsory insurance. For example, the Nigerian Insurance Act 2003, states that all cargo to be imported into Nigeria must be insured with a local insurer, and non-compliance will upon conviction attract a fine of N500, 000.[85] Hence, in such circumstances where local cover has been obtained, an insured stands the risk of the insurer failing as a result of stability issues or outright failure or refusal to pay the insureds.[86] Such occurrences are common in Nigeria, and Nigeria has in the past recorded numerous mass collapse of insurance companies, which has resulted in loss of confidence in the market.[87] To stem this trend, NAICOM, the Nigerian insurance regulator introduced risk pools like the Energy and Allied Risks Insurance Pool of Nigeria and the Nigerian Liability Insurance Pool, which has increased the capacity of local insurance syndicates and pools to retain risks and meet claims promptly.

To maintain reasonable levels of financial stability, some jurisdictions create pools also called risk pools, which are mandatory national insurance pools. The local laws in some jurisdictions compel all registered insurers to participate through a compulsory session of certain perils to a national insurance system, this approach is common where the risk is too large or complicated for the local insurance system to handle or for a single local insurer. An apt example is the Brazilian Nuclear Risk pool that requires the transfer to an insurance pool of any insurance policy, underwritten by a local insurance company and covers nuclear risk.[88]

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[85] Insurance Act 2003, s. 67(1) & (4).
[86] Chukwudeh Stephen Okechukwu, 'The Bane of Selling General Insurance in Nigeria' (2016) 2(3) International Journal of Social Studies; See also Oluwakemi Akinbola and Likali Isaac, ''Ethical Issue: A Problem In Nigeria Insurance Companies' (Masters Thesis, School of Management, Blekinge Institute of Technoloy, 2010);
[87] Ekerete Ola Gom-Ikom, 'Unsettled Claims Now Unsettling Nigeria's Insurance Industry' (2018) Proshare Newsletter.
[88] ibid 27.

The benefit that flows from an admitted policy is the fact that where an MIP incorporates one or more local admitted policy, then, such local admitted policies automatically benefit from such a pool. The pool creates an additional layer of protection for policy holders because whenever the local insurer becomes insolvent or is distressed, the government backed local pools will be a fall-back option. One very popular type of pool, sponsored by a local government, is the catastrophe pool.[89]

3.3.3.3. Local Premium Taxes and Insurance Premiums are Deductible:

The profit of a company is dependent on how best that company organises its tax affairs and the extent of tax savings it can secure. One means through which a company can efficiently organise its tax affairs is through claiming expenses that were legally incurred; such payments are called allowable expenses or allowable deductions. Tax laws and practices are always of great importance to multinational companies and to multinational insurers in the course of designing multinational insurance policies. The tax laws of some jurisdictions allow a policyholder to deduct any amount paid as a premium in that jurisdiction. Hence, the policyholder will treat the premium payment made as an allowable expense. This therefore means that an admitted policy will help the insured to achieve some tax savings arising from the deductions made on its premium tax payment and the premium paid for the policy cover.[90]

In Nigeria, certain deductions are allowable expenses and can be deducted from the profit before tax is paid to the government, these qualifying expenses are:

- National Housing Fund Contribution;
- National Health Insurance Scheme;
- Life Assurance Premium;
- National Pension Scheme; and
- Gratuities.[91]

[89] ibid. see also Zurich (n 133) 2.
[9090] Airmic, 'Compliance of Multi-National Insurance Guide 2015' (2015) AIRMIC Technical 19.
[91] PKF, 'Nigerian Tax Guide' (2013) PKF Publication.

In addition to the above, under Nigerian law, insurance premiums are not subject to withholding taxes; this means that taxes will not be deducted at source as is normally done with most other services. This saves the insured from a plethora of administrative hindrances, which characterise the administration of the withholding tax system, particularly where the taxpayer needs to apply for a refund of excess taxes paid under the WHT system.[92] Where an insured obtains an admitted policy in Nigeria, the above benefits will be available to that insured and can be applied as tax savings to reduce taxes that would have been paid and by extension increase its profit.

3.3.3.4. Taxability of Claims Payment and Deductibility of Premium Payment:

One challenge with insurance globally is the need to have a balanced system that protects the insured and the insurer from excessive and multiple taxation. The insurance sector involves monetary flows to both the insured and the insurer, and each flow could give rise to tax burdens that could impact significantly on the income or revenue of the insured and the insurer. In this light, one tax solution that is visibly offered by admitted insurance, particularly in Nigeria, is that when an insured obtains a life insurance policy, that person will be entitled to deduct the premium paid on the life insurance before computing the tax payable on income. In other words, the premium paid becomes an allowable deduction.[93]

Further to the above, tax authorities in Nigeria are always on the prowl and becoming more aggressive because of Nigeria's dwindling oil revenue,[94] hence, they are looking for revenue that could be subjected to additional tax liability. For insureds, a major issue that always arise, is whether claims payments received from their insurers should be treated as a taxable income, or whether it should be exempt from tax. To answer this question, based on the various forms of policies, where it is an admitted policy, no

[92] Federal Inland Revenue Service, 'Further Explanatory Comments on Withholding Tax Principles and Operation' (2006) FIRS Circular Number 2006/02 5.
[93] Personal Income Tax Act 2011, s 33(4)(d)
[94] Wole Obayomi, 'KPMG Tax Outlook 2018' (2018) KPMG Publication 6, 8, 25. See also Emmanuel Uniamikogbo, Emmanuel and Amos, 'Corporate Governance and Tax Agrresiveness in Nigeria' (2019) AE – FUNAI Journal of Accounting 20 – 25.

serious complication arises because such payment is treated as a compensation that is not taxable.[95] The implication is that the payments made by an insured in the form of a premium on a life policy are deductible and payments to the insured in the form of compensation are also exempted from tax. This makes an admitted insurance a tax efficient option for an insured in Nigeria. However, the concern will be whether these tax advantages will affect the revenue stream of government. In response to this concern, the Nigerian tax law has an inherent safety valve; where an insured suffers a loss and is entitled to compensation, that same insured will not be entitled to claim a tax deduction on that loss.[96]

Claims payment under an admitted policy makes the transaction much easier by reducing or eliminating the negative effects of exchange rates volatility.[97] In other words, where a loss occurs and an insured is entitled to compensation, if the cover was received from a foreign insurer and in a foreign denomination, the compensation paid could suffer foreign exchange losses if there is any significant negative exchange movement, and it will also be treated as taxable income in the hands of the insured. No doubt, volatility in foreign exchange rates is a huge threat to businesses and it introduces serious levels of uncertainty, because in the payment of claims, parties agree on the currency in which the payment will be denominated. However, the value of the claim payment is subject to the exchange rate at the time of payment, which could prove to be unfavourable to any of the parties even where there are slight shifts in the basic points. In addition, where claims payment is made in a particular currency but the company may need to convert it to another currency before use, it becomes exposed to the volatilities of the foreign exchange market. The consequence of this is that an otherwise adequate policy could unexpectedly become inadequate because of very distant factors, which like exchange rate volatility, can appear remote at the time of the contract but may eventually play a significant role. However, where in the course of converting the foreign currency to local currency, the transaction results in some form of foreign

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[95] Personal Income Tax Act, Third Schedule, para 26.
[96] Companies Income Tax Act 2004, s 27(b).
[97] Hayden (n 115).

exchange gain, that gain will be subjected to capital gains under *Section 3(b) of the Capital Gains Tax*.[98]

These challenges are almost non-existent in the case of admitted policy, because claims are paid in the local currency of the admitted jurisdiction, especially in view of the fact that the extent of loss and damage would have been quantified by the loss adjusters before claims payment is made.[99] Furthermore, an admitted policy is a simple option available to circumvent the fragilities of the currency market and prevent its fluctuations from affecting the real value of the benefit received as compensation. The insured will normally receive the compensation in the place where the loss occurred and in the local currency of that jurisdiction. This means that there will be little or no need for exposure to the currency market. The fragility of the currency market, which affects non-admitted policies, is because restrictions are imposed by countries as a monetary policy tool to defend their economy and to shield the local currency against economic attacks and unexpected devaluation and inflations.[100] An option open to the insured and insurer to hedge against these volatilities, is for the parties to agree on a fixed conversion rate between foreign and local currency.[101] Such a rate will be specified in any legal document that evidences the multinational insurance programme; thus addressing the risk or likelihood of foreign exchange losses. In Nigeria, this option of a fixed exchange rate has been adopted through the establishment of the FMDQ OTC Securities Exchange, which was established based on the Investments Securities Act 2007[102] to provide foreign exchange hedging services as a foreign exchange market stabilisation window.

3.3.3.5. Policy and Claims Management:

An insurance policy requires a great deal of management and servicing. This is because insurance business is influenced greatly and driven largely by information. A simple event or accident could be a determining factor in fixing or reviewing an insurance

[98] Capital Gains Tax Act LFN 2004, s 3(b).
[99] ibid.
[100] Allianz (n 132) 12.
[101] Zurich (n 133).
[102] Investment and Securities Act 2007, part XIV.

premium, influencing and insurer's decision to issue an insurance policy, or an insured's decision to continue with an existing policy. These factors make it more suitable for an individual or entity, which is closer to the location of the risk to manage and service the policy; hence, a locally admitted policy works really well.

This is because an admitted policy will utilise a local insurer, a local broker and other local insurance intermediaries. These actors have local managers and local employees who are better able to provide details on the changing value of assets or properties and provide other information updates.[103] No doubt, quick information will lead to a quick response in adjusting and amending policies. The experience and local knowledge of local experts will be useful in such situations, especially because they understand the local bottleneck, practices and how to circumvent them.

3.3.3.6. Local Language:

Language is a powerful tool for business facilitation and it is the vehicle through which the terms of a transaction are spelt out; hence, it is integral to the management of any form of business transactions. Language choice matters greatly in international transactions because often the parties involved are parties from different cultures and language backgrounds. Even where parties have the same language background, disagreements arise over interpretation and meaning of terms contained in an insurance policy and agreement. Interpretation thus always becomes an issue when disputes arise based on an agreement. For example, the word clock could be included in a policy and could be interpreted by party A as a wrist watch, while party B may interpret it as a wall clock (see ***Wise Underwriting Limited and Anor v Grupo Nacional Provincial SA***[104]). Thus, semantics and definitions come into play in most cross-border transactions; consequently, parties go a great distance to clearly express their intentions in written form. Yet these efforts have proven to be inadequate, especially because some documents are expressed in more than one language. The best approach to avoid these difficulties is to simply prepare documents in the language of the local country, where the risk is situated.[105] This eliminates or reduces the problem of language and

[103] Zurich (n 133) 3.
[104] Wise Underwriting Limited and Anor v Grupo Nacional Provincial SA [2004] EWCA Civ 962
[105] Hayden (n 115) 28.

interpretation to a reasonable extent, and the chances of it occurring are less likely under an admitted policy than under a non-admitted policy. This is a major solution introduced by admitted policies to the language problems in international insurance.

3.3.3.7. Compulsory Insurance and Local Financing:

In Nigeria, certain insurance covers are mandatory in some sectors of the economy, for example, all employers with five or more employees must obtain group life insurance for all its employees;[106] in addition, all motor vehicles in Nigeria must have motor vehicle insurance covering third party liability[107] and all licenced health care practitioners must have professional indemnity insurance.[108] Additionally, all buildings under construction in Nigeria must have insurance cover, [109] and all employers must have the employees' compensation cover which guarantees compensation in the event of death, personal injury, disease and disability arising in the course of an employment.[110] The issue that flows from the above, is whether any of these compulsory insurance can be provided by a non-admitted insurer? This concern is evident because some of these insurance covers are provided only by agencies run by the Federal Government; for example, employees' compensation is administered by the Nigeria Social Insurance Trust Fund. This therefore raises the concern about compliance, the implication of which only admitted insurers can legitimately provide some of these compulsory insurance covers. In Nigeria, it is also mandatory for any persons interested in participating in any contract or procurement involving the government, to show evidence that they are fully compliant with the provisions of the employees compensation cover.[111] This raises a strong indication that the utilisation of admitted insurance in Nigeria is to a great extent inevitable by insureds, and where they desire to patronise an unadmitted insurer, it has to involve careful planning and designing in a manner that takes cognisance of all these unique regulatory needs in Nigeria.

[106] Pension Reform Act 2004, s 9(3).
[107] Motor Vehicle (Third Party) Insurance Act 2004, s 3(1).
[108] National Health Insurance Scheme 1999, s 45.
[109] Insurance Act 2003, s 64.
[110] Employees' Compensation Act 2010, s 1 – 6.
[111] Public Procurement Act 2007, s 16(6)(d).

Often, counter-parties in some domestic contracts request and insist that insurance must be obtained from an admitted insurer before the contract can be finalised. Thus, evidencing that local insurance cover could in some instances be a condition precedent or a mandatory requirement for the finalisation of a contract. Such practices are common in transactions with banks, property ownership and leases. Requests of this nature are always backed up by the additional request for admitted insurance certificates as evidence of proof of domestic cover. This automatically places admitted insurance in better stead over and above non-admitted, particularly in relation to financing local businesses through local financial institutions.[112]

3.3.3.8. Local Control:

A typical multinational insurance programme is designed to be controlled from the head office of the insured company and it normally will be managed from the office(s) of an offshore insurer. This approach normally comes with its own problems and challenges; for example, the local subsidiary of the insured may not have any form of control over the programme, making it very difficult to manage such a cover and take pro-active steps in terms of legislative compliance and/or to appropriate tax advantages sufficiently, like claiming allowable expenses on premium payments and getting exemptions for claims payments.

An admitted programme grants the management team and risk management department of a subsidiary company some level of local control over the insurance policy. The trend globally is for the risk department of a parent company to control all decisions regarding insurance cover and all other risk coverage issues, even when they may not be best suited to handle some issues. Realistically, some insurance covers are better managed by local personnels; most local administrations can seek a programme design that suits their taste and needs. They will also enjoy the liberty to make decisions regarding deductibles, terms and conditions, add-ons amongst others. Decisions regarding most of these issues are best suited to be made by local members.[113]

[112] ibid 28.
[113] ibid.

3.3.3.9. Access to Dispute Resolution Windows:

In situations where domestic law requires policyholders to obtain only admitted programmes, a company that opts for a non-admitted programme stands a huge risk of ultimately being left without an enforceable insurance cover because the cover was obtained illegally. This legal implication is based on the principle of *ex turpi causa non oritur actio*, that is, no action can be founded on the basis of an illegal cause. This unexpected result can arise from the nullification of a non-admitted policy or its non-recognition by relevant regulators/bodies and even by the court. Thus, access to justice is one solution that admitted insurance grants to parties in an insurance contract.

Unlike, non-admitted insurance cover, one benefit enjoyed by admitted cover is the fact that NAICOM is empowered by law to set up an administrative dispute resolution mechanism to resolve dispute between parties in an insurance contract. This system is quasi-judicial in nature; it is beneficial because it does not involve the technicalities that characterise a regular judicial approach to dispute resolution in Nigeria, and it is a faster, more pragmatic and cheaper option for dispute resolution. Hence, where there is a dispute between a local insurer and an insured, they can resort to this more efficient system rathen than the regular judicial system, which could be slow and inefficient. This benefit does not accrue to parties operating a non-admitted programme; hence, this type of regulatory intervention with respect to dispute resolution could be completely lost, where any cover short of an admitted cover is utilised. In other words, where dispute arises, parties to a non-admitted insurance cover will be unable to tap into the additional benefits that flow from this quasi-judicial settlement system. It is a fact that the efficiency of this system is not in doubt. In Nigeria, this role is played by NAICOM through its Complaints Bureau, which is established under section 8 (a) of the NAICOM Act.[114] The Bureau operates as an organ of NAICOM and is a platform through which complaints can be brought against erring insurance companies and intermediaries. In Nigeria, in 2012 alone, the Complaint Bureau handled a total of 349 cases, it resolved about 86 and facilitated settlement of claims to the tune of #1.22 billion naira (about 4.4

[114] National Insurance Commission Act 1997, s 8(a) (NAICOM Act).

million GBP).[115] These cases could have been taken before the regular courts and would have suffered the common fate of undue delay, expensive costs and a damaged commercial relationship. These are the privileges that are not likely to be accessible to parties of non-admitted insurance cover.

3.3.3.10. Implicit State Guarantees:

The global financial system is characterised by booms and bursts, and economists will always argue that these circles are inevitable and there is nothing that can be done by governments and regulators to prevent an eventual burst after a boom; the only intervention that can take place is to delay its occurrence and to manage the fall out of a burst when it occurs. However, experience, has shown that when a burst occurs, governments may be inclined to step in to manage the side effects and the losses that arise from it. There is always the tendency to intervene by taking over some financial institutions or by injecting funds and liquidity into them. Such interventions are targeted at institutions that are domestic and considered to be ‘‘*too big to fail’’* or as capable of posing serious systemic risks to the economy. The far-reaching implication will be that local insured that obtained cover from non-admitted insurers will be left without any form of cover and will be exposed to bear their losses. One major benefit that admitted insurance programmes confer on an insurance company is the implicit guarantee that the insurer will be rescued and policyholders will be protected if the insurer runs into trouble. The implicit guarantees can be in several forms including a public bail out or recourse to funds from a central public guarantee scheme, etc.[116] Also, in some jurisdictions like the United States of America, Associations of Insurance Companies always have private compensation schemes that can be resorted to in the event that an insurer goes bankrupt. For example, in California, admitted insurers are part of the California Insurance Guaranteed Association that can pay claims with a maximum cap

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[115] Chris Agabi, ‘Nigeria: Insurers Pay N1.22 Billion Claims Through NAICOM’ *Daily Trust* (Abuja, 25 September 2012).

[116] John Csiszar, ‘Admitted v Non-Admitted Insurance Company’ *Houston Chronicle* (Texas) < http://smallbusiness.chron.com/admitted-vs-nonadmitted-insurance-company-41360.html> accessed June 20, 2014.

of $500,000 when a member-insurer becomes insolvent.[117] In Florida, admitted insurers are required to participate in the Florida Insurance Guarantee Association.[118]

These benefits of implicit state guarantee or even express privately arranged guarantees, may not be available to policyholders of non-admitted cover.

3.3.3.11. Less Transaction Cost:

The cost of obtaining insurance is never cheap. Admitted insurance policies in most jurisdictions are highly regulated and this could reflect in the approach adopted by some regulators, particularly the pegging of premiums that can be charged by an insurer. Where insurance regulators adopt such an approach, it could translate into reduced premium rates for the insured, which are more likely to be realistic.[119] This is in sharp contrast to the possible pricing for non-admitted policies. A foreign purchaser of a non-admitted policy is not likely to enjoy any pricing benefits that may flow from premium rate caps imposed by its local insurance regulator; thus raising the possibility of undue premium rate volatility, which may not benefit an insured.[120] It is instructive to note that the rate of premiums for compulsory insurance that can be charged in Nigeria is regulated by NAICOM and approval must first be sought and obtained before a premium can be increased; non-compliance with this requirement, attracts severe sanctions including the possibility of withdrawal/revocation of an insurer's licence and registration.[121] I must mention that this provision is inappropriate, because, even though the insurance sector is regulated, there is a need for market forces and market principles to be allowed to determine prices.[122] The insurance sector is largely a private sector driven market; hence, price control should not be allowed. Markets are more likely to develop when there is the freedom to operate freely and when the forces of demand and supply and the effect of competition operate freely. Markets that are altered and distorted through price control remain under-developed, and there is no incentive for private

[117] ibid.
[118] Paul Mack, 'What is the Difference between Admitted and Non-Admitted Insurance Company?' (2011) APM Newsletter.
[119] Csiszar (n 98).
[120] Michael Boldt, 'Admitted v Surplus Lines' (2013) Risk Management Publication.
[121] Insurance Act 2003, s 50.
[122] Erinne Chibueze, 'Insurance Premium Ratings in Nigeria, Issues and Problems' (1994) University of Nigeria Research Publication.

sector participants to invest more capital in such markets; worse still, foreign investors stay away from such markets because of these restrictions. Such restrictive practices could be the reason why the Nigerian insurance market has remained largely untapped and insurance penetration in Nigeria remains below 1%.[123] This is unlike developed markets like the UK insurance market, where market forces determine the premiums and there are no regulations that control this aspect of the market. Where in an MIP, the master policy is issued in the UK and the premium is fixed based on competitive pricing as influenced by market force. The design of the MIP will involve a local insurer obtaining reinsurance from the same foreign insurer that issued the master policy, then some form of challenge regarding the applicable reinsurance premium could kick in. The UK reinsurance premium rates could have been place based on flexible markets rates as determined by market forces; however, in Nigeria, the local insurer must first obtain approval in principle before placing risk with a foreign insurer. In the course of obtaining this approval, in the form of 'Approval in Principle', it is mandatory to submit a premium work sheet to NAICOM for its approval.[124] This reality could lead to pricing concerns because Nigeria operates a regulated pricing regime for its insurance market and England operates a liberal and market driven pricing regime. This is particularly the case, where NAICOM approves a premium rate which is lower than the open market premium rate in England.

The above aspect of the thesis has analysed some problems with insurance, and multinational insurance in particular. It has further discussed the solutions that are offered by an admitted insurance programme in the scheme of a multinational insurance programme. However, admitted programmes also have their drawbacks that make them imperfect and therefore require that a proper balance must be created between admitted and non-admitted policies in the course of designing a multinational insurance programme, which will be applicable to some extent in Nigeria. The next aspect of the thesis, will discuss the drawbacks that are associated with multinational insurance programmes, but this will be discussed along with

[123] Rosemary Onuoha, 'Insurance Penetration in Nigeria is Still under 1.0%' (Vanguard, August, 2017).
[124] Review of Requirement for Approval in Principle, Letter of Attestation and Certificate for Offshore Reinsurance Requests 2013, paragraph 1.

the solutions offered by non-admitted insurance policies, because, often, the strength of admitted insurance is the weakness of non-admitted insurance.

3.4 Non-Admitted Insurance Programmes

A non-admitted insurance policy is one that is issued by an insurer to cover a risk in a country wherein it has no license to operate. It is a policy issued in a country to operate wholly or partly in another country. This in effect means that the insurance contract is negotiated, finalised and executed in a different country, with the resultant effect that premium may be paid in the offshore country and in a currency distinct from that of the jurisdiction where the risk is situated.[125] Non- admitted insurance can also be described as an insurance policy that has cross-border effect by covering a foreign based risk without the issuance of a local insurance policy; hence, the risk is transferred to another country.[126] In other words, it is a policy issued by a non-resident insurance company for a foreign domiciled risk. [127] In some jurisdictions, a non-admitted insurance company is also called an '*excess and surplus line carrier*', and therefore conducts insurance business without having to go through the same registration and approval process that admitted insurers are subjected to.[128] Hence, a non-admitted insurer is not expected to fill and file company's registry forms and make returns to regulatory bodies within such jurisdictions.[129] Non-admitted insurance is an approach that has been in use for a very long period and has operated with little or no difficulty,[130] until recently, where it has increasingly come under intense regulatory scrutiny, which has threatened its continued legitimacy and existence.[131] The details of which will be discussed in later parts of this work. It is a trite fact that non-admitted insurance is prohibited in some jurisdictions but permitted in others.

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[125] Helen Hayden, 'Global Insurance Compliance: Arranging Multinational Insurance Programs' (2008) Airmic Publications < http://www.airmic.com/sites/default/files/global_insurance_compliance_helen_hayden.pdf> accessed 3 November 2013 (n 1) 30.
[126] Claude Gallello, Castles and Peters, 'Non-Admitted Coverage' (2005) 9 Willis International Alert.
[127] Hayden (n 170) 30.
[128] Laura Zaroski, 'Admitted v Non-Admitted: What is the Differences? And What Happens When a Carrier is Declared Insolvent?' (*Socius Insurance Services Blog*, 18 March 2013) < http://sociusinsuranceblog.wordpress.com/2013/03/18/admitted-v-non-admitted-what-is-the-difference-and-what-happens-when-a-carrier-is-declared-insolvent/> accessed 21 June 2014.
[129] ibid.
[130] Gary Orford, *International/Multinational Insurance* (Xlibris, 1st Edition, 2001)
[131] Rick Jensen and Claude Gallello, 'Non-Admitted Coverage and Premium Taxes: No Standard Solution' (2011) 53 Willis International Alert 1.

Jurisdictions that partially or completely permit non-admitted insurance cover are the United States of America, Canada, Austria, Singapore and Chile.[132] Jurisdictions where non-admitted insurance are not allowed includes Argentina, Brazil, Switzerland, Nigeria, Russia, China, India, among others.[133] The key issues affecting non-admitted insurers in most jurisdictions are regulatory and tax related.[134] For example, on 15 May 2009, the Argentinian Ministry of Economy and Public Finances penalised both an insured and a broker for taking out an insurance policy with an unlicensed insurer. The penalty was a fine on the insured, which was about 8 times the value of the premium, and the fine on the broker was 15 times the values of the premium.

Before proceeding into other details of non-admitted cover, some insurance market problems will be identified and the solutions provided by non-admitted insurance programme will be discussed along with the drawbacks of admitted insurance.

3.5. Solutions in Non-Admitted Insurance Programmes and Drawbacks of Admitted Insurance Programmes

A popular idiom says ‘there are always two sides to every coin’, this in effect means that where there is a solution flowing from an item, the item can also manifest disadvantages and draw backs. This reality is evident in the case of admitted insurance programmes, which as discussed above, are vested with numerous benefits, making them suitable for insureds. However, admitted insurance programmes are not flawless and faultless; they are characterised by several drawbacks, which makes them unsuitable in some instances. In the same breath, non-admitted insurance has both strengths and inherent weaknesses. Thus, the solutions contained in non-admitted insurance cover will be discussed along with the weaknesses of admitted insurance.

3.5.1. Less Expensive/Lower Costs

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[132] ACE, ‘Group Personal Accident and Business travel – Frequently Asked Questions’ (2011) ACE Publications.

[133] Pedro Rodrigues, ‘International Programs: Navigating the Complex Regulatory World’ (Zurich Seminar, 2013) < Pedro Rodrigues, ‘International Programs: Navigating the Complex Regulatory World’> accessed 24 June 2014.

[134] ibid 2.

Cost management and reduction is a major component in decision-making for businesses; this underlies the importance of pricing in any business. The premium paying for an insurance cover will determine how economical taking out a cover may turn out to be. Non-admitted insurance, guarantees that the price to be paid for an insurance cover is reduced and minimal. This is achieved through the power of bulk purchase or bulk buying power,[135] in that the premium can be negotiated in a manner that will be more favourable because the prospective insured is purchasing a cover that is likely to cover several jurisdictions at the same time. Based on this, it can be assumed that the insured or its broker will be in better stead to negotiate more favourably. Hence the insurer is likely to accede to a reduction in the premium, though the premium may appear high; however, when calculated on a per jurisdiction basis, it is usually far less than what would have been paid if separate/independent policies were taken out.[136]

Furthermore, the above points become even more apparent when juxtaposed against the total cost of admitted average purchased for the same number of jurisdictions; for example if an admitted jurisdiction costs 20,000 USD, then all things being equal, 10 jurisdictions could cost 200, 000 USD. However, a non-admitted could ordinarily cost 25,000 USD for a jurisdiction, but in view of the fact that the multinational insurance programme will cover 10 jurisdictions, it can be negotiated to 18,000 USD per jurisdiction, which ultimately results in average lower cost and better value for money.[137] In other words, the cost benefit derived from non-admitted cover becomes apparent when the total cost for such a cover is compared to the aggregate sum of independent local admitted cover of the same number of jurisdictions. Another factor that can contribute in cost reduction is less administrative expenses that usually arise from the cost of air and land fares to attend meetings, hotel accommodation, allowances etc.[138] One other significant contributor to the cost saving and premium rate

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[135] Zurich, 'Guide to Global Programs: The Latest Developments in Global Programs in a Fast Changing Economic and Regulatory Environment' Zurich Business Insurance Business 7 <http://zdownload.zurich.com/main/landingpages/Guide_to_Global_Programs.pdf> accessed 21 June 2014 (Zurich Guide).6.

[136] Carl Niedbala, 'Startup Risk Tips: Admitted/Non-Admitted Insurance Policies' (2014) Founder Shield Publication.

[137] Hayden (n 170) 30.

[138] ibid.

reduction is the less time involved in finalising such transactions, which ultimately gives rise to less expenditure, and better economy of scale.[139]

Although it has been discussed that an admitted policy in a multinational insurance programme can be cheaper because regulators like NAICOM are empowered to peg premium rates, depending on a number of factors, a multinational company has the option to buy insurance cover at the group level or simply authorise its numerous subsidiaries to purchase local cover and polices from their jurisdiction of residence or domicile. Though purchasing a local policy could be cheaper than a foreign policy, as explained above, a foreign non-admitted policy, could in the final analysis, be considerably cheaper after its strictures have been properly designed and adequately perfected.[140] This benefit of the non-admitted policy is an apparent drawback for the admitted policy because more often than not, they are negotiated by individual subsidiaries that may not be buying a significant volume of cover to necessitate the reduction of the policy rate. In other words, unlike admitted policies that individually are cheaper, it leads to a higher total final cost because each subsidiary will have to separately negotiate its own domestic policy' therfore, the advantage that flows with economy of scale is lost. Conversely, all subsidiaries do not possess the same level of bargaining power; some subsidiaries may not have the requisite level of sophistication and expertise to demand favourable policy rates.[141] Other facts like domestic tariff rates, local competition, underwriting sophistication amongst others can give rise to higher premium rates for admitted insurance policies.[142] This is apparent from the application of economies of scale on the entire non-admitted insurance value chain. It is a trite principle in business that better deals are negotiated on a wholesale basis than on several retail bases because the party negotiating the insurance cover as a prospective insured has a stronger bargaining position and can demand better/more favourable terms, as opposed to negotiating several retail deals separately.[143]

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[139] Donna Pfluger-Murray and Jason Taylor, 'Global Implications of Admitted, Non-Admitted and Self Insurance' Risk Management Magazine < http://cf.rims.org/Magazine/PrintTemplate.cfm?AID=2904> accessed 24 June 2014.
[140] Hayden (n 170) 28.
[141] Hayden (n 170) 28.
[142] ibid.
[143] Ivelin Zvezdov, 'Competitive Premium Pricing and Cost Savings for Insurance Policy Holders: leveraging Big Data' (2017) MPRA Publication.

3.5.2. Scope of Insurance Coverage

Admitted insurance policies are known for having less risk coverage when juxtaposed with multinational non-admitted policies. That is the number of risks that are covered under an admitted insurance policy are fewer than the risks covered under a non-admitted insurance policy. Each jurisdiction has its scope of coverage and in some jurisdictions it is strictly regulated; hence admitted cover could be more restrictive in terms of scope and wording. The extent of scope certainly is determined by the capacity of the domestic insurance market, trade, custom and practice. Some jurisdictions that are not sufficiently developed may have certain practices that could be obnoxious and terms that are unfavourable or hard to interpret or understand. This raises the possibility of serious gaps in insurance cover and even situations of under-insurance or non-insurance in cases where policyholders may erroneously believe that they have obtained the requisite cover, whereas in actual fact, the cover may be insufficient or inadequate.[144] This reality makes non-admitted cover better suited for broad risk cover, placing it over and above admitted cover. One key feature of non-admitted is that it provides a broader coverage and covers some specific exposures like global interdependencies and linkages, which are not addressed by admitted policies. The non-admitted policy is built in a manner that connects appropriately and carefully minimises duplications of coverage. This level of uniformity and consistency provides comfort for both the insured and insurer, particularly because of its clarity, which leads to clearer understanding of the contractual obligations and its scope.[145]

Closely related to this is the fact that the primary focus of pre-contractual insurance negotiations are usually centred on the terms to be inserted into the policy documents. In this respect, an advantage, which non-admitted insurance negotiations have over admitted insurance, is that the insured can negotiate the inclusion of broader policy wording that could be couched in a manner that grants extended coverage, covers extraneous perils and add-ons, which are otherwise not available in admitted insurance. This benefit cannot be obtained under an admitted policy, especially because it is usually designed for perils that are known

[144] ibid.
[145] Hayden (n 170) 30.

or common within the local insurance market. Little or no cognisance is paid to risks and exposures that are based on hindsight and history or are considered to be too remote.

3.5.3. Alignment of Insurance to Corporate Risk Management Approach

Large multinational corporations always face the problem of ensuring that their risk management approach is uniform and integrated. One benefit of non-admitted insurance cover is that it facilitates ease of integration of insurance policies and corporate risk strategy. Companies at the group level are expected to have both a corporate policy and a corporate risk management strategy. This will naturally form the basis for its approach towards purchasing, structuring and managing its risk and insurance covers. For example, at the company's headquarters or at group level, it may adopt an approach that favours retention of a significant amount of loss through large deductibles or self-insured retentions.[146] However, such an approach, or any other approach within the corporate plan and strategy, may not be available under existing local policies within some domestic insurance markets. This will certainly lead to some frustration of the global corporate risk management strategy, which could result in re-adaptation of the strategy to suit existing local realities, at the expense of reducing the effectiveness of the risk management strategy. This too can have adverse effects and reactions. But this problem is not likely to arise under non-admitted insurance cover.

3.5.4. Payment of Local Premium Tax and Levies

In Nigeria, all insurers, insurance brokers and loss adjusters are mandated to pay 1% of their premium, commission and fees to NAICOM as a levy.[147] Normally, to determine the premium to be paid for an insurance cover, insurers take cognisance of the statutory payments and ensure that it is sufficiently built into the premium. The implication of this is that the premium, fees and commission for admitted insurers, brokers and loss adjusters could be significantly higher for this singular reason. In other jurisdictions, insurance premium tax may be imposed on premiums paid by insureds. Insurance premium tax has been defined simply as a tax on general insurance premiums.[148] The tax rate varies across jurisdictions. One key hallmark of admitted insurance is that it is subjected to insurance premium tax,

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[146] ibid 29.
[147] Insurance Act 2003, s 16(1)(b)&(2).
[148] HM Revenue and Customs, 'Introduction to Insurance Premium Tax'

which in England is a standard rate of 6% and 20% for travel insurance and some insurance for vehicles and domestic/electrical appliances (proposal for increase of the standard rate is proposed in the Summer Finance Bill 2015). Under English tax and insurance laws, insurance contracts concluded on a long-term basis are exempt from premium tax. Other categories of insurance exempt from premium taxes are reinsurance, commercial insurance for ships, aircraft and goods in international transit.[149] Where the risk is located offshore, premium tax will not be imposed. These go to show that imposition of premium tax is associated with admitted insurance; however it is neither imposed nor charged on non – admitted programmes. Hence, non-admitted insurance seems to be better suited for cost-savings when it comes to tax planning and tax-saving strategies.

3.5.5. Probable Absence of Technical Depth and Skills

Insurance is a very technical area that requires sufficient knowledge, skill and experience. Nigeria is still an emerging market in the global insurance space and this is evident in the quality of skilled experts in its market. Nigeria is still building the required technical workforce with the right skill set for the insurance market. This reality is similar in other emerging markets; however, skilled experts in insurance are more likely to be readily available in the right mix and balance in jurisdictions with greater insurance penetration. This has an implication in jurisdictions where local policies are taken out for cover for which local insurers and brokers lack the requisite skills. For example, until recently, the power sector in Nigeria was state-controlled but was later unbundled and privatised. This led to sale of assets to private investors and the opening of a new frontier in the Nigerian insurance landscape – power-sector risk insurance. Local insurers and brokers had not been exposed to such transactions and they lacked the capacity, knowledge, skill and experience to deliver in this area; hence, there was an obvious skills gap for that need. This is one major disadvantage of admitted insurance, especially for jurisdictions that are strict. It is a known fact that loss adjusters, risk surveyors and risk control services experts in developing countries cannot match the expertise of those in developed countries.[150] This makes it economically expedient

[149] ibid.
[150] Hayden (n 170) 26.

to avoid multinational insurance programmes that are largely admitted in nature; rather, a healthy mix of admitted and non-admitted policies should be designed.

3.5.6. Financial Strength and Capability of Insurers

Simply obtaining insurance cover on its own is not sufficient; the insurer must be able and have the financial capacity to meet claims and demands that arise from losses. In other words, an insurer must be solvent and financially capable of responding to claims made on it by the insured. Following the outset of the financial crisis, regulations of financial services has become more intense, stringent and rigorous.[151] The insurance sector has not been left out of this trend of increasing regulations.

Notwithstanding this push, there are jurisdictions where the solvency requirement is still far below expectation,, to worsen the situation, most of these jurisdictions do not have proper rating services. For example, in Nigeria, it was reported in early 2018 that three insurance companies were insolvent;[152] consequently, in July 2018, NAICOM increased the capital base for the insurance sector.[153] Hence, it became very difficult or impossible for parent companies to even conduct a convincing due diligence on a locally admitted insurer.[154] Consequently, this is not an easy task because there are moments, when even the local management of a subsidiary company will not have sufficient knowledge and information on the local insurance market and admitted companies. These can stem from poor and inadequate reporting requirements,[155] resulting in difficulty to monitor a local insurer's solvency.

This problem is not readily linked to non-admitted insurance within a multinational insurance programme because jurisdictions that have developed enough market depth, to the extent that they can export insurance services, are usually highly sophisticated markets with strong financial capacity. Such jurisdictions also have robust solvency regimes and sufficient market

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[151] Zurich, 'Guide to Global Programs: The Latest Developments in Global Programs in a Fast Changing Economic and Regulatory Environment' Zurich Business Insurance Business 7 <http://zdownload.zurich.com/main/landingpages/Guide_to_Global_Programs.pdf> accessed 21 June 2014 (Zurich Guide).
[152] Bala Augie, 'Solvency Ration of Five Nigerian Insurers Fall Below Regulatory Threshold' (May 2018, Businessday, Lagos)
[153] NAICOM Recapitalization Circular, July 2018.
[154] Hayden (n 170) 29.
[155] ibid.

detectors to ensure healthy levels of liquidity and solvency. Similarly, these markets have several pools that also exist as an added layer of protection. On this point, non-admitted insurers from a market perspective are often more capable.[156]

3.5.7. Absence of Central Control

One major response by businesses to the financial crisis is the increasing emphasis on centralisation of key business and professional corporate functions such as legal/regulatory departments and risk management departments. Specifically, the risk management departments now seem to eschew a strategy that gives them less control over the management of their corporate and global insurance risks. In other words, risk management departments dislike the adoption of fragmented risk management strategy, which is characterised by several admitted insurance covers for their various subsidiaries and interests around the world. This effectively removes central control from the parent company's risk management team, leaving control and decisions in the hands of less sophisticated domestic experts, which if not sufficiently supervised, can lead to under–insurance or over insurance, coverage gaps, poorly worded policies, restrictive covenants among others.

The absence of centrality and control is further aggravated by the fact that most policies are written in different languages and without a counterparty interpreted version. This comes with many challenges that may include interpretational disagreements and difficulty in finding unbiased and competent interpreters; other defects that flow with these are lack of uniformity in the whole collection of policies, duplication of coverage and difficulty or near impossibility to monitor the local insurers and their solvency levels.[157] One must also add that in addition to possible solvency problems, which a locally admitted insurer could suffer, another likely problem is that of liquidity. Liquidity problems are different to solvency problems. The former can be described as an absence of an adequate going concern asset.[158]

One effect of globalisation as explained earlier, has compelled companies to review their management of capital, revenue, assets and employees. However, it has also compelled

[156] Robert Hartwig, Weisbart and Lynch, 'Global Insurance Capital Standards: Orign, Perspectives and Impacts on US Markets' (2015) Insurance Information Institute
[157] Zurich Guide (n 113) 6.
[158] Michelle Brennan, Clark and Vine, 'What May Cause Insurance Companies to Fail and How this Influences our Criteria' (2013) Standard & Poor Ratings Direct 5.

companies to adopt a more centralised approach to manage finances, legal human resources and insurance. Based on this, most companies now structure their insurance/risk management departments to be based at their central global offices. The centralised approach makes it possible for the central office to manage the insurance needs of both the parent company and all its affiliates, subsidiaries and sister companies, as opposed to having risk management department at both the headquarters/parent company level and subsidiary or branch levels.[159] This approach appears to have been necessitated by both globalisation and other needs. One such need is the emerging corporate governance obligations in some jurisdictions, which has necessitated companies to put in place proper risk management systems.[160]

Such a centralised approach fits perfectly with non-admitted insurance programmes because it enables risk managers to apply the same standards across all their insurance programmes. In other words, the same insurance standards can be applied to purchase cover for all company's affiliates and subsidiaries. Central control provides many benefits; for example, it enables a particular set of persons or teams to take direct responsibility for monitoring the insurance programmes along with the insurer and broker, ensuring that they are updated as and when necessary, changes are made to comply with regulatory requirements in several jurisdictions and reminders for filing of required returns are centrally managed.[161]

It is trite that uniformity of level and scope of a cover is necessary for international companies having a high degree of inter-related exposure; this can only be addressed through a non-admitted cover that fills in gaps that would have been absent in independent and fully admitted programmes covering different jurisdictions.[162] Defects in an independently purchased set of fully admitted cover can come in the form of undercover or overlapping cover. These problems can arise from poor communication between the global risk management departments and other risk management departments in subsidiaries. This remains one of the greater benefits of non-admitted programmes over admitted programmes.

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[159] Zurich Guide (n 12).
[160] ibid.
[161] Hayden (n 170).
[162] ibid.

3.5.8. Cash-Before Cover

In Re Claim Direct Test Cases where premium is defined as the "*consideration required of the assured in return for which the insurer undertakes his obligation under the contract of insurance*"[163] Usually the payment of a premium is to be made at the principal place of business of the insurer[164] but any other acceptable method of payment that is customary could be permissible, including payment through a disclosed agent of the insurer.[165] Overall, the express provisions of the policy take precedence over any practice; thus, if the policy requires that a premium should be paid to one agent and it is paid to a different agent, the law will not recognise the payment as a valid premium payment.[166]Furthermore, where authority is delegated to an agent, the agent cannot sub-delegate the authority to another agent.[167]

Jurisdictions like Nigeria and Ghanainsist that an insurance policy will be valid only upon the condition that premium has been paid; doing otherwise will render the policy ineffective/invalid.[168] Consequently, payment of a premium must be made in advance and not in arrears in such jurisdictions. However, in the United Kingdom, marine insurance in the context of mutual insurance, does not require payment of premium before a risk is covered because the Marine Insurance Act 1906 allows premium to be paid at a later or future date.[169] Under-Nigerian law, it is expressly stated that the premium must be paid before cover, non-compliant policies will not only be invalid but will be of no effect.[170]This provision though in the Nigerian Insurance Act, was not implemented until the NAICOM '*Guidelines on Insurance Premium Collection and Remittance'* dated January 2013, was released.[171]

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[163] *Re Claim Direct Test Cases (*2003 Lloyd's Rep L.R. 680.
[164] *Montreal Assurance Co v MacGililvray* (1859) 13 Moo PC 87
[165] *Palmer v Phoenix Mutual Life Insurance Co* 59 Sickols 63 (84 N.Y. App) (1881)
[166] Cronkhite v Accident Insurance Co 35 Fed Rep 26 (1888)
[167] John Birds, Lynch and Milnes, *MacGillivray on Insurance Law* (Sweet & Maxwell, 12th Edition). 5 (MacGillivray).) 177.
[168] Market Conduct Rules on Insurance Premium Collection of the Ghana National Insurance Commission, paragraph 3.
[169] Marine Insurance Act 1906, s 31. See also MacGillivray (n 216) 175
[170] Insurance Act, s 50.
[171] Olusegun Yerokun, *Insurance Law in Nigeria* (1st Edition, Princeton Publishing Company, 2013)

Such policies pose challenges to multinational insurance because they increase the compliance and regulatory burden that must be satisfied. This is one challenge that an admitted policy introduces but is not common in non-admitted policies.

A key concern will then be the legal status of payment of premiums by instalment. In Nigeria, a policy will be void and of no effect if the premium is not paid before cover. However, in England, MacGillivray argued that payment of the premium by instalments is permissible and it is for convenience; thus, where for example an insured dies before fully paying the premium, the balance will be deducted from the sum insured.[172]

3.6. Drawbacks of Non-Admitted Policies

As much as non-admitted policies in an MIP have their benefits, there are certain drawbacks and negatives that are inherent in the use of non-admitted policies. These drawbacks are discussed briefly below:

3.6.1 The Question of Legality of Non-Admitted Cover

The laws of many countries expressly prohibit the conduct of unauthorised non-admitted insurance business within their territories. Despite the creation of the World Trade Organization in 1995 and the ascension of many countries into the WTO,[173] many of these countries have not extended their trade liberalisation obligations to their domestic insurance markets. Ironically, joining the WTO has led some states to unbundle their public monopolies and deregulate their economies through trade liberalisation measures, but this has not translated into a shift from admitted insurance approach to non-admitted.

The position in Nigeria has been discussed extensively in other parts of this work, particularly Chapter 4. Non-compliance with prohibitive provisions attracts penalties and sanctions. Some of the penalties associated with illegal conduct of non-admitted business includes inter alia imprisonment of brokers, senior officers of both the insured and insurer, severe fines and interest, which could be several times the value of the premium paid, imposition of premium tax, tax penalty and interest for failure to deduct or failure to deduct and remit taxes to the

[172] MacGillivray (n 216) 192
[173] The Agreement Establishing the World Trade Organization.

relevant tax authorities. In Nigeria, an insurance brokerage firm which conducts unauthorised business will upon conviction be liable to a fine of N250, 000 and or imprisonment for a period of two years and the firm will be mandated to refund any money paid by any insured.[174] An insurance firm that transacts with a brokerage firm on any illegal insurance business will be liable, on conviction, to a fine of N500, 000 and to refund any money paid by any insurer.[175] Any firm that is not licenced but conducts non-admitted services as a loss adjuster will, upon conviction, be liable to a fine of N250, 000[176] and any insurer that conducts insurance business with such a loss adjuster will be liable to a fine of N100, 000.[177] Nigerian law requires that all imports into Nigeria must be procured from an admitted insurer and any importer, broker and clearing and forwarding agent that contravenes this provision will be liable, on conviction, to a fine of N500, 000.[178] The most severe of these penal provisions is applicable where a person transacts insurance business with a foreign insurer; such an action which is prohibited, [179] and such a person will be liable, upon conviction, to a fine which shall be five times the value of the premium and to a three year term of imprisonment.[180]

With respect to the above penal provisions, there are two issues that arise, the first is that the approach adopted in Nigerian law may not be as effective as the draftsmen would have envisaged, and may be a bit slow because the form of penalty recognised in the Insurance Act 2003 can only be imposed by a court of law and upon conviction only. The problem with this is that the court system in Nigeria is slow; hence, the trial could drag on for many years and could be frustrating. Even when the trial is concluded, the maximum penalty contained in the Act is paltry for such a multimillion-naira sector. The monetary penalty is so small that on its own, it can create incentives or insurance parties to contravene it. A very real weakness of the Nigerian admitted system and its prohibition or control of non-admitted insurance is that sanctions can only be imposed on a non-admitted insurer, or its officers are tried and convicted by a Nigerian criminal court. However, the constraint will be to compell non-admitted insurers and their officers to attend a criminal trial in Nigeria, in view of the fact

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[174] Insurance Act 2003, s 36(8)(a).
[175] Insurance Act 2003, s 36(8)(b).
[176] Insurance Act 2003, s 45(7).
[177] Insurance Act 2003, s 45(8).
[178] Insurance Act 2003, s 67(4).
[179] Insurance Act 2003, s 72(1).
[180] Insurance Act 2003, s 72(3).

that they are foreign residents and Nigeria does not have the legal and diplomatic capability to compel them to appear in Nigeria. The implication of this is that while Nigeria is involved to illegal insurance transactions it could be the subject of a criminal trial; the main criminal party, which is the foreign insurer, may not be subject to a criminal trial and conviction because section 36 of the Constitution of the Federal Republic of Nigeria does not permit trial in absentia. The solution to this problem will be for the Nigerian Insurance Act 2003, to be amended and the criminal penalty changed to administrative penalty, which can be imposed by NAICOM whenever they establish a prima facie case of breach of the Act.

However, it should be pointed out that a positive aspect of the approach to punishment of illegal non-admitted insurance business in Nigeria is that the law makes clear provision for refund to be made by an insurance broker or loss adjuster to an insured that procures illegal insurance cover from a non-admitted insurance policy. This is instructive because under Nigerian law, an illegal cover is void and of no effect. Detailed work on legality of non-admitted insurance is contained in later parts of this work.

3.6.2. Tax Deductibility of Premium Payment

In a typical non-admitted insurance policy, the primary insured is the parent company of the multinational company; however, the subsidiary (or subsidiaries) is expected to make contribution to the premium payment based on an agreed premium sharing formula that will be proportional to the cover it enjoys under the non-admitted master policy. The parent company is expected to pay premium taxes in the country of its residence. Arriving at the tax that is expected to be paid, a complex tax computation is adopted by first calculating the adjusted profit of the subsidiary. The next stage will involve calculating the assessable profit of the company and finally the total profit of the company.[181]

The calculation of the adjusted profit of the company, first requires an adjustment to eliminate subjective considerations, for it to be a near perfect and an objective reflection of the profit.[182] Hence the law permits deduction of certain qualifying expenses, that have contributed “wholly”, “exclusively”, “necessarily” and “reasonably” in arriving at the profit. The

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[181] Arogundade J, *Nigerian Income Tax and its International Dimension* (Spectrum Books, 2005) 174-193.
[182] Companies Income Tax Act LFN 2004, s 24 and 27 (CITA).

Nigerian Companies' Income Tax Act 2004 also specifies certain expenditure that is clearly not deductible.[183] The qualifying conditions for expenditure to be deductible or allowable are that it must be "wholly" applied in the making of the profit, which also means that it must be "entirely" applied.[184] The courts in ***Gulf Oil Company v FBIR***[185] have also interpreted 'necessarily' to mean appropriately or inevitably[186] these three conditions must be present.

The key question in the context of multinational insurance programme is whether in the course of computing its taxes, premiums paid to a non-admitted insurer by a subsidiary either directly or through its parent company, will be treated as an allowable and deductible expense? The answer is more likely to be in the negative, because the requirements of necessarily and reasonably would not have been satisfied, especially because of its outright illegality. This automatically renders the premium payment a non-allowable expense.

This is a huge demerit for non-admitted programmes, because it will simply mean that a company has thrown away an opportunity for some tax savings. Although it could be argued that premiums on just one subsidiary may not appear significant when examined from the size of the balance sheet of the local subsidiary or the parent company; however, when the premiums paid by separate subsidiaries are aggregated, then the effect and extent of the lost opportunity for tax savings could become significantly more noticeable. This in effect could safely lead to the conclusion that amounts and income that ought to have been saved, would completely be lost through forfeiture of a legitimate tax saving window. Overall, this becomes a strong advantage that admitted insurance have over non-admitted.

3.6.3. Payment of Premium Taxes

In jurisdictions where non-admitted insurance is permissible, there is always the likelihood of the regulators imposing higher premium taxes on such non-admitted insurance companies.[187] This is notwithstanding the principle of non-discrimination and most favoured nations' obligations under the WTO treaties that prohibits all forms of discrimination in

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[183] CITA, s 27.
[184] *Gulf Oil Company v FBIR* [1985] FHCLR 1.
[185] ibid.
[186] ibid.
[187] Brian Casey and Dean Conlin, 'State Insurance Premium and Other Insurance Taxes' (2009) Lexis News Room.

international trade of goods and services.[188] In other words, where permissible under domestic law, a local tax authority may impose premium tax for all premiums paid within its jurisdiction; this may be the case even in situations where the law permits a non-admitted insurer to operate, which may equally permit the regulators to impose higher insurance taxes on the non-admitted insurer despite extant WTO obligations.[189] This may be a particularly attractive option for most developing nations that may seek to justify such positions on the basis that they have to protect their domestic economies. In addition, there is an incentive for nations to adopt such a stance because only a state can contest any form of breach of WTO obligation; thus, aggrieved business concerns will lack the necessary *locus standi* to challenge the higher premium taxes before the WTO Dispute Settlement Body (DSB).[190]

Another disadvantage that flows from the above is that local regulators may mandate the non-admitted insurer to reinsure a percentage of the policy with an admitted reinsurance company. This may be an approach designed to retain some of the premiums within the domestic economy, retain some foreign exchange domestically and to ultimately protect the domestic economy.[191]

3.6.4. Taxes on Claims Payment

The tax treatment of claims payment received by a local subsidiary company is a significant challenge associated with non-admitted programmes. Local tax authorities are always seeking new ways to increase revenue for the government through taxes, by gathering many more persons within the tax net. Consequently, some levels of over-zealousness are exhibited by tax authorities in the discharge of their statutory duties.

In the course of these over-bearing regulatory exercises, non-admitted multinational insurance programmes become targets. When a non-admitted claim is paid to an insured and the local tax authority classify it as unearned income, it could be subjected to local tax. This is particularly the case where the claim payment is to be paid offshore to the parent company and not to the local subsidiary. The amount paid will therefore unquestionably be treated as

[188] General Agreement on Trade in Services 1994.
[189] General Agreement on Tariffs and Trade, Art. 1 and 2; Trade Related Aspects of Intellectual Property Rights, Art 4.
[190] Agreement Establishing the World Trade Organization, Annex 2.
[191] Hayden (170) 32.

unearned income under the tax law of the jurisdiction of the parent company or any other tax jurisdiction where the claim is paid.[192] Where domestic law prohibits non-admitted insurance, any payment made to a local insured will equally be treated as unearned income and will therefore be subject to tax.

In circumstances where the unauthorised non-admitted cover is not detected by regulators and eventually a claim payment is made offshore, the local insured will often be confronted with the challenge of bringing the claim payment into the domestic financial system. The challenge will arise because the company is expected to be able to explain and disclose the source of the funds and the means through which it was earned; this is in line with money laundering legislation that imposes obligations of disclosure of the source of the funds.

3.6.5 Non-Existence of Relevant Local Professional Services

Multinational insurance goes beyond merely executing an insurance contract, exchange of policy documents and payment of claims. There is a great degree of professional services involved in the process of managing an insurance contract. When a loss arises under an insurance contract, it is expected that the required machinery will be put in place for proper risk assessment to be conducted, and a thorough claims investigation to be carried out. The implication of this is that the services of actuaries and loss adjusters will be specifically needed when loss arises. The actuarial experts will be required to gather correct information on previous claims. Examiners may also be involved throughout the entire process and will seek to establish a number of factors like coverage, liability and damage. The examiner will usually also make some recommendations regarding the settlement amount.

On the other hand, loss adjusters are required to make a claim adjustment to reflect the appropriate levels; hence they must visit the scene of the loss, investigate damages, interview witnesses among others. Other experts who are likely to be involved in the claim settlement process are, reconstruction experts, private investigators, lawyers, auditors, accountants, cost managers, engineers, support personnel, rehabilitation experts, among others. This indicates the extent of expertise required in proper claims management and a reasonable level of efficiency and sophistication must be exhibited. However, this will always be an issue of

[192] CITA 2004.

great concern in the context of a non-admitted because of the question of ready and available local capacity to meet the above standards. If there is no local capacity to provide these services, the insurer will therefore be obliged to fly in personnel from outside the non-admitted jurisdiction to perform the required expert services. This will no doubt add to the cost burden on the multinational insurance programme.[193]

3.7. Forms of Non-Admitted Policies

Having discussed the nature, strengths and weaknesses of non-admitted programmes, it is expedient to analyse various forms of non-admitted programmes. This aspect of the thesis will discuss the internal workings of a typical non – admitted policy; hence, it will not have many legal issues. The essence of this discussion is for a proper understanding of the issues of legality and the tax concerns that will be presented and analysed in Chapters 4 and 5 of this work.

The major forms of Non – Admitted Policies are –

- *Single global policy insurance policy or master policy with worldwide coverage*;[194]
- *Single global insurance or master policy and separate stand-alone local policies, which is also called a combined Master programme*.

3.7.1. Single Global Policy or Master Policy with Worldwide Coverage

This is an insurance policy that is issued in the home jurisdiction of a parent company, covering both its local domestic operations and the operations of its subsidiaries globally. This therefore means that the policy operates both as a fully admitted policy in the jurisdiction it is issued and at the same time as a fully non-admitted programme in the jurisdictions of the

[193] Hayden (n 170) 33.
[194] Anup Seth, 'Global Insurance Programs' (GIRO Conference and Exhibition, Liverpool, 14 October 2011) .3 (Seth); David Halperin, 'How to Build a Multinational Program' (2012) Chartis Publication 3 < http://www.aig.com/Chartis/internet/US/en/How%20to%20Build%20a%20Multinational%20Program_tcm3171-421131.pdf> accessed 27 June 2014.

parent company's subsidiaries.[195] This therefore means that only a single master policy[196] is issued, for which the parent company is the insured.

3.7.2. Combined or Controlled Master Policy

In simple terms, a controlled master programme is an admitted policy for the parent company that contains extended coverage for the host territories of subsidiaries of a multinational company.[197] That is, it is a combination of a master insurance programme and several independent and interlinked local policies.[198] In effect, this approach to multinational insurance is a combination of both locally admitted policies and non-admitted Difference in Condition (DIC) and Difference in Limits policy (DIL).[199]

The DIC and DIL policies are designed to address the limitations on the local policies and to address gaps in the local policies.[200] In other words, the DIC/DIL coverage is intended to sit above the admitted insurance policy by providing additional cover if the local policy proves to be insufficient, and will be activated if a local policy fails to fully cover an exposure.[201] The local policies are usually designed and taken out to ensure that compulsory insurance obligations are met.[202]

In more specific terms, a DIC cover provides indemnity when the terms and conditions of the master policy are broader than those of the local policy; at such points, the insured can activate the DIC cover in the master policy to drop down in order to indemnify those uncovered terms and conditions. A DIC cover is designed to operate as a "wrap around" broad policy that provides extended cover for perils that are not contained in a normal standard policy. While the DIC relates to the scope of coverage, DIL relates to the amount of claim involved. Hence, a DIL cover provides insurance coverage in circumstances where the loss exceeds the limit of the liability under the local policy; at such a point, the master

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[195] AIG, 'A Guide to the World of AIG Multinational Insurance' AIG/Chartis Publication (AIG)
[196] A master policy is an insurance agreement executed between both the insured and insurer and it is designed and structured to cover risks and insurable interest in several states, nations or jurisdictions.
[197] AIG (n 237) 7.
[198] Seth (n 236) 4.
[199] Hayden (170) 33.
[200] Allianz, 'International Insurance Programs' (2008) Publication 13 (Allianz IIP).
[201] Zurich, 'Managing Multinational Insurance Programs' (2011) Zurich Publication.
[202] Robin Federici, 'International Insurance – Controlled Master Packages' (2012) Insurance Educations and Training Associates Materials).

policy drops down to indemnify the insured for the remaining insured amount. A DIL clause is a provision inserted in a master policy that provides cover in monetary terms for any pecuniary difference between the locally admitted policy and the limit of the master policy.[203] In other words, where the total amount of the claim exceeds the contractual provision in the local policy, the limit of cover applicable under the master policy can be activated.[204]

The nature of a controlled master policy can take several forms; for example, it can primarily involve the purchase of the best and widest available local cover and a non-admitted cover is purchased to operate as an additional cover.[205] Another option available is for the company to purchase the most minimal mandatory/compulsory cover and top it up with a non-admitted comprehensive cover. The common and most basic structure for a controlled master programme is when local subsidiaries of a multinational company purchase the locally admitted cover, while the parent company seeks out an insurer that has licenses directly or indirectly (fronting)[206] in the other jurisdictions. In the latter category, the insurer will bear responsibility for the premium collection, payment of applicable taxes, payment of claims and arranging reinsurance with its parent insurance company.[207]

Further to the above, the claims settlement process is made in the jurisdictions in which the risk is situated. A controlled master policy can be structured in various forms, which will be discussed below. One must quickly raise a caveat that there is no hard and fast rule in the designing of combined or controlled master policies, rather, exigencies and the peculiar needs of the insured and the insurers and existing capability will ultimately influence the model of the combined master policy to be adopted. Moreover, various international insurance companies have designed models that they have mostly kept as trade secrets, or in some occasions, such approaches have been patented as their intellectual property. This buttresses the fact that a suitable model is a matter of need, circumstance, innovation and creativity.

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[203] IRMI, 'Difference in Limits Clause' (2014) IRMI Glossary.
[204] Blackfriars Group, 'What is Difference in Condition and Difference in Limits' (2014) Insurance FAQ.
[205] Hayden (n 170) 33.
[206] According to Robert Hall, fronting "is the process by which a primary insurer cedes all or virtually all of the insurance risk of loss to a reinsurer who controls the underwriting and/or claim handling process either directly of through a managing general agency" in Robert Hall, 'Fronting: Business Considerations, Regulatory Concerns, Legislative Reactions and Related Case Law'
[207] ibid 33.

3.8. Designs, Structures and Forms of Controlled Master Programmes

It remains the fact that no particular design is a perfect design and there is no hard and fast rule on what programmes should look like, rather the need, exigencies, preferences of the parties and law will determine the options to be taken. However, a few popular variations of controlled master programmes are discussed below:

3.8.1. Broadest Possible Local Cover and a Non-Admitted DIC/DIL Cover

The first combination option involves the local subsidiary purchasing the broadest possible local cover available in the domestic insurance market. Such a cover is then backed up with a non-admitted master DIC/DIL policy. This brings in the combined benefit of compliance with local regulatory requirement and compliance with tax obligations through the payment of local premium tax.[208]

This type of non – admitted policy requires that premium payment is made to the local insurer, in the local currency, which effectively eliminates the risk associated with purchasing foreign currency and foreign exchange rates volatility. Under this arrangement, the subsidiary will be required to monitor the administration of the domestic policy, while the parent company of the insured will monitor the administration of the non-admitted cover.[209]. This approach is technically a plus-plus, in the sense that the best available local capacity is appropriated by the local subsidiary and the best possible global cover is equally appropriated by the parent company for its benefit and the benefit of the local subsidiary. Thus, there is sufficient insurance cover for most possible risks. This arrangement is less likely to attract the attention of local regulators and as a result, it is less likely to suffer from excessive regulatory scrutiny.

3.8.2. Compulsory Insurance are Covered by Local Programmes and other Risks are covered by Non-Admitted DIC/DIL Policy

This is more or less a minimum or base compliance approach because the balance/distribution of local and non-admitted cover is such that the only local covers purchased are those that

[208] Hayden (n 170) 34.
[209] ibid.

are made mandatory under the law.[210] The obligation to purchase the minimum cover is made by the local subsidiary and it will also bear the responsibility of managing it. The DIC/DIL cover is purchased offshore by the parent company and the latter policy is drafted and designed to provide cover for all other non-compulsory risks. Where this type of controlled master programme is adopted in Nigeria, the local subsidiary will be required to purchase insurance cover like group life insurance for all its employees,[211] motor vehicle insurance covering third party liability,[212] professional indemnity insurance[213] and employees' compensation cover.[214] Any other cover can be purchased by the parent company under a non – admitted insurance arrangement.

Like the first option, this second covers all the benefits associated with a locally admitted policy, while at the same time it provides the element of central control, which is craved and sought after by most headquartered risk management departments. The implication of such an approach is that the master policy will be relied upon for the majority of the cover. This has its challenges (which has been analysed in paragraph 3.6 of this Chapter), which are increasing because of the increasing scrutiny that is applied to non-admitted policies.[215]

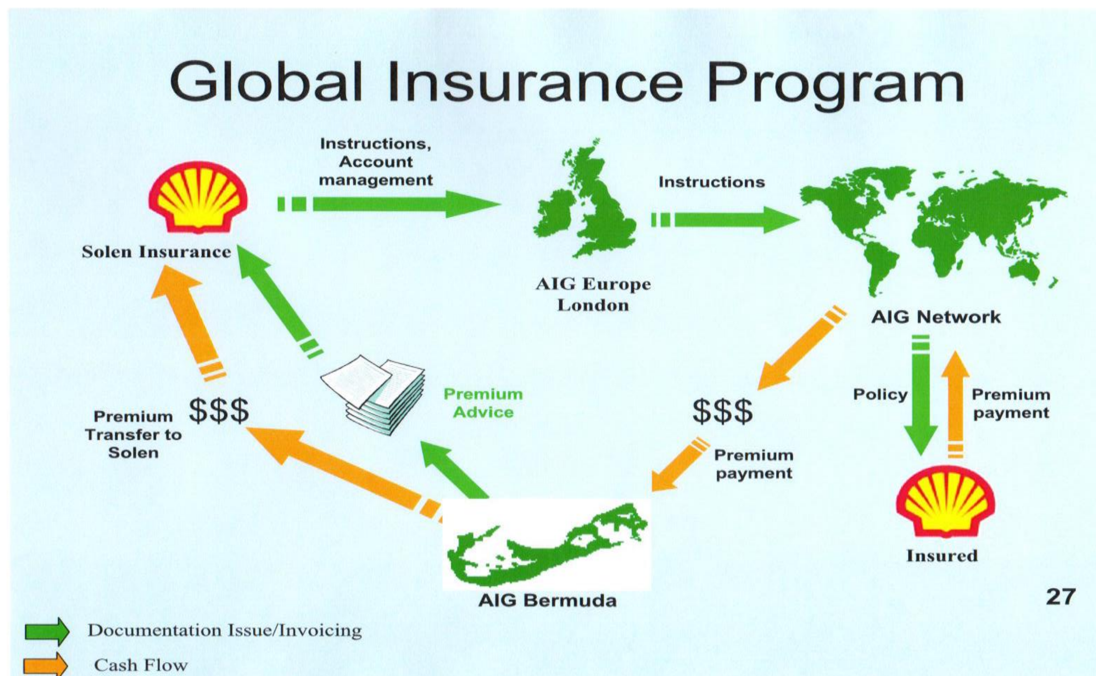
3.8.3. Insurance through a Local Insurer but Re-Insuring through a Non-Admitted Captive Insurer

A captive is an insurance company that provides insurance and reinsurance services to its non-insurance parent company and to subsidiaries of the parent company.[216] Normally, a captive insurer operates as a form of self-insurance where the insurance company is owned by the insured but the insurer provides the services of a commercial insurer to the insured.[217] This type of non-admitted cover is popular among large multinational oil and gas companies because the subsidiary is required to purchase all cover locally, which will also be managed

[210] Some of the compulsory insurance under Nigerian law are: builders liability – under the Insurance Act 2003 and under the Lagos State Building Control Law 2010; occupiers liability – under the Insurance Act 2003 and Lagos State Law; employers liability – (Group Life) – under the Pension Reform Act 2004; employers liability – under the Workmen's Compensation Act 1987; healthcare professional indemnity – under the National Health Insurance Scheme Act 1999; motor third party liability – under the Insurance Act 2003.
[211] Pension Reform Act 2004, s 9(3).
[212] Motor Vehicle (Third Party) Insurance Act 2004, s 3(1).
[213] National Health Insurance Scheme 1999, s 45.
[214] Employees' Compensation Act 2010, s 1 – 6.
[215] Hayden (n 170).
[216] Saad Hafiz, 'Understanding Captive Insurance Company' (2009) RBC Wealth Management Publication 1.
[217] Shanique Hall, 'Recent Developments in the Captive Insurance Industry' (2012) CIPR Newsletter.

and administered locally. Afterwards, arrangements will be made to cede by way of reinsurance; part of the risk to an offshore captive insurance company. The ceding will involve a non-admitted reinsurance of the highest possible percentage permitted by law to be ceded to overseas entities. At the headquarter level, the multiple local and captive-based policies are grafted into a single international policy anchored on the captive insurer. This centrally controlled risk will subsequently be reinsured with another commercial reinsurer.

This approach appears quite simple but is one that will require hands on management and continuous assessment to ensure that premium payments and claim payments are done timeously and in the most appropriate sense and context.[218] Captive insurance is becoming a popular option in designing multinational insurance. The model used by Shell is analysed by Claude Gallello, Martin, Strnad and Adrea Koroluk, and represented below:[219]



Based on this unique model applied by Shell, it ensures local subsidiaries obtain cover up to a maximum value of USD 20 million, while the standard policy cover for locally issued policies is USD 250 million. Also, the local policy limits for excess property cover for large exposures is USD 155 million. There is also a standard liability cover for each of its

[218] Hayden (n 170).
[219] Claude Gallello, Martin, Strnad and Adrea Koroluk, 'Is Non-Admitted a Non-Starter? Global Program and Staying Legal in the 21st Century' (RIMS Conference, April 2008).

subsidiary operating locally. The Shell Group Captive Company, SOLEN, provides reinsurance services on the local policies to protect its balance sheet.[220]

[220] Gallello (n 261) 28.

3.8.4. The Use of one Non-Admitted Master Policy, Local Policies and Policies from Network Partners

This approach is a very creative and complicated one, designed to be distinct from the traditional approach and to be able to retain the benefits of a non – admitted policy, while at the same time complying with local laws and regulations. This approach entails a parent company obtaining a global cover that is supported by admitted policies obtained by its subsidiaries and it also arranges insurance cover through a third element, which is the network partners of the global insurer managing the global insurance policy.

The network partners are usually licenced insurers within individual domestic markets, while the global insurer or lead insurer is a non – admitted insurer that issues a non-admitted global master policy. The global policy, and those issued by its network partners, are likely to be similar in structure, coverage, wordings and scope.[221] Normally, a network country manager is appointed to manage the network service and the network manager will be responsible for maintaining high network quality standards, promotion of the network teams and ensure compliance with the global insurer's business practice guides and standards.[222] Other responsibilities to be borne by the country manager includes filing reports with relevant regulatory bodies, making group and network-wide updates on the changes within that jurisdiction and making contributions aimed at improving the global network.[223]

The lead insurer could choose to transact with either a wholly or partly owned network firm; this has the advantage of reduced cost as a result of economy of scale and greater efficiency. This flows from the fact that pricing across the wholly owned network firms is usually standardised and structured. Furthermore, there is a greater degree of consistency and stability associated with wholly owned network, in the sense that it introduces some level of uniformity and integration of the IT infrastructure, the same uniformity of standards is extended to other areas including the code of conduct for personnel, standards and corporate values.[224] In addition, it is easier for the local insurer to implement agreed plans of action. In

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[221] Allianz IIP (n 242)
[222] Claude Gallello, 'Global Network Practice' (2013) Willis Publication 1.
[223] ibid 1.
[224] Carla D'Andre and Denise Berger, 'Going Global with Wholly Owned Networks' *Risk Management Society Magazine* (New York)

contrast, non-owned networks do not deliver the same level of synergy and speed, and switching from one network to another poses its own risks and challenges, such as frictional costs, IT integration, ignorance on the real performance capability of the partner.[225]

All the above analysis can effectively point to the fact that while the first and second structures for multinational programmes appear to follow the traditional approaches, the third and fourth options appear to be more innovative, modern and more compliant with existing corporate, insurance and tax regulatory framework.

3.9. Controlled Master Policy: Interactions between the Master Policy and the Local Policies

In a controlled master policy, there is frequent interaction between the master policy and the local policy. Both policies are always linked with the interplay of Difference in Limit (DIL), which triggers the drop in limit clause and a Difference in Condition (DIC), which triggers the drop in coverage clause. A controlled master policy is quite unique because it introduces the element of combination of the strengths of the master policy and one or more local policies. The wording on the each of the policies will be key to determine the nature of interaction between the master and local policies. In other words, the obligation of the global and local insurers will flow directly from the wording of the policies. It is always important to ensure that a local policy is made independent of the master policy and that its limits cannot simply be eroded by payments under the master policy. This effect is usually achieved by including two special clauses into the policy document, they are the excess in limits of a liability clause and a drop-down clause.

An excess in the limit clause is a clause that provides additional cover beyond the limit provided by an underlying policy (i.e. the local policy). That is an excess in limit of liability clause entitling the benefiting party to rely on the excess cover (usually in the form of a DIL or DIC) contained in the master policy;[226] however, it could also impose some limit on the extent to which the master or umbrella policy can be relied upon. Such a limit could be an

[225] ibid.
[226] Joana Roberto, 'The Rise of Global Insurance Policies' (2016) For the Defence (May 2016, 21 – 26)

annual limit or an aggregate limit on the entire policy.[227] In ***Manpower Inc v Insurance Company of the State of Pennsylvania***[228], a US Wisconsin court had outlined some conditions for the application of a DIC/DIL master policy, which stated that the local and master policy must be compared and it must be established that the master policy provides broader cover than the local policy and in addition, the extent of the coverage under the local policy must be established.

Occasionally, in a multinational insurance programme, the insured could run into difficulty if the master policy and the local policy are not properly integrated; hence, even if there is a DIC/DIL clause, which provides excess cover, it will not be activated unless the wording is properly crafted through the incorporation of a drop-down clause.[229] It is preferable that the local policy should incorporate by reference the global policy by stating that it is a part of the global policy and is bound by the limits of the global policy.[230] The effect of a drop-down clause is that it requires an excess insurer to provide insurance cover when stated conditions are satisfied; for example when the underlying insurer is insolvent or underlying aggregate limits are exhausted.[231]

The drop-down clause provides a contractual basis for the excess cover to be triggered under the master policy. That is where the local policy, which is the primary cover is exhausted, the cover under the master policy, which is the umbrella policy will be activated.[232] Reliance on a drop-down policy or another policy to apply when the primary policy is no longer available can only apply if it is expressly agreed contractually.[233]

The workings of a drop-down clause in a multinational insurance programme has been quite problematic and has been subject to divergent judicial interpretation in the courts in the United States of America. In England, in 2009, the High Court of Justice, Queen's Bench

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[227] Zurich, 'Excess Liability Insurance Policy' < https://www.zurich.com.au/content/dam/ australia/ general_insurance/ corporate_liability/excess_liability_insurance_policy.pdf> accessed 25 December 2015.
[228] Manpower Inc v Insurance Company of the State of Pennsylvania 807, F.Supp 2d 806, 809 (ED Wis 2011)
[229] Nosizi Ralephata, 'True Excess Carrier Issues: Trigger, Duty to Defend and Drop Down' (2014) 44 The Brief.
[230] Hayden (n 170) 38.
[231] Alexander Oddy and Sam Vardy, 'Can a Drop Down Clause in a Master Policy Provide Excess Layer Coverage?' (2009) Herbert Smith Insurance and Reinsurance Litigation E-Bulletin.
[232] Anne Marie O'Brien, 'Three Facts about Excess Policies Drop Down Cover' (2013) Midwestern Insurance Law Guide.
[233] *Sybron Transition Corp. v. Sec. Ins. of Hartford., 258 F. 3d 595, 598 (7th Cir. 2001)*

Division had an opportunity to make pronouncements on the workings and application of a drop-down clause in a multinational insurance programme, in the case of ***Flexsys America LP v Insurance Company Limited***.[234]

The most problematic issue that arises in the interaction between a master policy and a local policy in a multinational insurance programme, is the determination of the event or timing of the trigger of the DIC/DIL cover under the master policy. Normally, the excess liability insurer, responsible for the master policy, does not have any problems in so far as the local or primary insurer performs its obligations and provides sufficient cover for losses. The courts[235] have repeatedly emphasised that the determination of the trigger in a master policy must be determined based on a clear interpretation of the wording or language of the policies and it should be determined on a case by case basis.[236]

Generally, US courts have taken the position that based on the wording of master and local policies; cover in a master policy cannot be triggered except if the local policy has been exhausted either by judgment or by settlement between the insurer and the insured.[237] Thus, where the wording of the policies is not ambiguous, courts have held that the master policy is not triggered until the local policy has been exhausted. *In* ***Comerica v Zurich America Insurance Co***[238] the wording in the master policy that fell for construction stated that the master policy will not cover losses not covered under the local policy, except, for losses that the local policy could not cater for because it has been exhausted. Thus, in the instant case, a loss occurred and the insured entered into a settlement based on which the insurer paid compensation that is less than the value of the local insurance cover and is also less than the loss, the insured sought to trigger the excess coverage under the master policy. The court held that the wording of the policy was clear, except if the local policy has been exhausted by reason of payments for loss, the master policy cannot be triggered. In a similar breath, in a 2012 decision *of* ***JP Morgan Chase & Co v Indian Harbur Insurance Co***[239] the master policy contained a condition precedent that it will become active only where the underlying

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[234] *Flexsys America LP v XL* [2009] EWHC 1115 (Comm).
[235] *Comerica v Zurich America Insurance Co* 498 F. Supp. 2d 1019, 1022 (ED Mich. 2007).
[236] Anthony Lanzone and Dennis Burke, 'The Drop-Down Liability of Excess Insurers' (1989) The Brief 36.
[237] Nosizi Ralephata, 'True Excess Carrier Issues: Trigger, Duty to Defend and Drop Down' (2014) 44 The Brief.
[238] *Comerica v Zurich America Insurance Co* 498 F. Supp. 2d 1019, 1022 (ED Mich. 2007).
[239] *JP Morgan Chase & Co v Indian Harbur Insurance Co* 947 NYS 2d 17, 20 (App Div 2012)

insurer had paid the full amount under the primary policy. However, in the instant case, when the loss occurred, the insured had two insurance policies and a master policy paired to one of the insurance policies. The insured entered into a settlement arrangement with the two primary insurers and received joint compensation, which was higher than the amount insured under the subject master policy; however, the compensation was not clearly allocated to each of the primary insurers because it was paid jointly. The insured sought to trigger the excess cover under the master policy. The court held that it was unclear if the condition precedent for the master policy to be activated had been met because of the failure to allocate the joint compensation with the detailed contribution of each of the primary insurers.

The decision of the courts in the above cases is straight forward and is in line with the interest of justice because the wording used in the insurance policy is clear and unambiguous; hence, if the courts had imported extraneous meanings into these policies, it would have caused hardship to the parties, particularly to the insurer. Insurance business is one which requires that certainty and legal interpretation should take such a path of certainty of words and their interpretation;[240] where, insurance policies are given extraneous interpretation, it could create a situation of uncertainty and erode market confidence in the insurance industry.

The US approach is clear and the position of the US courts is fair and much in line with the literal rule of interpretation, which requires that unambiguous words should be given their plain and ordinary meanings in the course of interpretation of statutes.[241] The above decisions of the courts have been easy because of the unambiguous wording that was the subject matter of construction. The process of identifying and determining the trigger of a master policy becomes complicated where the wording of the policy documents is ambiguous and usually, in order to protect the insured, the courts in the US will normally interpret such clauses in favour of the insured.[242] In the case of ***Zeig v Massachusetts Bonding & Insurance Co***[243] the clause that was up for interpretation stated thus – ''As excess and not contributing insurance, and shall apply and cover only after all other insurance herein referred to shall have been exhausted in the payment of the claims to the full amount of the expressed limits of such other insurance''. The court interpreted this clause to be ambiguous and held that the

[240] Ben Macfarlane, 'Insurance Contract Certainty Revisited' (2006) Mondaq
[241] *Attorney General of Bendel State v Attorney General of the Federation & Ors* (1981) 9 SC 78.
[242] *Zeig v Massachusetts Bonding & Insurance Co* 23 F2d 665 (2d Cir. 1928)
[243] *Zeig v Massachusetts Bonding & Insurance Co* 23 F2d 665 (2d Cir. 1928)

conditions stated in the policy was too stringent because it required the insured to utilise the full amount of the policy sum and must exhaust the underlying policy before it can call on the master policy. The court further held that the insurer had no rational interest in demanding that the full amount under the primary policy must be collected, the court held that the excess limit insurer should have concerned itself simply with the excess of the limit coverage. On this basis, the court held that the clause had no rational advantage to the insurer and made the result harmful to the insured.

Since, the decision in Zeig's case, courts in the US have relied heavily on the phrases – 'no rational advantage to the insurer' and 'result harmful to the insured' as tests or basis for determining whether to judicially vary the terms of the policy and compel the excess liability insurer to provide cover for the insured. Hence, in ***Maximus v Twin City Fire Insurance Company***[244] the clause that fell for interpretation was that the cover in the master policy will apply ''only after all applicable underlying insurance with respect to an insurance product has been exhausted by actual payment under such underlying insurance and shall only pay excess of any retention or deductible amount provided in the primary policy and other exhausted underlying insurance''. In this case, when loss arose, the insured entered into settlement with its primary insurers and they paid less than the amount indemnified in the primary policy, while the insured absorbed the remaining losses in order to lay foundation to claim excess of limit of liability cover under the master policy. The court in construing the above clause, held that the phrase 'exhausted by actual payment' was ambiguous because it was not specific in its demand that the underlying insurers must themselves pay the full amount of the policy limit.

The approach adopted by the courts in cases where the wording of the master policy appears to be ambiguous may appear to be harsh on the excess cover insurance; however, such a level of judicial activism is necessary to do justice to the parties. It is trite that where the wording of a statute or an agreement are ambiguous, the court is expected to correct the wrong and advance the remedy;[245] hence, it is permitted for the court to go beyond the wording of the statute of agreement to ascertain what the actual objective of the parties were or are. This

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[244] *Maximus v Twin City Fire Insurance Company* 856 F. Supp 2d 797, 799 (Ed Va. 2012).
[245] Bello v AG Oyo (1986) 5 NWLR (Pt 45) 828 @ 871, A – D.

approach towards interpretation is known as the mischief rule of interpretation and it has its origin in the Haydon case.[246]

In extreme application of the mischief rule or the mischief approach towards excess limit coverage, the courts have in numerous cases completely ignored the wording of the actual policy and proceeded to consider other factors. In ***Pereira v National Union Fire Insurance Co of Pittsburgh***[247] the court was called upon to interpret the following wording – ''The company shall provide the insured with insurance in excess of the underlying insurance … only after all underlying insurance has been exhausted by actual payment of claims or losses thereunder. In the event of the depletion of the limits of liability of the underlying insurance solely as the result of actual payment of claims or losses thereunder by the applicable insurers, this policy shall apply to claims or losses as excess insurance over the amount of insurance remaining under such underlying insurance''. The court declined interpreting the wording of the clause with respect to the condition of exhaustion of the underlying policy on the grounds that it would cause hardship to the insured because the underlying insurer had already gone bankrupt.

This brings into focus the issues of the interpretation of a DIC/DIL cover in a master policy, where the primary insurer has become insolvent. The key question is whether that will form a sufficient trigger for the excess insurer to be required to step into the shoes of the primary insurer. As stated above, the courts will always resort to the wording of the policy for interpretation and will resolve such issues on a case by case basis. In ***Continental Marble & Granite v Canal Insurance Co***[248] the wording of the master policy stated that the excess cover insurance will be triggered when the primary policy is 'inapplicable'. The primary insurer became insolvent and the insured sort to rely on the above wording to drop down the master policy in order for it to operate as a primary policy. The court refused to give effect to that interpretation on the grounds that the master policy cannot be a basis of a guarantee against the insolvency of a primary insurer.

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[246] *Haydon's Case* [1584] 3 Co Rep 7a.
[247] *Pereira v National Union Fire Insurance Co of Pittsburgh* No 44 Civ. 1134, 2006 WL.
[248] *Continental Marble & Granite v Canal Insurance Co* 785 F 2d 1258. 1259 (5th Cir, 1986).

However, a contrary decision was taken in the case of ***Reserve Insurance Co v Pisciotta***[249], where the court decided that the excess insurance under the master policy must drop down to provide indemnity for any amount above the amount recoverable under the master policy. The excess insurer was not required to provide cover for the amount within the primary cover.

The decision in Reserve Insurance case appears to be a more balanced approach to the provision of secondary cover when a primary insurer becomes insolvent. Because it does not obligate the excess liability insurer to perform the obligation of the primary insurer rather, it obligates it to perform its exact contractual obligations under the master policy, thus it does not cause hardship to the excess liability insurer, neither does it cause hardship on the insured. With respect to the primary cover, the insured can find solace either in any state-run deposit insurance arrangement that applies to policyholders of insolvent insurers, or they may find solace by queuing as secured creditors of the insolvent primary insurer. Looking at it from the prism of Nigerian law, when an insurer beomes bankrupt and files for insolvency, policyholders are conferred with the status of unsecured but will be ranked higher than other unsecured creditors but lower than secured creditors. In cases of insolvency, the ranking for persons entitled to payment under Nigerian law is as follows – liquidation fees, secured creditors, policyholders, unsecured creditors, staff, shareholders and directors.[250] Based on the above, in cases of insolvency of an insurer, the insured may not be left totally without a remedy as it relates to its primary cover.

One other issue relevant to the interaction between a master policy and local policy is the appropriate treatment when the cover of a local policy is broader than that of the master policy; the issue then is whether in the event of exhaustion of the local policy, the insured can demand that the excess insurer extends cover to the extent of the local cover. This is called reverse Difference in Limit (DIL) coverage because a normal DIL cover involves a master policy, which is broader than the local policy; hence, when the local policy is exhausted, the insured can trigger extension of coverage limits under the master policy. In the case of reverse cover, it is the opposite. When this issue arose in the ***Flexsys America LP v XL Insurance***[251] the court held that it is impossible for a master policy, which is narrower

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[249] *Reserve Insurance Co v Pisciotta* 640 p2d 764, 812 (Cal, 1982).
[250] Insurance Act 2003, s 32(4).
[251] *Flexsys America LP v XL* [2009] EWHC 1115 (Comm).

than the local policy, to be applied beyond its limit and on the terms and coverage scope of the local policy. In England the High Court decision in ***Flexsys America LP v XL Insurance***[252] addressed the interaction between a global master policy and local policies, particularly the interpretation and implication of drop-down clauses. Flexsys distributes products used in the manufacturer of rubber tyres, it was engaged in conspiracy to monopolise the US market for these products and to prevent KKPC from competing with it, and as a result Flexsys incurred liabilities. Flexsys had a local policy worth 1 million USD and an international master policy with limits of 25 million USD. Flexsys relied on its local cover that was exhausted and it sought an indemnity under the international master policy, placing reliance on a drop-down clause. The key policy wording provides as follows:

> *In the event of partial exhaustion of a local policy this Policy will pay in excess of the reduced underlying Limit of Indemnity. In the event of total exhaustion of a local policy this Policy will continue in force as the underlying insurance subject to the terms Exceptions and Conditions of the particular local Policy.*

Flexsys argued that the second sentence should be the basis for the drop-down cover to be activated. XL disagreed, the position the High Court affirmed that the drop-down will not be allowed to drop down because even though it was within the scope of the local policy it was outside the terms of the master policy.

Another English case that has bearing on the working of a drop-down clause and excess in limit clause is ***Teal Assurance Co Ltd v W R Berkley Insurance (Europe) Ltd and Aspen Insurance UK Ltd***[253] BV obtained a professional indemnity cover, designed as a tower of insurance cover, with a primary cover of US$ 5 million provided by Lexington Insurance Co Ltd, and an excess cover with a total limit of US $55 that was underwritten by its captive, Teal Assurance Co Ltd. The entire cover was reinsured with WR Berkeley and Aspen. But the excess and top policy excluded claims emanating from the US and it also incorporated by reference the terms of the primary policy. BV brought claims that emanated from the US and Canada in addition to other claims that in aggregate had exceeded the limit of the primary

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[252] *Flexsys America LP v XL* [2009] EWHC 1115 (Comm).

[253] *Teal Assurance Co Ltd v W R Berkley Insurance (Europe) Ltd and Aspen Insurance UK Ltd [2013] UKSC 57*

cover. The captive insurer argued that liability arose under each excess cover when the liability has been settled or judgment is given to that effect. However, the Commercial Court, Court of Appeal and Supreme Court all held that the coverage for the losses is not triggered when it is presented to the insurer or paid by the insured, but when the loss occurs and in the order in which they are ascertained by judgment, arbitral award or settlement. Furthermore, in accordance with Teal's case, the reinsured cannot manipulate the way it claims against the reinsurer, claims must be presented in the order they have occurred and not in a way that benefits the reinsured.

It is also important for a master policy to contain provisions stating that the same terms and conditions apply to the local policy because an absence of such a clause could become the basis for insured arguing that a loss not contained in the locally admitted policy or even out-rightly excluded thereunder, should be covered under the global policy. This could lead to unintended consequence for the lead insurer.

3.10. Factors Underlying the Strength and Problem-Solving Features of a Controlled Master Policy

The approach adopted so far in some parts of this chapter is the analysis of the internal workings of various forms of multination insurance programme by discussing the strength and problem-solving features of these programmes or policies. It is hoped that through this approach, the nature and workings of these multinational insurance programmes will be appreciated in greater depth. For purposes of consistency, the same will be adopted in closing the discussion and analysis of controlled master policy, as follows:

3.10.1. Compliance with the Extant Regulatory Framework

The very essence for inventing the combined master programmes is to ensure that local regulations are complied with. The various variations of such policies can be adapted and adjusted to suit specific regulatory demands. Though the approach is complicated, it ensures jurisdictions that bar non-admitted policies are accommodated by including local policies and re-insuring the maximum possible limits with a reinsurer that is within the MIP design or utilizing local network partners to provide primary cover in these jurisdictions. Where the parties opt to use a captive they can reinsure through the

captive. This approach ultimately has become the most legally compliant approach available.[254]3.10.2. Reduced Cost and Cheaper

Both admitted and non-admitted policies have cost benefits and limitations simultaneously as discussed earlier. Hence, a controlled programme master policy draws on both admitted and non-admitted programmes in a manner that significantly reduces the cost involvement. Greater cost benefit is drawn when a lead insurer employs the services of some wholly owned networks. These benefits can be transferred to the insured by way of much reduced payments on premiums; furthermore, the fact that a single risk manager or department is involved and often one lead insurer is appointed, it makes it easier to negotiate more favourable terms and conditions, boosted by the benefits of economies of scale.[255]

3.10.3. Premium Tax Payment and Tax Deductibility

A key feature of insurance taxes is usually the obligation to pay premium tax to the tax authorities of the jurisdiction where the risk is situated. Though this apparently could appear as a gaping hole in the cost savings of a grand multinational insurance plan, it however entitles the local subsidiary to deduct the premium paid before assessing itself to tax. The premium tax paid is usually a percentage of the premium, not the whole of it, and since the local subsidiary is entitled to deduct the premium payment, the difference in the two sets of payments becomes its tax savings.[256]

3.10.4. Central Control and Management

Most multinational companies have dedicated risk management departments, and clearly drafted risk management strategies, which is a part of the corporate risk management strategy. To properly co-ordinate such strategies, some level of firm central control of the entire programme must be achieved. This is a benefit that flows from a controlled master programme. Importantly, the control helps to improve cost allocation and to properly scrutinise and manage costs that could raise transfer-pricing concerns.[257] This is key because

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[254] Hayden (n 170) 35.
[255] ibid.
[256] Staurt Dollar, 'Are Insurance Premiums Deductible?' (2014) Financial Advisor; University of California, 'Tax Savings on Insurance Premiums' (2007) UOC HR & B Publication.
[257] Hayden (170) 36; Michael Moody, 'New Concerns for International Insurance Programs' (2012) Roughnotes < http://roughnotes.com/rnmagazine/2012/june2012/2012_06p078.htm> accessed 8 November 2014.

the control and management of risk can be elusive and clumsy. This always requires that a company is hands on with respect to its risk management and for adequate information to be available and within easy reach. Without a proper management of risk, a company stands the risk of being exposed to a chaotic situation, especially where it has subsidiaries and risks scattered around the world. A controlled master programme makes it easier for the risks to be managed centrally and for the management of the risks to be monitored from one location and coordination to be done from that central location.

3.10.5. Enhanced Claims Handling and Uniformity of Cover

A controlled master programme provides the best and most balanced approach in claims handling because claims are to be paid in the local currency, and to a local subsidiary without any concern that the claim payment will be taxed as unearned income. This is particularly instructive because tax authorities are always on the look-out for income that accrues to companies, and any inflow will ordinarily be deemed to be taxable, except if clear explanation or justification can be provided. Such authorities, place greater focus on income that is paid from overseas. However, a controlled master programme helps to prevent that because better explanation and justification are usually available for the tax authorities to see and understand the basis for such income accruals.

Furthermore, a controlled master programme grants uniformity of coverage in that the master and local polices can be integrated, and with the right mix of 'tie-in of limits endorsements', excess limits of liability clause' and 'drop-down clause,' an ideal coverage with few or no gaps can be achieved.[258] In other words, with the right combination of entitlements and limitations, a controlled master programme can guarantee adequate protection and cover for the insured, notwithstanding the state of the available cover, some back-up cover is always available based on the structuring of the master and local policies because it is like a cocktail of policies.

[258] ibid.

3.11. Drawbacks of a Controlled Master Programme

3.11.1. Aggregate Limits

The maximum annual aggregate limit for the entire cover is usually covered under the master policy. This means that where an annual limit has been exhausted in a particular way, the insured group, comprising of parent companies and subsidiaries, will be left without cover. This could present a very deceptive situation, where an insured could erroneously conclude that it has a valid and sufficient cover. In the sense that because of the cap in the maximum cover available, the cover provided could be exhausted by losses suffered by one subsidiary or subsidiaries, whereas other subsidiaries and entities covered by the policy may be relying on the aggregate cover but may not realise that the annual or total limit had been exhausted by other covered entities without its knowledge. This automatically reverses the position of other benefitting entities to one of zero cover and complete exposure to risks.

3.11.2. Complex Documentation

A combined master programme is always characterised by complex legal documentations and the involvement of several parties like insurers, risk managers, brokers and legal advisers. Often, there is also a myriad of documents that need to be negotiated, edited, finalized and executed; these documents could come in the form of fronting agreements, indemnity agreements, reinsurance contracts, the master and local policies et cetera.[259]

3.11.3. Time Duration and Implementation

Setting up a multinational insurance programme, particularly a controlled master programme can be time consuming. Available AIG templates[260] provide an estimated duration of 90 to 180 days for risk and coverage review, they also project that submission development could take between 60 to 90 days; preferring a suitable quote could take between 30 to 45 days and making the entire transaction binding could take 0 to 15 days. That production covers the pre-inception stage.[261] The inception stage involves implementation that will require between 0 to 60 days. The post inception review requires 60 to 180 days, while renewal preparation

[259] Hayden (n 170) 37.
[260] AIG (n 237).
[261] AIG (n 237).

before the expiration of the programme requires 90 to 120 days. In effect, this is the life cycle of a controlled master policy prepared by AIG.[262]

3.12. Conclusion

Having established the premise that unbundling protectionism through the WTO framework may not be as efficient and speedy as desired, especially in the light of globalisation, it was argued in the earlier chapter that Multinational Insurance Programme presents an alternative window for engagement in global insurance business within a private sector and industry driven initiative. The chapter has analysed the meaning and types of multinational insurance programmes, including exporter's package, admitted insurance and non-admitted insurance. Major points of discussion were the solutions proffered by each of these forms of Multinational Insurance Programmes and the challenges that confront these types of insurance products. The chapter also discussed the types of non-admitted insurance and the models applicable in the design of multinational insurance programmes. Also analysed is the role of master policies and local polices and the interaction under a multinational insurance programme through the options of add-on coverage in the form of DIC/DIL covers. The legal issues that arise in the interaction of master policies and local policies were discussed and a more in-depth analysis was attempted on captive insurance programmes.

Chapter Three analysed the solutions provided by an admitted insurance policy which includes among others, compliance with domestic laws, access to local insurance pools, deductibility of local premium taxes and insurance premiums, taxability of claims payment and deductibility of premium payment, better policy and claims management, absence of local language barrier, most suitable for local compulsory insurance and local financing, availability of local control, access to dispute resolution windows, easy benefit of implicit state guarantees and less transaction cost. Conversely, the chapter analyzed the solutions that are inherent in a non-admitted insurance policy, some of which are that it is less expensive, have broader coverage, guarantee that persons with greater technical depth and skill will work on the programme, ensure that insurers with greater financial strength and capacity will work on the programme, guarantee flexibility on control of the programme, among others. The drawbacks of non-admitted insurance are discussed including key issues like its legality,

[262] AIG (n 237).

tax deductibility of premium payment by the subsidiaries of a multinational company, imposition of withholding tax and value added tax on claim payments from the non-admitted insurer and the availability of required expertise at the local level to manage such a complex programme at that level.

Also analyzed are the various forms of non-admitted programmes and the key types of controlled master policies to wit – the broadest possible local cover and a non-admitted DIC/DIL cover; compulsory insurance is covered by local programmes and others risks are covered by non-admitted DIC/DIL policy, insurance through a local insurer but re-insuring through a non-admitted captive insurer and the use of non-admitted master policies, local policies and policies from network partners. The interaction between master policies and the local policies were discussed along with the interplay of Difference in Limit (DIL), and a Difference in Condition (DIC).

The essence of this Chapter was to analyse and simplify the operations and workings of multinational insurance programmes and to therefore set the foundation for a more in-depth and critical analysis of the legal issues that affect this special type of insurance. As a result, the next chapter will focus on the legal issues affecting multinational insurance programmes, from both a global perspective, but also from a Nigerian perspective, which is more specific. The analysis in the next chapter will attempt to answer the question surrounding the legality of multinational insurance programme and more specifically it will closely examine the appropriateness of relying on multinational insurance programme as a quicker and more reliable path to liberalisation of trade in insurance services.

CHAPTER FOUR

MULTINATIONAL INSURANCE II

LEGALITY, CHALLENGES AND SOLUTIONS TO MULTINATIONAL INSURANCE PROGRAMMES IN NIGERIA AND LESSONS FROM OTHER JURISDICTIONS

4.0 Introduction

The two preceding chapters have argued that the insurance market globally is designed on strong nationalistic and protectionist policies and laws. However, in a bid to dismantle these structures, the WTO through its frameworks, initiated steps to introduce liberalisation in international trade and supply of services including insurance services. In this vein, the WTO has successfully pushed countries to make a number of commitments under its GATS Arrangement, and countries like Nigeria have made some reforms to its insurance laws. However, there is still an ample number of provisions that are still protectionist in nature. The preceding chapters also argue that while protectionism is a sure path for market stagnation, liberalism is a guarantee to increase proficiency and expertise because of the interaction between a developing market and developed players that will come from abroad. This is in addition to the foreign investment that will flow into the market through foreign capital. It has also been argued that even advanced markets like the EU and the UK still have some level of protectionism including distortion of the Most Favoured Nation and National Treatment principles, as can be seen from the discrimination introduced by the EU passport regime. This finding therefore points to the fact that despite WTO's efforts towards achieving market liberalisation, protectionism at national and regional levels is still entrenched.

To address this problem, the market response has been quicker and more innovative in the form of multinational insurance programmes. Hence, the preceding chapter, carefully discussed and critically analysed multinational insurance programmes and their internal workings. The previous chapters highlighted various types, forms and structures of multinational insurance programmes, ranging from the most basic to the most complex. The invention of some of the most complex designs have been as a result of challenges that had be-devilled known and existing structures. It must be admitted that multinational

insurance programmes have introduced very creative methods to solve the problems of protectionism and other problems that confront global trade restraints.

However, despite the inventiveness of insurance and legal experts of multinational insurance, it has however not succeeded entirely in eliminating the challenge of protectionism and other legal and regulatory problems that confront the supply of insurance services across international borders and national boundaries. These solutions and fresh challenges give birth to a circle of new problems, new solutions and newer problems. In addition, the recent past at a global level, has witnessed a push back of globalization and the actions by regulators and rhetoric of world leaders like President Donald Trump have further compounded the problems and seen the re-introduction of new protectionist challenges. These challenges which are in the form of regulatory fines or reduction of market access are evident in the recent actions of regulatory bodies that can at best be considered to be extreme, and too tough for trade liberalisation.

It is in the light of the above that this chapter will examine the legality of multinational insurance programmes, legal challenges that have be-devilled multinational insurance programmes, the solutions and analysis of possible alternatives; importantly, it will commence with the legality of multinational insurance programmes. This chapter will also critically analyse specific legal issues that impact on insurance sector liberalisation and protectionism in Nigeria in the context of multinational insurance programmes. Also including issues, such as discriminatory insurance sector licencing regime in Nigeria, restricted rights of foreign insurers to seek legal redress in Nigerian courts, overregulation and restrictions in the exercise of the right of local insurers to seek approval to cede risk with offshore insurers and reinsurers, dealing with the problem of prohibition of cut–through clauses in the designing of multinational insurance programmes in Nigeria. This chapter will also go beyond discussing the problems, it will examine the legal application of solutions that are inherent in multinational insurance programmes aimed at dealing with the issues of its legality; for example, fronting and the use of the financial interest clause.

Effectively, this chapter directly and indirectly addresses the question – ‘‘*How can the protectionist stance of Nigerian law against insurers providing multinational insurance programmes, be rebalanced to reflect a fairer and balanced playing field?*’’

4.1 Analysis of the Legality of Multinational Insurance Programmes

One question that has repeatedly been asked, emphatically and desperately by insurers, insurance intermediaries, insured, regulators and insurance stakeholders, is whether multinational insurance programmes are legal or illegal. The answer to this question bears direct relevance to the future of multinational insurance programmes. Within the industry, the question has been the subject of debate and no clear-cut answer appears to have been found.

It is believed however that the answer to this question is exactly the same answer to the question on the legality of non-admitted insurance. Unfortunately, there is no universal answer to these questions because the laws of each country will be the basis for determining the legality of multinational insurance programme in that jurisdiction. And it can be safely stated that regarding the legality of non-admitted insurance cover, including multinational insurance programmes, they can be classified into three categories, to wit – jurisdictions completely prohibiting non-admitted insurance programmes, jurisdictions that partially prohibit non-admitted insurance programmes and jurisdictions that adopt a hybrid approach.

Jurisdictions that completely prohibit non-admitted insurance are Argentina, Brazil, China, Japan and Mexico.[1] Some examples of jurisdictions that operate partial prohibition of non-admitted insurance are Australia, Sweden, New Zealand and Nigeria among others.

The approach to be adopted in this chapter will focus the analysis on specific jurisdictions, and attention will be placed on only a few jurisdictions.

Nigeria

Nigeria is a typical example of an admitted insurance jurisdiction that prohibits any form of non-admitted insurance cover or insurance related services.[2] The Nigerian Insurance Act 2003, explicitly states that two requirements must be fulfilled before a person can carry out any form of insurance business, to wit – local incorporation or registration of

[1] Carlos Ramos Miranda, 'Non – Admitted Underwriting Issues for Foreign Insurance Companies' (2011) International Law Office. See also AXCO, 'Non – Admitted Insurance Summary' (2014) SPE International Regulation Taxation 2007 – 2014.
[2] Research and Market, 'The Insurance Industry – Governance, Risk and Compliance – The Nigerian Insurance Industry' (2016)

the foreign insurance company[3] and registration with and licencing by NAICOM.[4] These restrictive provisions of the Nigerian Insurance Act is re-enforced by Section 72 of the Insurance Act 2003 that deals with insurance contracts involving foreign insurers and foreign reinsurers. This section prohibits any person from transacting insurance or reinsurance business with a foreign insurer or reinsurer with respect to any insurable interest in Nigeria, which has been classified as domestic insurance.[5]

The categories of insurance and reinsurance business classified as domestic are fire, motor, liability, life and accident.[6] However, based on directives by NAICOM, oil, gas and aviation risks have been inserted into the list of domestic insurance.[7] By virtue of the above, the Insurance Act prohibits all forms of non-admitted insurance in Nigeria and a breach of this prohibition will attract a penalty upon conviction to a fine of a sum equivalent to five times the value of the premium.[8]

It is important to note that the Nigerian law on non-admitted insurance, which is highly protectionist, but contrary to the intention of the draftsmen of the law, it is also skewed and unbalanced against Nigerian based insured and insurance intermediaries. This point is reflected in the fact that the prohibition not to procure non-admitted insurance, and the penalty imposed for breach of this provision is targeted and applicable only to Nigerian based insured and insurance intermediaries. The Insurance Act 2003, does not contain any penalty or sanction for breach of this provision by a foreign insurer. In other words, there is no provision prohibiting a foreign insurer from selling insurance products in Nigeria; the applicable prohibition applies to only persons buying insurance cover in Nigeria. Thus, even where a breach occurs, a foreign insurer that sells a non-admitted product in Nigeria will stricto sensu not be sanctioned or better still, cannot be sanctioned under Section 72(3) of the Insurance Act 2003.[9]

The implication of the above, from a strict legal interpretation, is that where a non-Nigerian resident insured or prospective insured has an insurable interest in Nigeria that falls within the list of domestic insurance, the non-resident would be able to legally purchase non-admitted insurance cover and would by reason of its location fall outside

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[3] Insurance Act 2003, s 3(a) & (b).
[4] Insurance Act 2003, s 4(1).
[5] Insurance Act 2003, s 72.
[6] Insurance Act 2003, s 72(2)(a).
[7] Insurance Act 2003, s 72.
[8] Insurance Act 2003, s 72(3).
[9] Insurance Act 2003, s 72(3).

the regulatory and supervisory jurisdiction and purview of NAICOM and may create a situation where NAICOM may not be able to detect such. This creates significant room for regulatory arbitrage by multinational companies because a foreign subsidiary or a non-resident payment company can easily obtain global cover in the form of a master policy that covers its insurable interest in Nigeria. A typical global insurance cover through the instrumentality of financial interest clause will fit perfectly into this scenario. The details and legality of the financial interest clause will be discussed later in this chapter.

One implication of the above is that while the draftsmen of Section 72 of the Insurance Act 2003 sought to create a water tight non-admitted insurance regime, they have inadvertently succeeded in implementing protectionst laws only on the Nigerian based supply side of the insurance value chain; whereas, the foreign based supply side for Nigerian domestic list is completely open and foreign insureds can purchase insurance cover from foreign insurers and vice versa. The Nigerian approach when contrasted with the approach in Ghana, under the Ghana Insurance Act 2006, reveals this obvious gap even more clearly. Under Sections 39 and 41 of the Ghana Insurance Act 2006, foreign insurers are expressly prohibited from conducting any form of insurance business or providing any form of insurance cover in Ghana without first obtaining a licence.[10] The Act imposes clear criminal sanctions on foreign insurers that breach this provision and the prohibition covers any form of direct or indirect involvement through a representative, branch or a contact office; in addition, any form of solicitation of business is equally prohibited.[11]

The above points to the fact that the Nigerian protectionist approach towards administering non-admitted insurance is not as strict and difficult as the Ghana approach. However, despite the fact that both Nigeria and Ghana appear to be stuck in their protectionist past, globally in the last three decades there has been a shift towards opening up markets, which is in line with globalisation and with the agenda of the WTO. This is also the reality in insurance circles, particularly with respect to countries granting market access to non-admitted insurers.

One of the ways that other non-admitted jurisdictions have adopted in granting market access and opening their markets is through the creation of a window for non–admitted insurance participation, which does not require local incorporation of a foreign insurer,

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[10] Ghana Insurance Act 2006, s 39 & 41.
[11] Ghana Insurance Act 2006, s 39 & 41.

and at times does not also require local registration/licencing from the local insurance regulator. In South Africa for example, an innovative and liberal approach was adopted in 2018 under the Insurance Act 2018. Based on this approach, South African law expressly prohibits the conduct of unlicensed insurance business;[12] however, it does not stipulate that incorporation of a local company is a mandatory requirement for grant of market access or for grant of insurance licence.[13] This regulatory approach is less protectionist when compared to Nigeria and is more receptive to non-admitted insurance. The South Africa Insurance Act 2018 also permits a foreign reinsurer to conduct insurance business if any of the following condition is met - it obtains a licence locally or it establishes a representative or branch office in South Africa or creates a trust.[14] It should be noted that establishing a branch office or creating a trust does not necessarily require local licencing. These same markets access rights are available for Lloyd's underwriters.[15] The implication of this approach is that a foreign reinsurer can participate in the South African insurance market without setting up a local office once it establishes a representative office. This approach is less protectionist and is likely to attract more foreign capital and capacity to South Africa, while at the same time it creates a clear tax presence in South Africa that entitles the South African tax authority to collect all taxes due and creates jobs locally. This approach reduces the incentive for arbitrage because major multinational insurers would rather opt for this window and have a representative office instead of operating another model of multinational insurance programme that could expose them to the likelihood of breaching the domestic insurance laws and attracting huge penalties.

If this model is to be criticised, one key concern that could be raised with respect to the South African approach to non-admitted insurance is that even though it allows market access where a foreign insurer sets up a representative office, the South African insured could be exposed to danger if the insurer collapses or begins to struggle financially, and the regulators will be almost powerless to contain the fall out because they do not have sufficient capacity and proximity to properly supervise and regulate such foreign insurers from a prudential and conduct angle. This is a genuine concern because unlike a locally licenced insurer that would be subject to intrusive forward looking prudential and conduct

[12] South Africa Insurance Act 2018, s 5(1).
[13] South Africa Insurance Act 2018, s 6(1) & (2).
[14] South Africa Insurance Act 2018, s 6(1).
[15] South Africa Insurance Act 2018, s 6(2).

supervision, for a non-admitted insurer, the right degree of access to its books and health status would not be readily available to local insurance regulators.

To address this concern, the draftsmen of the South African Insurance Act 2018 adopted a clever solution by requiring consultation must take place with the foreign regulatory authority that primarily regulates the foreign non-admitted insurer.[16] But the question remains, whether this consultation is an effective tool for prudential and conduct regulation and supervision of a foreign non-admitted insurer. Insurance supervision is supposed to be an engaging intrusive process and should be on an ongoing – forward looking basis. However, such intense and close supervision could be lacking under this consultative arrangement and reliance would have to be placed on foreign regulator to do their job properly to prevent any form of burst of the foreign non-admitted insurer because any such occurrence will, through the instrumentality of contagion, result in a first-hand impact on the South African insurance market. The better approach that should be adopted in South Africa would be for its insurance regulators to require foreign insurers to file a country by country report, detailing their insurance health status and prudential-conduct compliance standing on a global basis. It must be mentioned that South Africa has always been pro – reform since the 1990s, this necessitated its enactment of the Long Term Insurance Act, 52 of 1998 and the Short Term Insurance Act, 53 of 1998, which required South African Insurance Laws to undergo peer review every 5 years.[17] This accounted for the astronomical growth of total net premium income from 29, 755, 000, 000 Rand in 1990 to 168, 637, 000, 000 Rand in 2000.[18]It should be noted that the South African law grants more market access than Nigeria and is therefore far more advanced and recent than the Nigerian Insurance Act 2003, which was enacted in 2003 and has been operative for about 15 years without any amendment. These increased market access that is inherent in South African law (which is the most liberal insurance law across Sub – Saharan Africa) has contributed in making South Africa the leading insurance market in Africa. This is evident in the fact that South Africa has the highest insurance penetration rate in Africa, which was 16.99% as at 2017.[19] It has also been long established that when compared to the rest of Africa, the South African insurance market is the most

[16] South African Insurance Act 2018, s 23(2).
[17] Oxford Business Group, 'South African Insurance Industry Undergoes a Period of Transformation' (2016) OBG South Africa Report.
[18] Grietjie Verhoef, 'South Africa – Leading Africa Insurance' (in World Insurance, 2012) 325 – 345.
[19] Jennifer Rudden, 'Insurance Penetration in Sub – Saharan Africa in 2017, by Country' (Statistisca, 23 October 2019'

competitive, with multi channels distribution models.[20] This is clearly evident from the fact that it has liberalised laws that allows more market access and by implication, transfer of capital and technical expertise.

The Nigerian Act is ripe for an amendment and I recommend that the South African model should be adopted in Nigeria. This recommendation is instructive, because despite the protectionist stance of Nigerian insurance law, local insurers still lack the capacity to cover huge risks in the oil and gas sector, maritime and aviation, consequently, recourse has to be made to foreign insurers and reinsurers, especially in marine, aviation, transport and the oil and gas sectors of the economy.[21] Ironically, despite all these, the NAICOM had placed an unofficial embargo on the issuance of new insurance licences to interested investors and even where foreign insurers indicated interest in setting up shop in Nigeria, NAICOM directed them to go and buy into existing insurance companies.[22] This is indicative of the absence of a well thought out solution by NAICOM and the protectionist approach has not and is not improving the condition of the insurance market in Nigeria.

In order to identify more suitable options and models for Nigeria to address its challenges with respect to regulation of non- admitted insurance, a comparative analytical approach covering India and Brazil would be attempted. This would mean that the comparative analysis would have covered Africa (Ghana and South Africa) and Asia (India). The essence of picking these jurisdictions is to analyse their approach in order to identify lessons that can be learnt by Nigerian insurance regulators, policy makers and stakeholders. Subsequently, a more in-depth analysis of key legal issues arising from multinational insurance programme in Nigeria will be attempted.

India

India is one other country that operates as an admitted insurance jurisdiction, with laws restricting and prohibiting non-admitted insurance. The Indian insurance market was nationalized just after its independence in 1947 and remained under a highly protectionist

[20] Johannes Grosskopf, 'Ready and Willing – African Insurance Industry Posed for Growth' (2018) PWC Publication.
[21] Chinedu Eze and Ebere Nwoji, 'Local Firms Low Capacity Sustains Foreign Insurers Grip on Nigeria Airlines' *Thisday Newspaper* (11th September, 2018)
[22] Nike Popoola, 'NAICOM Lifts Ban on New Licence Issuance' (Punch Newspaper, 5 September 2018, Lagos)

regime until some attempts towards liberalisation were made in August 2000.[23] The life insurance industry was nationalised in 1956 and the general insurance industry was nationalised in 1972.[24] This exercise led to the taking over of all foreign life insurance companies which were converted to government corporations and ran as government assets and was backed by the *Life Insurance Corporation Act 1956*. General insurance became the target of nationalist activists and by 1972, the *General Insurance Business (Nationalization) Act 1972* was enacted and became the basis for nationalization of 107 general insurance companies and their amalgamation into a monopoly known as the General Insurance Corporation of India operating with four subsidiaries, to wit - National Insurance Company Limited, New India Assurance Company Limited, Oriental Insurance Company Limited and United India Insurance Company Limited.[25] It would be recalled that as analysed in Chapters One and Two of this work, Nigeria had adopted a similar approach that was aimed at indigenising certain aspects of its economy including the financial services industry, which covers insurance. However, the Nigerian approach was not ultra-nationalistic in nature; hence, there was no nationalisation of insurance companies in the sense of a government take-over or expropriation, rather, foreign companies were indigenised and were to be run by Nigerian players and actors. However, this meant that foreign insurers had to sell off their interests in these companies hurriedly. For that period in Nigeria, government monopoly was restricted to the reinsurance sector, where the only players as at that time were all government owned. Comparatively, the Nigerian attempts at this time were less aggressive compared to the approach of out-right nationalisation by the Indian government. This means that while in Nigeria, private sector participants were permitted to participate in the insurance market, in India, it was strictly a government affair. The implication was at this time, Nigeria was in an even better position in terms of insurance market liberalisation compared to India.

Typical of such mis-adventures, the Indian General Insurance Corporation of India was run inefficiently and not based on free market principles; for example, it could hardly increase premiums because of political pressures, and hence, its premium rates were below actual market rates, as a result, it became a perpetual defaulter in settling claims.[26]

[23] Neeraj Tuli and Celia Jenkins, 'Business – Focussed Legal Analysis and Insight in the Most Significant Jurisdictions Worldwide' (2017) 5 The Insurance and Reinsurance Law Review 1.
[24] Kracher, B., Chatterjee, A., and Lundquist, A. R, 'Factors related to the cognitive moral development of business students and business professionals in India and the United States: Nationality, education, sex and gender' (2002) 35(4) Journal of Business Ethics 255 – 268.
[25] Sharma Deendayal, *Banking and Insurance. India*: (2010, Rajat Publications New Delhi)
[26] Sharma Deendayal, *Banking and Insurance. India*: (2010, Rajat Publications New Delhi)

The *Indian Insurance Act 1938* remained the primary legislation for the regulation and supervision of the insurance industry in India until recent reforms. The reform of the market has been long coming and was initiated in 1993 with the government setting up the *Malhotra Committee* to examine the legal framework for the regulation and supervision of the insurance sector in India.[27] The Committee was also mandated to suggest a new structure for the insurance industry by assessing issues like coverage limits, quality of insurance services, efficiency and variability, structural and policy changes to the regulatory framework and overall make recommendations for the regulation and supervision of the insurance sector.[28] At the end of its work, the Malhotra Committee recommended among other things that private sector players should be permitted to enter and participate in the insurance industry and that foreigners should be permitted to enter the insurance market but through Joint Venture arrangements with Indian partners.[29]

Based on the above recommendation, the *Insurance Regulatory and Development Authority Act 1999 (IRDA Act)* was enacted and it established the Insurance Regulatory and Development Authority (IRDA). Based on the IRDA Act 1999, private sector participants could be involved in the Indian insurance market. Prior to the enactment of the IRDA Act 1999, the Indian Insurance Act 1938 was applicable and it required that any person desirous of carrying any form of insurance business must first be licenced and registered to carry out that form of Insurance Business.[30] This effectively excluded any form of non-admitted insurer from participating in the Indian Insurance Market. However, under the IRDA Act 1999, an insurance company will be permitted to operate in India if it is incorporated locally in India, the foreign shareholding does not exceed 26 percent of the equity capital and it obtains an insurance licence from the IRDA.[31] Again, if this provision is compared with the provisions of the Nigerian Insurance Act 2003, it appears to be that the Nigerian Act is more liberal in the sense that it does not contain any restrictions on the percentage of shares a foreign investor can hold in a Nigerian registered insurance company. The implication of this is that in Nigeria a foreign person or entity can own 100 percent of the shares in a locally registered insurance company. Without

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[27] Syed Ahmed Salman, Hafiz Majdi Ab. Rashid and Sheila Nu Nu Htay, 'The Progressive Development of India's Insurance Industry from Ancient to Present Times' (2016) 6(4) Human Resources Management Research.
[28] Sinha, A, 'Emerging Trends in Distribution in the Life Insurance Sector in India: a Study of a few Leading Players' (2013) 43(7) Indian Journal of Marketing 53-61.
[29] Neeraj Tuli and Celia Jenkins, 'Business – Focussed Legal Analysis and Insight in the Most Significant Jurisdictions Worldwide' (2017) 5 The Insurance and Reinsurance Law Review 1.
[30] Indian Insurance Act 1938, s 3(1)
[31] Indian insurance Regulatory and Development Authority Act 1999, s 2(7A).

doubt, the IRDA Act 1999 was an improvement on the previous regime but was still a far cry from the level of liberalisation expected from a gigantic jurisdiction like India.

However, in 2000, further attempts towards liberalisation were made through the *Indian Foreign Exchange Management (Insurance) Regulation 2000* which are not only commendable, but are worth emulating by Nigeria, in an attempt to further liberalise its market. By the provision of the Indian Foreign Exchange Management (Insurance) Regulation 2000, persons resident in India are prohibited from purchasing any general or life insurance policy issued by a non-admitted insurer.[32]

However, quite commendably, unlike the Nigerian strict protectionist approach, Indian law creates an exception to the above general rule, to the effect that based on Regulation 3 of the Indian Foreign Exchange Management (Insurance) Regulation 2000, a life insurance cover can be purchased from a non-admitted/non-Indiancompany on the condition that the Reserve Bank of India must permit or authorise the transaction. This provision makes it clear that India is not an ultra-strict admitted jurisdiction, the exception for life insurance points to this reality. It is however strange that the decision to grant a waiver or permit is exercisable by the Reserve Bank of England and not the Indian Insurance Regulator known as the Insurance Regulatory and Development Authority (IRDA). The reason for such a choice is questionable in view of the fact that the IRDA is better equipped to assess if the reasons advanced for the waiver or authorisation are sufficient. The approach adopted by India indicates that the Indian authorities consider the interest of its residents important by ensuring that this aspect of its market is open to foreign competition and the option of purchasing cover from some of the best global insurers. This approach is one that is suitable and should be considered for adoption in Nigeria, particularly because the Nigerian life and non-life insurance market is still highly underdeveloped and its residents have been denied the benefit of enjoying world class and appropriate insurance services and are at best just putting up with the poor services available locally. In fact, this has been a major factor in contributing to the low patronage of the market locally.[33]

Other exceptions are contained in Regulation 4 of the Indian Foreign Exchange Management (Insurance) Regulation 2000. The first exception relates to a person who is not permanently resident in India; such a person can continue to hold a subsisting

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[32] Indian Foreign Exchange Management (Insurance) Regulation 2000, Reg. 3 (Forex Regulation).

[33] Ola Gam-Ikon, 'How Regulators Underdeveloped the Insurance Industry in Nigeria' (2012) Proshare

insurance policy that had been taken out in another jurisdiction and the premium is paid in a foreign currency outside of India.[34] The meaning of a non-permanent resident has been described as a person who takes employment for a specified or defined period of time, or a specific job/assignment that is for less than three years.[35] This therefore means that where an insured has an employment contract for more than three years, the employee will not fall under this category and will be unable to benefit from this exception.

To safe guard this exception from likely abuse, the Regulation contains three inbuilt conditions that must be satisfied before this exception will apply; they are as follows - the person must be a non-permanent resident, the premium must be paid in a foreign currency and payment must be made outside of India and not within India.[36]

These are mandatory provisions that must be satisfied before the exception in Regulation 4(1) will apply. However, a clear and close examination of this provision reveals that it is not as generous as it appears, especially because it can only be benefitted by non-permanent residents. Furthermore, the benefits this exception attempts to confer is the same conferred under an exporter's package but, it must be admitted that this exception has the additional benefit of conferring legal validity on such a non–admitted insurance policy, as a result, it can be relied upon in circumstances where local law requires compulsory insurance.

A second exception is contained in Regulation 4(2) of the Indian Foreign Exchange Management (Insurance) Regulation 2000 that is to the effect that a non-admitted policy will be valid if a person resident in India had, prior to purchasing that non-admitted policy, obtained the authorisation of the Indian Central Government. It is a pre-requisite that a person seeking to rely on this exception must first obtain the authorisation before purchasing the policy because non-compliance with that condition will render the policy void and of no effect. In addition, the exception applies to only a general insurance policy.[37] Even though these exceptions are laudable, once concern with them shows that approving responsibilities are conferred on non– insurance regulators; for example, the exception under Regulation 3 requires prior approval from the Reserve Bank of India, while the instant exception under Regulation 4(2), requires approval from the Central Government. These approving authorities are not insurance regulators and may not

[34] Forex Regulation, Reg 4(1).
[35] Forex Regulation, Proviso to Reg 4(1).
[36] Forex Regulation, Reg 4(1).
[37] Forex Regulation, Reg 4(2).

understand the intricate details of insurance regulations; hence, they are not best suited for such a role. It would have been more appropriate to domicile these responsibilities in the IRDA of India that will take into considerations important factors like solvency, balance, comparable regulatory standards among others before granting or declining the grant of approval or authorisation.

In addition, as authorisation under this exception is to be obtained from the Indian Central Government, it is surprising that no particular government agency is mentioned, unlike the exception under Regulation 3 that empowers the Reserve Bank of India to exercise the requisite waiver or grant or permit. Some level of consistency in both exceptions would have been suitable and appropriate in this respect.

The third exception contained in the 2000 Regulation is two pronged and is contained in Regulation 4(2) of the Indian Foreign Exchange Management (Insurance) Regulation 2000. The first part relates to persons previously resident outside India who had taken out an insurance policy with a non-admitted insurer. In such situations, the validity of the policy will be acceptable if a premium is paid from an offshore foreign currency account or from funds in an onshore foreign currency account with authorised dealers operated by a non-resident entity or individual.[38] The second leg of the exception relates to life policies that satisfy the above requirement and as a condition, the policy must have been in force for not less than three years before the policyholders returned to India. When claims payments are to be made for polices under this exception, such claim payments can be made into an offshore or onshore account and will not be treated as illegal receipt. However, in the case of life policy, it must be repatriated to India within seven days of its receipt.[39] This exception again is commendable, particularly because of its pragmatism and practicality. India recognises the fact that it has a huge global diaspora, especially in view of its over one billion population, and it equally recognises the fact that it has to position itself as a hub for business capable of attracting foreign nationals. If such noble objectives must be achieved and achievable, then it must be willing to permit and tolerate some level of non-admitted involvement in its market, particularly in its life insurance market. These levels of tolerance from a previously ultra-strict non-admitted jurisdiction are commendable and it is a direction that Nigeria can begin to explore because Nigeria does not currently have a comparable regime. The only exemptions Nigeria seems to

[38] Forex Regulation, Reg 4(3) (i).
[39] Forex Regulation, Reg 4(3) (ii).

currently grant to foreigners working within its local economy, is their choice to be excluded from its contributory pension scheme, as contained in the Nigerian Pension Reform Act. Paragraphs 2.1.1 and 2.2.1 of the Guidelines for Cross-Border Arrangements under the Pension Reform Act 2016 confer this discretion on foreigners working in Nigeria. Beyond this exemption, there is no comparable exemption for persons (foreigners and Nigerians) having existing insurance cover upon their return or upon commencement of residency in Nigeria. This is a situation that has been effectively taken care of by Indian law; there is the need for Nigeria to learn and adopt similar standards and regimes for similar situations within its borders.

In an attempt to further liberalise its market, and based on complaints that the Indian Insurance market remains significantly protectionist in structure, the Insurance Laws (Amendment) Act 2015 (ILA 2015) was passed into law. The key provisions of this law are of interest and would be a strong lesson for jurisdictions like Nigeria. It has effectively established the fact that even though comparatively, the Nigerian insurance market was still more liberal in 1999 when the IRDA Act was passed into law, today, India has made significant reforms and can pride itself on being, to some extent, a far more liberal market, far and above Nigeria.

Under the ILA 2015, foreign participants are now permitted to own a maximum of 49 percent of the equity capital.[40] This introduces significant improvement over and above the 26 percent benchmark contained in the IRDA Act 1999. This therefore further raises the chances for a non-Indian shareholder to easily have a major shareholding, where there are three or more shareholders. It must be mentioned that this is still a far cry from the expectation of 100 percent and it is still lower than Nigerian 100 percent guarantee.

Another significant and commendable progress made by the ILA 2015, is that under Section 2 (9) (d) of the IRDA Act as amended by Section 3 of the ILA 2015, a foreign company engaged in reinsurance business can now operate in India through a Branch established in India.[41] Even though India remains a non-admitted jurisdiction, the IRDA 1999 as amended by the ILA 2015, has relaxed the prohibition of foreign insurers and reinsurers by creating a window for authorisation to be sought from the IRDA for insurance or reinsurance risk to be placed with a foreign insurer or reinsurer.[42] The

[40] IRDA Act, s 2(7A) as amended by the Insurance Laws (Amendment) Act 2015, s 3.
[41] IRDA Act 1999, s 2(9)(d), as amended by Insurance Laws (Amendment) Act 2015, s 3.
[42] Insurance Act, s 2CB, as amended by the Insurance Laws (Amendment) Act 2015, s 4.

liberalisation reforms in the Indian insurance market are already yielding fruit. In 2016, the IRDA issued the Onshore Reinsurance Branch Approval and Order of Preference Regulations 201 that granted approval to Lloyd's to open a reinsurance branch in India. However, to maintain capital and foreign exchange controls, a Lloyd's reinsurer will be required to retain in India at least 50 percent of the insurance business it generates within India. If it obtains a certificate of registration under Regulation 4(b), then it would be required to retain a minimum of 30 percent of the reinsurance business it writes.[43]

Almost immediately after the Onshore Reinsurance Branch Approval and Order of Preference Regulations 2016 was issued, Swiss Re, Munich Re, Hannover Re, SCOR, RGA and XL Catlin sought and obtained certificates of registration under Regulation 4(a) that requires 50 percent local retention.[44] This fact validates the assertion and argument that liberalisation attracts foreign investors and improved capacity. This approach adopted by India appears to be a controlled and intelligent liberalisation, in the sense that it has built in a shock and control system, which will assist in restricting and controlling capital flight and simultaneously promoting retention of capital locally. No doubt, most non-admitted jurisdictions have also nursed fears of capital flight as a basis for their protectionist stance, but this Indian model is one that is worth adopting because it presents = a win-win solution for both proponents of admitted and non-admitted insurance.

If Nigeria adopts a model like the Indian model, it is likely to attract a similar level of interest from global insurers because Nigeria has a population of over 200 million people and has been the largest economy in Africa since 2014. Continued adoption of its current protectionist regime will not help the market to develop as fast as it should. The Nigerian insurance regulator, NAICOM, has for 10 years imposed an unannounced ban on registration and issuance of new insurance licences and has rather directed that any person interested in participating in the insurance market should buy into existing insurance companies.[45] However, it has announced that the ten-year ban would be lifted in 2019.[46] It is evident that the model of banning the issuance of licence has not attracted foreign

[43] Onshore Reinsurance Branch Approval and Order of Preference Regulations 2016, Regulation 4 (a and b) and see also Shankar Garigiparthy, 'India – Onshore Reinsurance Branch Approval and Order of Preference Regulations' (2017) Lloyd's Market Bulletin.
[44] Shankar Garigiparthy, 'India – Onshore Reinsurance Branch Approval and Order of Preference Regulations' (2017) Lloyd's Market Bulletin.
[45] Nike Popoola, 'NAICOM Lifts Ban on New Licence Issuance' (Punch Newspaper, 5 September 2018, Lagos)
[46] Nike Popoola, 'NAICOM Lifts Ban on New Licence Issuance' (Punch Newspaper, 5 September 2018, Lagos)

investors; hence, the decision of NAICOM to lift the ban. Instead of just lifting the ban alone, it is important for NAICOM to liberalise the market in a manner that is similar to the approach in India and South Africa, which are tested and trusted models, considering the growth in the South African and Indian insurance markets.[47] These approaches are more likely to help grow the Nigerian insurance market faster. In addition, there is the need for Nigeria to amend its laws to grant greater market access to non-admitted insurers through the window of operating in Nigeria through branch and representative offices, while at the same time collaborating with their home country regulators to ensure that conduct and prudential regulatory standards are adhered to and observed.

4.2 Recent Regulatory Enforcements

The last few years have witnessed a number of regulatory enforcement actions, targeted at multinational insurance and cross-border insurance programmes. This is an indication that regulators are beginning to show more concern in determining whether insurers are transacting business without authorisation. The regulatory actions to be discussed in this part of the work relate to the following jurisdictions - India, the United States and Brazil.[48] I must mention that none of these issues were the subject of litigation; hence, there is no case law arising from them.

4.2.1 India

This enforcement action was reported in the Wall Street Journal. The Indian federal tax authority decided to impose a tax assessment on the parent company of Adidas, headquartered in Germany. The assessment arose from losses suffered by the Indian subsidiary of Adidas, following losses resulting from a fire at the local Adidas warehouse in India. In 2009, the parent company received compensation worth about $20 million dollars from an insurance company outside of India.[49] This apparently meant that there was a global programme with respect to the loss. The Indian subsidiary received about $10million from a local insurance policy and informed the Indian tax authority that the claim payment received by the global company could not be assessed to Indian taxing

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[47] Oxford Business Group, 'South African Insurance Sector Undergoes a Period of Transformation' (2016) The Report South Africa 2016. See also Anil Roy Dubey, 'Growth and Development of Insurance in India' (2018) 14 Indian Journal of Development Research and Social Action 31 - 45

[48] Suresh Krishnan, 'Structuring Multinational Insurance Program: Emerging Regulatory Challenges' (2013) ACE Journal 2

[49] Prasanta Sahu and Jae Krishna, 'India to Tax Adidas Insurance Claim' *World Street Journal* (March 2011)

jurisdiction because the master policy was issued outside India and claims payment was equally made outside India. A tax audit and investigation were initiated by the tax authorities. The investigation identified some email exchanges between staff at both the parent company and local subsidiary that pointed to the fact that payment was effected offshore but was intended ultimately for the benefit of the Indian subsidiary. Based on this discovery, the Indian tax authorities concluded that its taxing jurisdiction had been evoked and it could therefore impose taxes on the $20 million even though it was received offshore by the parent company.[50] The tax department stated that: '*The entire scheme appears to be arranged by the Adidas group in such a way as to evade paying taxes on this amount in India*.'[51]

The applicable law at the time this tax audit was conducted was the IRDA 1999, which states that no non-admitted insurer is permitted to conduct any class of insurance business in India.[52] From my understanding of this provision, it can be invoked only where the non-admitted insurer has a direct connection with India and can be said to be conducting insurance business in India. Where an insurer only provides cover for the insurable interest of a foreign entity and the latter paid the premium without being recharged by a local subsidiary, it cannot be deemed to be conducting insurance business within India. In other words, if the local subsidiary of Adidas in India had paid a premium contribution for the master policy, it would have meant that the insurer was conducting insurance business in India. However, in tthis instance, Adidas Germany only insured its financial interest in India; hence, the position taken by the Indian tax authority can be contested on this ground. Unfortunately, this case was never submitted for tax dispute resolution or litigation. Thus, the action of the Indian tax authorities has set an administrative precedence, which would have to be tested in the courts subsequently.

Even though this enforcement action had taken place in far-away India and the tax authorities invoked anti-avoidance tax provisions, the decision poses a threat to multinational insurance and to global programmes. It is a precedent for many other regulators to rely on and it sets an easy template that can be followed on a large scale. This is particularly important for non-admitted insurers because even though they may not have been involved in any transaction that creates a sufficient tie to a local jurisdiction, they may therefore not be violating the insurance laws. However, tax

[50] Krishnan (n 48) 2
[51] Sanjay Kedia, 'India Tax Adidas Insurance Claim' (2013) Marsh India Insight
[52] IRDA Act 1999, s 3(1)(a).

authorities exercising some of their broad powers may seek to impose tax liabilities on such transactions by relying on their anti-avoidance powers.[53]

It is advisable that non-admitted insurers and others connected thereto, ensure that they can provide necessary documentations on how their global programmes are structured when demanded by regulators; they must also emphasise the need to preserve such documentation that should identify where premium taxes were paid, and also beneficiaries of the insurance covers.[54] Doing otherwise could give regulators sufficient reason to invoke their broad powers under tax laws.

4.2.2. The United States

This case involved insurance transactions linked to New York. Insurance regulations in New York State permits buyers of insurance products to purchase non-admitted cover on the condition that the transaction does not involve a New York insurance broker and the entire transaction is staged outside of New York. In this situation, an insurance brokerage firm, Waldorf & Associates, was a New York based firm involved in an insurance transaction that related to the sale of property, casualty and other insurance policies, worth over USD$ 30billion. These were policies issued by Lloyds of London to over 300 universities and charities. Tax regulations in New York place the burden of remitting the due taxes on the insured. The New York based broker did not inform the insured of these instructions and obligations. The transaction and relationship had been ongoing for about 15years. The matter was investigated by the New York State Insurance Department and imposed a fine of about US$ 3.4million and the obligation to pay all the unpaid taxes. [55]

4.2.3. Brazil

The Brazilian insurance system is structured as a non-admitted jurisdiction; hence, insurers are required to obtain licences before offering their services within Brazil. In October 2011, National Western Life Insurance Company (National Western), a Texas based firm was charged by the Brazilian Insurance Regulator (*Superintendencia De Seguros Privados-SUSEP).* National Western had been illegally selling life insurance cover in Brazil without the knowledge of the regulators and without the policyholders knowing that it was unlicensed. The situation became public knowledge only after a

[53] Krishnan (n 48)
[54] ibid.
[55] ibid

holder filed a complaint before SUSEP over unpaid claims. After investigating the incidence, SUSEP imposed a fine of US$ 6.2billion on National Western. This is the biggest fine to be imposed by a Brazilian regulator.[56] Based on notes released by National Western, it stated that SUSEP had been unsuccessful in its attempt to serve it and contended that SUSEP has no jurisdiction over National Western, particularly because it did not transact insurance business in Brazil, neither does it have officers, employees, properties or assets in Brazil. For this reason, it had stated that the fine remained invalid and would be unenforceable. Consequently, it declined to include the dispute and the fine in its annual report as a material pending legal proceedings.[57]

When compared to the two earlier cases discussed, this case presents itself as the most audacious because the regulator SUSEP imposed a fine that had never been heard of in Brazil and second, it exercised its regulatory jurisdiction over an entity that had no residence or corporate domicile in Brazil. This is a striking precedent, but its enforceability remains to be seen. The issue of jurisdiction as a condition for enforcing this penalty remains key at the moment; there is hardly any legal basis to be relied upon in seeking its enforcement in a US court. The chances are bleak, particularly when viewed against an earlier unsuccessful attempt by a Brazilian policyholder to seek enforcement of the policy through a US court the case was struck out.[58]

The most probable response from regulators to this jurisdictional contest and uncertainty may be to increase supervision domestically and to direct sanctions against any local intermediary and local insured patronising non-admitted insurers. The laws of most countries are clear on this.

4.3 Challenging Legal and Regulatory Issues Bedevilling Multinational Insurance Programme in Nigeria

Having analysed the legality of multinational insurance programmes in Nigeria, the practices in other jurisdictions and the lessons to be learnt by Nigeria, it is expedient to now focus on specific practical legal and regulatory challenges confronting multinational insurance programmes in Nigeria. Insurance business is a significant component of the economy of any nation and a key part of the global and domestic financial system, in fact,

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[56] Ben Travener, 'Brazil Targets Unregistered Financial Services' *The Rio Times* (15 November 2011); see also US Department of State '2012 Investment Climate Brazil' Bureau of Economic Report
[57] Redfield Blonsky, 'National Western Life' (2013) Updated Thesis 3
[58] Travener (n 56)

about of global GDP is based on premiums written in the global primary insurance market.[59] The financial system of a nation is the fuel of its economy, its commerce and trade; hence, there is the need to subject it to serious regulation and supervision. The approach and intensity of supervision and regulation could advance the interest of one and undermine that of another. It is in the light of this that the focus will be placed on specific legal challenges confronting multinational insurance programmes in Nigeria. The approach would be from both a Nigerian perspective and a global perspective.

4.3.1. Licencing Issues and Domestic Concerns in Nigeria

Multinational insurance is confronted with a number of regulatory challenges in Nigeria. One of these is the mandatory requirement for local insurance licence to be obtained before cover can be provided. In other words, a local insurance licence is a condition precedent for conducting insurance business in Nigeria and this is in addition to the requirement to incorporate an insurance entity as a limited liability company. These requirements are clearly contained in Sections 3 and 4(1) of the Nigerian Insurance Act 2003.

The importance of these provisions is that the conduct of un-licenced non-admitted insurance is out-rightly prohibited under Nigerian law. Thus, a multinational insurer that is desirous of satisfying this requirement, will be required to apply for and obtain a local licence in Nigeria from NAICOM. In the designing of a multinational insurance programme, the option to obtain a local licence arises mostly when a captive insurer is included in the mix, where a fronting agent is to be adopted or where the insurer elects to obtain local authorisations. However, even though Nigerian law makes provision for licence application to be brought and the licence obtained, in a rather odd twist, the NAICOM has within the last ten years imposed a total ban on the issuance of new insurance licences.[60] NAICOM had advised all foreign insurers interested in participating in the Nigerian market to buy into any existing local insurance company because of the ban.[61] This has been disruptive for the smooth operation of multinational insurance programmes that fall within the above mentioned category.

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[59] Swiss Re, 'World Insurance: The Great Pivot East Continues' (2019) 3 Swiss Re Institute Publication 8.
[60] Zaka Khaliq, 'NAICOM Suspends Composite Insurance Licence' *Leadership Newspaper* (Abuja, 8 March 2018)
[61] Nike Popoola, 'NAICOM Lifts Ban on New Licence Issuance' *Punch Newspaper* (Lagos, 5 September, 2018)

However, it must be pointed out that this action by NAICOM is illegal and ultra vires its powers under the Nigerian Insurance Act.[62] Section 5(1) of the Nigerian Insurance Act confers on a prospective insurer the right to apply for an insurance licence and based on Section 7(1) of the Nigerian Insurance Act, where NAICOM is not satisfied and intends to reject the application, it must notify the applicant of its intention to reject the application.[63] The key test in determining whether a licence would be granted is whether NAICOM is "*satisfied or not satisfied*". This presupposes that NAICOM must examine each application on its merit and decide whether or not to grant a licence. This provision and other provisions do not in any way confer in NAICOM the powers to impose a ban on the issuance of licence. In fact, by application of the words ''not satisfied'', this presupposes that NAICOM will consider each application on its merit and it would take a decision based on an objective assessment. This wording removes any form of discretion by NAICOM in the decision-making process, moreover, even where NAICOM is not satisfied with an application, there is the obligation to notify the applicant of its proposed decision, which would activate the right of the applicant to either appeal to the Minister of Finance or proceed to satisfy the unmet conditions and re-apply to NAICOM.[64] In fact, NAICOM is obligated to state reasons for its rejection of an application and the applicant is equally entitled to remedy the wrongs and re-apply for the licence. These checks effectively curtail the powers of NAICOM and goes to show that a unilateral ban by NAICOM is ultra vires its powers.

In circumstances like these, it will be best for an aggrieved applicant to apply for a judicial review of the administrative action of NAICOM that imposes a ban on registration of new insurers. In the Nigerian case of ***General Sani Abacha, A-G Federation, State Security Service and Inspector General of Police v. Chief Gani Fawehinmi***[65] the Nigerian Supreme Court came to the conclusion based on statute, the powers of a public officer or institution are fettered; whenever it is exercised, the court is empowered to inquire into the factual basis for its exercise and would mirror this against the circumstances of the case and the expected decision from a reasonable man. The court will thereafter base its decision on the reasonable man's test and review the decision or action of the public officer or public institution. A similar position was taken in the case of ***Margaret***

[62] Nigerian Insurance Act 2003, s 5(1).
[63] Nigerian Insurance Act 2003, s 7(1).
[64] Nigerian Insurance Act, s 7(2) and (3).
[65] General Sani Abacha, A-G Federation, State Security Service and Inspector General of Police v. Chief Gani Fawehinmi [2000] 6 NWLR (Pt. 660) 228

Chinyere Stitch v AG of the Federation and 3 others,[66] where the Supreme Court of Nigeria held that for a licence to be revoked, if any discretionary powered was fettered, the court will intervene if that power was exercised arbitrarily or improperly.

Without doubt, the decision taken by NAICOM is arbitral and improper in every respect. The above being a decision of the Supreme Court of Nigeria, will be binding if the legality of the ban imposed by NAICOM on issuance of new licences is contested in courts. This would be an appropriate step towards the dismantling of administrative protectionist walls being put up, even against multinational insurance programmes and cross-border insurance services in Nigeria.

It is worthy of note to mention that while the ban was subsisting, NAICOM eventually advised foreign insurers interested in doing business in Nigeria to buy equity interest in existing licenced insurance companies in Nigeria. This in itself is illegal because it is an indirect means to restrict foreign insurers from having full control of insurance companies in Nigeria. This offends the spirit and letters of Section 17 of the Nigerian Investment Promotion Act 1995 that entitles non-Nigerians to invest and participate in the operation of any enterprise in Nigeria and forms the basis for foreigners to own up to 100 percent equity in any enterprise in Nigeria.[67] Thus, what we can see is a situation where statute guarantees a right, but regulators are seeking to take it away, albeit, illegally. Thus, this illegal protectionist barrier can be successfully dismantled through the institution of legal action in Nigeria because the ban and the alternative option provided by both offends extant written laws. In the hierarchy of laws in Nigeria, statute law stands over and above administrative measures that must be enabled by a statute and are usually considered as delegated legislation.

Practically, the direction of NAICOM, such an option would only give rise to acquisition of interests in local insurance companies that could be likened to marriages of convenience or forced marriages because each company has its culture, standards, controls and systems. Thus, based on the direction from NAICOM, participation in the insurance market in Nigeria industry could force foreign insurance companies to lower some of their standards in order to accommodate other local participants. As a result of this cultural and system clash, some local insurance players have expressed concern that

[66] *Margaret Chinyere Stitch v A.G. Of The Federation* (1986) 5 NWLR (Part 42) 1007.
[67] Nigerian Investment Promotion Commission Act 1995, s 17.

foreign insurers come into the Nigerian market with unfriendly conditions that are incongruous with the local operating environment.[68]

It is instructive to note that further to the above analysis, Nigeria has express commitments under GATS on commercial presence for foreign-service providers in all sectors of the Nigerian economy to need and be entitled to incorporate or establish the business locally in Nigeria.[69] This by implication is a right that is available to foreign insurers; thus the prohibition by NAICOM clearly offends this obligation. This violation by Nigeria, creates justification for a case to be initiated at the WTO Dispute Settlement Board (DSB), which could lead to a decision against Nigeria.

One other legal problem with the ban on the issuance of new insurance licences by NAICOM is that it was never published, but was an internal policy that was adopted within NAICOM. It clearly breaches the Transparency obligations under GATS that Nigeria is a signatory to. The GATS obligates all WTO members to publish promptly at the latest at the time of commencement all measures that will be of general application to trade in services.[70] Where it is not possible to publish information on a measure, it is expected that such information should be made public and publically available.[71] Nigeria is further obligated to promptly inform the WTO Council for Trade of any changes to its laws, regulations or administrative guidelines that would significantly affect its WTO obligations.[72] The ratio behind this principle of transparency is for compliance with due process requirement, and in order for members and other persons affected or to be affected by these measures to have reasonable opportunity to acquire information on this measures, adjust their activities and take pre-cautionary steps.[73] These provisions, excluding the obligation to notify the WTO Council for Trade applies to all member states of the WTO, notwithstanding, whether or not any specific commitments have been made.

The licence ban in Nigeria, which is a kind of measure, was neither published nor publicised, this offends the provision of GATS and means that Nigeria is in breach of its WTO obligations by imposing such a ban without taking the necessary steps in line with

[68] Favour Nnabugwu, 'Foreign Buyers Come into the Market with Imported Conditions – NEM Insurance MD' (Vanguard Newspaper, 12 June 2017, Lagos).
[69] General Agreement on Trade in Services 1994, Schedule of Specific Commitments, GATS/SC/65 1.
[70] General Agreement on Trade in Services (Annex 1B), Art III (1).
[71] General Agreement on Trade in Services (Annex 1B), Art III (2).
[72] General Agreement on Trade in Services (Annex 1B), Art III (3).
[73] Panagiotis Delimatsis, 'The Principles of Transparency in Domestic Insurance Regulation' (Brown Bag Lunch, Berne, 13 March, 2006) 5.

its international obligations. The publication requirement of a measure would be sufficient even if it is published on the website of a regulatory authority because Article III (2) makes provision for the recognition of such publications.[74] Ironically, NAICOM did not take the step to even publish this prohibition on its website or on its Notice Boards.

The above issues highlighted are essential problems that confront the implementation of some forms of multinational insurance programmes in Nigeria, especially those that will require some form of insurance licencing, which are largely captive insurance arrangements and fronting. Having discussed the legal issues associated with licencing of insurance companies in the context of multinational insurance programmes, other legal issues will be analysed subsequently.

4.3.2. The Legal Issues Surrounding the Right of a Non-Admitted Insurer to Sue and Be Sued in Nigeria under a Multinational Insurance Programme

Just like other contracts, in a multinational insurance programme, disputes are likely to arise between parties to the insurance contract or between a party/parties and third parties. In transactions of this nature, there is the possibility that legal disputes could arise between parties and this could take any of the following forms of dispute:

- a non-admitted insurer in an MIP and a Nigerian resident company that is an insured or a subsidiary of an insured or a beneficiary under the insurance contract;
- the insurer and/or the insured and a third party;
- an insured third party suing the insured and the insurer or suing the insured and the insured applies to join the insurer to indemnify it;
- the insured suing the insurer in Nigeria; and
- a non-admitted insurer suing a party in Nigeria in exercise of its right of subrogation.

These hypothetical scenarios raise the legal question, can a non-admitted insurer sue and be sued in Nigeria? This question is analogous to the question, can a foreign unincorporated company sue and be sued in Nigeria? In Nigeria, there is currently no case law that addresses the first question; however, with respect to the second question, there is a rich corpus of law that has evolved over the years. Therefore, in attempting to

[74] Delimatsis, Panagiotis, 'Article III GATS: Transparency' in Rüdiger Wolfrum, Peter-Tobias Stoll, Clemens Feinäugle, (eds.) *Max Planck Commentaries On World Trade Law, WTO - Trade In Services* (2008, Martinus Nijhoff Publishers,Vol. 6) 92-107.

analytically answer the first question, reliance will be placed on this rich body of laws that relate to the second question.

As mentioned in Chapter Two of this thesis, the Nigerian Companies and Allied Matters Act 2004 (CAMA 2004)[75] and the erstwhile corporate law, the Companies Act 1968 prohibits foreign companies from carrying out any kind of business in Nigeria without first incorporating a company in Nigeria.[76] This prohibition also includes insurance companies and by extension non-admitted insurance companies. However, such foreign companies are permitted to, prior to incorporation, have a place of business in Nigeria strictly for correspondences purposes like receiving notices and other documents.[77] The provisions of the Companies Act 1968, did not make express provision for the right of foreign companies to sue and be sued but, in the case of **Wema Bank v National Shipping Line Limited**[78] it was held that a foreign company cannot sue or be sued in a Nigerian court. In this case, a Nigerian firm acted as local representatives and agents of a foreign German firm. The Nigerian firm sued the defendant seeking an order of the High Court to compel the foreign firm to deliver some goods that belonged to the Nigerian firm that were about to be shipped to the German firm based on instructions of the German firm but without the consent of the Nigerian firm. The German firm applied to be joined as a party to the suit but this elicited the issue whether or not they can sue and be sued in Nigeria in view of the fact that they do not have a recognisable legal personality in Nigeria. The Court in interpreting the provisions of the Companies Act 1968, held that a juristic person is a person or entity known to law and that all foreign companies not incorporated under Nigerian laws are not juristic persons under Nigerian law. Consequently, the application for joinder of the foreign German firm was struck out.[79]

It is apparent from the above decision that the Nigerian courts at that time and under the now repealed Companies Act 1968 decided to apply the maxim, ex turpi causa, non-oritur actio, which means that no action can arise from a baseless cause or from an illegal cause, because as at that time, the law was highly restrictive to foreign unincorporated business. This position under Nigerian law and that decision based on the Companies Act 1968 can at best be considered as anachronistic because it arrogantly refuses to recognise the

[75] Companies and Allied Matters Act, Laws of the Federation of Nigeria 2004.
[76] Companies Act 1968, s 370(1)
[77] Companies Act 1968, s 370(2)
[78] *Wema Bank v National Shipping Line Limited* (1976) 2 FRCR 133.
[79] See also *Shitta & Others v Ligali* (1941) 16 NLR 23 and *Agbonmagbe Bank Ltd v General Manager, GBO Limited and 1 Other* (1961) All NLR 116.

legitimacy of corporate incorporations carried out by other countries and at least for the sake of reciprocity, have accorded such recognition to foreign companies that are incorporated abroad.

Improvements were subsequently made to the Companies Act 1968 and it was enacted in 1990 as the Companies and Allied Matters Act 1990 (later 2004). Although the original position prohibiting foreign companies from conducting business in Nigeria is still retained in Section 54 and 55 of CAMA 2004, any company that breaches this provision and goes on to conduct business in Nigeria, the entire business arrangement would be illegal and void.[80] CAMA proceeds to criminalise any violation of this provision.[81] However, the most important novelty of CAMA is contained in Section 60 that confers on foreign unincorporated entities the right to sue and be sued under Nigerian law either in its name or in the name of its agent.[82] However, before analysing the right of a foreign company to sue and be sued, it is important to note that the prohibitions in Sections 54 and 55 of CAMA 2004 apply to only foreign companies 'carrying out' business in Nigeria. The important question therefore is – under Nigerian law, what is the meaning of carrying out business? The Nigerian Court of Appeal in *Ritz & Co KG v Techno Ltd*[83] had the opportunity to define the meaning of carrying out business and defined it as continuing activity by a company that could be in the form of supply of goods or services. The court proceeded to add that it connotes to conduct or continue a particular business or enterprise as a continuing or permanent occupation. This therefore means that for a company to be deemed to be carrying out business, there must be some act of repetition in selling of goods and services as against just a one off engagement.[84]

The implication of the above point is that a transaction that occurs once would not be considered to have been conducting business in Nigeria and the parties would not be deemed to have violated Nigerian law. This distinction is important because there are numerous transactions that do not in any way constitute conducting business in Nigeria and may even have been arranged offshore, but because one of the party is in Nigeria and some level of performance is in Nigeria, it could be mistaken to constitute doing business in Nigeria. Of course, it should not be expected that in such a situation an offshore company should incorporate a local company for that singular purpose. In light of this, it

[80] Companies and Allied Matters Act 2004, s 54(2).
[81] Companies and Allied Matters Act 2004, s 56.
[82] Companies and Allied Matters Act 2004, s 60.
[83] *Ritz & Co KG v Techno Ltd* (1999) 4 NWLR Pt 598.
[84] *Ritz & Co KG v Techno Ltd* (1999) 4 NWLR Pt 598.

is evident that a non-admitted insurer under a multinational insurance programme that has some level of coverage in Nigeria under its master policy or global policy, perhaps based on a DIC/DIL arrangement, would not be deemed to be conducting or carrying out business in Nigeria, particularly because the transaction is likely to be a one off arrangement between those particular parties or an arrangement that may be quite infrequent. Based on which, it can safely be argued that an infrequent multinational coverage will not contravene the provisions of Sections 54 and 55 of CAMA.

Having clarified this issue, the next sub issue is in what circumstances can a foreign company sue or be sued under Section 60 of CAMA. As mentioned earlier, a foreign company not registered in Nigeria that has a claim against a party resident in Nigeria, is allowed under Nigerian law to bring a claim either in its name or in the name of its agent.[85] Nigerian corporate jurisprudence now recognises this principle and acknowledges that it is unfair and unjust to exclude foreign companies with a claim from suing in Nigeria, particularly because suing does not in itself amount to conducting business.[86] But what is the position of the law, when the contract between a foreign entity and local entity is illegal; can the foreign entity sue or be sued based on Section 60 of CAMA? In other words, if a multinational insurance programme is designed in a manner that offends the restrictions and prohibitions of CAMA 2004 and the Insurance Act 2003, will the non-admitted insurer still have a right to sue and be sued?

This issue received judicial attention in the case of ***CITEC International Estates Limited v Edicomsa International Inc & Associates***[87] which was heard at the FCT High Court, the Court of Appeal and finally, the Supreme Court. Edicomas, a company registered in the United States entered into a contract with CITEC for conceptualisation, design and construction of 5,000 housing units in Abuja, Nigeria and for the construction of two factories for the production of Simplex Cepol Wall and Slab Panels and other items for the construction of the houses. Based on the terms of the agreement, EDICOMAS purchased all the machinery, equipment and vehicles for the construction of the building and operation of the factories. CITEC paid for the two factories but subsequently terminated the contracts on the grounds that EDICOMAS purchased second-hand equipment and that most of the equipment were not fit for purpose. Consequently, an action was initiated by EDICOMAS at the FCT High Court, but a preliminary objection

[85] *Bank of Baroda v Iyalabani Co Ltd* (2002) 13 NWLR (Pt. 785) 551.
[86] *Ritz & Co KG v Techno Ltd* (1999) 4 NWLR (Pt 598) 298.
[87] *CITEC International Estates Limited v Edicomsa International Inc & Associates* [2017] NGSC 13

was raised by CITEC, arguing that by entering into this contract, EDICOMAS had breached Sections 54 and 55 of CAMA 2004 and should therefore not be entitled to exercise the right of action contained in Section 60 of CAMA, particularly because the contract was a nullity by reason of Section 55 of CAMA 2004. The FCT High Court sustained the preliminary objection and decided in favour of CITEC, thus the suit was struck out for lack of legal capacity.

On appeal to the Court of Appeal, the Court in agreeing with EDICOMAS, held that the action of the latter did not violate Sections 54 and 55 of CAMA 2004 because the engagement was one off and there was no sufficient repetition for it to constitute or amount to carrying out business in Nigeria. The Court of Appeal further held that the intention of Section 60 of CAMA is to confer legal personality on foreign entities seeking to exercise the right to sue in Nigeria. The court held that even where a foreign company fails to comply with the provisions of Section 54 of CAMA 2004 by incorporating an entity locally, it can still sue and be sued in Nigeria, thus, Section 54 is not a bar to the exercise of the right under Section 60 of CAMA 2004.

CITEC was dissatisfied with this decision and appealed to the Supreme Court of Nigeria, where it was declared that any contract that violates Sections 54 and 55 of CAMA 2004 are not only void but illegal contracts and constitutes an offence. The Supreme Court proceeded to distinguish between a contract that violates Sections 54 and 55 of CAMA 2004 and a contract to be enforced under Section 60 of CAMA, emphasising the rights under Section 60 of CAMA 2004 can only be exercised when the rights arose from a lawful business and that for this kind of business to be lawful, they must be conducted outside Nigeria. The implication of this is that the intention for Section 60 of CAMA 2004 is for a foreign company having a transaction with a Nigerian entity where the transaction is enforceable in Nigeria, to make recourse to the courts in Nigeria and seek justice locally.

This clarification by the Supreme Court is an important one but it does not have much impact on non-admitted insurance because they are involved in transactions that are concluded outside Nigeria and only have contact with Nigeria because there is the need to enforce some form of rights locally and the Nigerian court is the forum conveniens. This will particularly kick in where a non-admitted insurer seeks to exercise a right of subrogation in Nigeria. Such combustive legal argument is likely to arise. None of these types of cases have arisen in Nigeria but when one arises, the argument and the

interpretation of the law would be that the action of the non-admitted insurer does not amount to carrying on business in Nigeria and does not contravene Sections 54 and 55 of CAMA 2004. However, to limit the availability of this defence to a defendant where a non-admitted has subrogated the right of an insured, it would be best for the non-admitted insurer to sue in the name of the insured, because this is permissible under Section 60 of CAMA 2004. However, to forestall a situation, where the insured that has been indemnified refuses to cooperate with and support the non-admitted insurer during the suit, it would be best for the insurance contract to contain a clear term that obligates the insured to support the non-admitted insurer in the event of the exercise of the right of subrogation. This approach will completely eliminate the delay that would arise from preliminary objections bordering on the capacity of the non-admitted insurer to sue in Nigeria.

It should however be pointed out that where the structure and design of an MIP involves so much activity in Nigeria and it constitutes conduct of business in Nigeria, in such circumstances, a non-admitted insurer will lose the right of action in Nigeria and would be affected by the effects of Section 55 of CAMA 2004.

Having discussed the issue of the right of a non-admitted insurer to sue in Nigeria, the next part of this chapter will focus on and appraise the window available under the Nigerian Insurance Act for insurance risks in Nigeria to be legally ceded to non-admitted insurer or reinsurer. This section of the work will also appraise the extent to which this statutory window complies with Nigeria's multilateral and international obligations.

4.3.3. Protectionism in Nigeria, Statutory Authorisation to Cede Risk Abroad and Non-Compliance with Nigeria's GATS Specific Commitments Obligations

It has been mentioned in previous chapters that non-admitted jurisdictions are mostly protectionist in nature and one of the ways in which the insurance market and industry players in addressing this challenge is through the introduction of multinational insurance programmes. However, this industry option is complementary to the efforts of the WTO aimed at liberalising trade, including trade in services. The WTO adopts a flexible approach in advancing its agenda; hence, it permits countries to make specific commitments under the GATS framework, which will at an agreed date be binding and obligatory on them. Ideally, the local legislations are to be amended to reflect these specific commitments by such countries. Nigeria has made some specific commitments

under GATS, which if implemented fully will provide legal basis for certain types of multinational insurance programmes including reinsurance services. However, despite its specific commitments, Nigeria's protectionist stance has prevented it from amending the local laws and complying fully with these commitments.

It has been mentioned in previous chapters that the Nigerian insurance regulatory framework is largely protectionist and non-admitted in nature. It is admitted that the Nigerian Insurance Act 2003 like those of other emerging economics adopted a very strict protectionist stance in its style to prohibit non-admitted insurance. But with Nigeria's accession to the WTO and signing of the GATS, Nigeria made a number of Specific Commitments under GATS that were designed to permit some forms of non-admitted insurance and reinsurance services. These commitments are supposed to be Nigeria's border and permission for non-admitted insurance services.

This section of the work will analyse these specific commitments made by Nigeria, appraise Nigeria's insurance legal framework in the light of these commitments and ascertain whether or not Nigeria is in breach of these commitments. This section of the work will also examine queries that have been served on Nigeria by the European Commission (EC) in the form of ''Request from the EC and the Member States to Nigeria''.[88] This section of the work will also analyse the lessons that Nigeria can learn from other jurisdictions like South Africa, which is both a sub-Saharan African country and a common law jurisdiction.

On 26th February, 1998, Nigeria made a number of Specific Commitments under GATS for Trade in Services within its territory.[89] In addition to several commitments in the financial service (that is banking and insurance sectors), Nigeria made specific commitments to grant market access with respect to cross-border supply of insurance services and consumption abroad in relation to the following categories of services: maritime shipping and commercial aviation,[90] goods in international transit,[91] reinsurance

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[88] Request from the EC and the Member States to Nigeria GATS 2000.

[89] World Trade Organization, Nigeria – Schedule of Specific Commitments – Supplement 1, 26 February 1998 (GATS/SC/65/Suppl.1).

[90] World Trade Organization, Nigeria – Schedule of Specific Commitments – Supplement 1, 26 February 1998 (GATS/SC/65/Suppl.1), paragraph 7(ii), 2 and GATS Understanding on Commitments in Financial Services, paragraph B(a)(i).

[91] World Trade Organization, Nigeria – Schedule of Specific Commitments – Supplement 1, 26 February 1998 (GATS/SC/65/Suppl.1), paragraph 7(ii), 2 and GATS Understanding on Commitments in Financial Services, paragraph B(a)(ii) and GATS Annex on Financial Services, paragraph 5(iv).

and retrocession and the services auxiliary to insurance that is insurance based consultancy, actuarial, risk assessment and claim settlement services.[92]

The implication of these specific commitments is that Nigeria undertook to operate as a full non-admitted jurisdiction with respect to maritime, aviation and transportation (popularly known as MAT services). Any country that makes such a commitment would automatically allow non-admitted insurers and reinsurers to operate within its market, subject to its powers to conduct prudential regulation and entitled to advertise and solicit for business within such markets without necessarily incorporating a local company or obtaining a local insurance licence. With respect to consumption abroad, Nigerian residents are also permitted to seek non-admitted insurers and purchase MAT insurance coverage from them. Similarly, based on the specific commitments, Nigeria undertook to completely open up its reinsurance market to a fully non-admitted status, not necessarily for MATS services but for all kinds of reinsurance and retrocession services. In addition, Nigeria took the extra step to make commitments to open up its markets to services provided by insurance auxiliary services providers, which can be provided both as cross-border supply of services and consumption abroad.

Despite these lofty commitments, Nigeria has in a bid to be protectionist in its regulatory approach, failed to comply with any of these insurance sector-based commitments. Quite appalling is the fact that Nigeria has not even shown much commitment to honour its obligations. This is evident in the fact that the Nigerian Insurance Act was enacted in 2003, which indicates that it commenced five years after the GATS specific commitments were made, but despite this, Nigeria did not legislate its specific commitments in insurance into the Insurance Act 2003 and is yet to comply, twenty-one years after making the specific commitments. Nigeria's breach of its GATS commitments continues till today as indicated in the reinforcement of the breaches through numerous guidelines and regulations. An analysis of these non-compliant provisions will be attempted below.

Notwithstanding the above commitments, the Nigerian Insurance Act 2003, authorises the ceding of risks to foreign unlicensed insurers and reinsurances only in exceptional circumstances or for purpose of the exceptional nature of the risk and where a Nigerian licenced insurer or reinsurer is unable to provide cover.[93] This means that it introduces

[92] World Trade Organization, Nigeria – Schedule of Specific Commitments – Supplement 1, 26 February 1998 (GATS/SC/65/Suppl.1), paragraph 7(ii), 2 and GATS Understanding on Commitments in Financial Services, paragraph B(b) and GATS Annex on Financial Services, paragraph 5(iv).
[93] NIA, s 74(4) and s 73.

some sort of right of first refusal in favour of Nigerian insurers and reinsurers. The wording of this provision is very broad and does not make any exception for risks that are related to maritime, commercial aviation and transportation or goods in international transit. Ideally, even though Nigeria is taking a protectionist stance, it is expected that these MAT based services should have been excluded from its prohibitions. The prohibition of MAT insurance is further reinforced by the requirement that all imports into Nigeria must be insured with an admitted insurer and non-compliance has been criminalised.[94]

The nature of specific commitment made by Nigeria is such that would not require any additional layer of authorisation, but would be cross–border and consumption abroad in nature. But the provisions of Section 72 of the Nigerian Insurance Act have added extra legal and compliance burdens on such transactions. For example, based on NAICOM's guidelines and regulations, a person interested in procuring non-admitted insurance or reinsurance cover is required to first obtain Approval in Principle and Letter of Attestation/Certificate to Reinsure Abroad.[95] This therefore rubbishes Nigeria's grant of full market access for MAT services under GATS because any WTO Member that grants full market access in any area or sector of its economy and with respect to any mode of supply, is precluded from introducing any form of measure like quantitative restrictions, limitations on the forms of entity and on foreign equity participation.[96] The protectionist measure that has been illegally adopted by Nigeria in this context is quantitative restriction and has been applied not only in MATs services but also in the oil and gas sector, which is the biggest contributor to Nigeria's GDP.[97]

With respect to risks emanating from the Nigerian oil and gas sector, the Nigerian Oil and Gas Content Development Act 2010 empowers NAICOM to approve the ceding of risk to foreign insurers and reinsurers but only when Nigerian local capacity has been fully exhausted.[98] Section 50 of the Act provides as follows*: "No insurance risk in the Nigerian oil and gas industry shall be placed offshore without the written approval of the National*

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[94] Nigeria Insurance Act 2003, s 67.
[95] NAICOM Operational Guidelines 2011, paragraph 5.1.
[96] WTO Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS) (S/L/92), Part 1, paragraph 8.
[97] National Bureau of Statistics, Nigerian Gross Domestic Products Report 2018.
[98] NOGIDA 2010, s 50

Insurance Commission which shall ensure that Nigerian local capacity has been fully exhausted."

It is important to note that with respect to non-admitted cover for oil and gas risks, these provisions operate as additional requirements to the conditions contained in the Nigerian Insurance Act. Hence, for non-admitted oil and gas related insurance risks cover, it is mandatory that Nigerian insurance capacity must be fully exhausted before approval for offshore cover can be applied for and granted. This condition operates as the first level of requirement /condition, while the requirement of special risk and exceptional circumstances contained in the Nigerian Insurance Act, is the second level of compliance requirement.[99] Thus, where the risk to be covered is an oil and gas based risk, two levels of authorisation must be sought and obtained.

NAICOM, in the exercise of these powers conferred on it, has issued a set of guidelines to guide the application and approval of non- admitted cover. The extant guidelines are as follows:

- *Circular on Requirement for Approval in Principle, Letter of Attestation and Certificate for Offshore Reinsurance Request*;[100]
- *Guidelines for Oil and Gas Insurance Business;*[101]
- *Circular on Reinsurance Request/Retrocession Arrangement in Respect Of Domestication and Special Risk Insurance*[102] and
- *Market Conduct and Business Practice Guidelines for Insurance Institutions in Nigeria 2018.*

The Nigerian oil and gas sector is the main stay of the Nigerian economy; consequently, it is a major source of foreign exchange and within the last 10 years Nigeria has become extremely protectionist in the handling and regulation of this sector; consequently, regulations and laws have been formulated to achieve this. Such legislation is the Nigeria Oil and Gas Content Development Act 2010 and the Guidelines for Oil and Gas Insurance Business 2010, The Petroleum Industry Bill pending before the National Assembly

[99] NIA, s 72(4)
[100] National Insurance Commission of Nigeria, 'Circular on Reinsurance/Retrocession Arrangements in Respect of Domesticated and Special Risks Insurance' 7 August 2012 (NAICOM/OCT/RE-CIR/01/08/2012) (NAICOM 2012)
[101] NAICOM, 'Guidelines for Oil and Gas Insurance Business' December 2010 (NAICOM 2010)
[102] NAICOM, 'Review of Requirement for Approval in Principle, Letter of Attestation and Certificate for Offshore Reinsurance Requests' December 2013 (NAICOM/OCT/RE-CIR/02/11-2013) (NAICOM 2013)

contains several protectionist provisions.[103] Interestingly, it has been mentioned that the Nigerian Oil and Gas Content Development Act contains some protectionist provision, which is reinforced by the NAICOM 2010 Oil and Gas Guidelines. The latter introduces requirements that are add-ons to the other requirements applicable, domesticated and non-oil and gas insurance businesses.[104]

These provisions of NAICOM 2010 Oil and Gas Guidelines, reiterates the provisions of the Nigeria Oil and Gas Content Development Act 2010, but in greater detail it distributes the legal obligations that flow therefrom; for the insured, it imposes the obligation to place Nigerian based oil and gas risk with Nigerian registered companies. Permitting them to insure the excess offshore only when two conditions are present, to wit -: where local insurance capacity cannot cover the risk domestically and where the authorisation of NAICOM has been sort and obtained.[105] The operative effect of paragraph 2.2 is that it makes it mandatory for Nigerian based risks to be insured locally, while equally permitting reinsurance to be done offshore, subject to the necessary approval by NAICOM.[106] The broader obligation not to insure or reinsure with a non- Nigerian insurance company is contained in paragraph 2.3 and it is applicable to domestic insured, prospective insured and domestic insurance companies that may seek to reinsure offshore.[107] In the distribution of obligations, NAICOM is charged with the responsibility of granting approval to entities seeking to place risk offshore but on the condition that local capacity has been exhausted.[108] Another distinction between paragraphs 2.2 and 2.3 is that 2.3 applies specifically to businesses classified as domestic insurance.[109]

The distinction in the import and application of both paragraphs 2.3 and 2.5 is important because it relates to the sanctions that will be applied in cases of breach where an insured or prospective insured breach their obligations in paragraph 2.2. The penalty for breach will be “the equivalent of 10 times the amount of premium paid with regard to the policy issued.”[110] On the other hand, where the provision breached is paragraph 2.3, the penalties

[103] Debbie Legall, ‘New Petroleum Industry Bill’ (International Bar Association Conference, 2010), see also Petroleum Industry Bill, s 284 – 288.
[104] Guidelines for Oil and Gas Insurance Business, paragraph 2.2 to 2.5. (O & G Guidelines)
[105] Ibid, paragraph 2.2.
[106] ibid
[107] ibid, paragraph 2.3.
[108] ibid, paragraph 2.5.
[109] ibid, paragraph 2.3.
[110] ibid, paragraph 2.7(i)

will be the equivalent of 5 times the amount of premium involved in the business transacted.[111]

In negotiating underwriting terms and conditions, indigenous or domestic entities are expected to take responsibility in establishing the agreement. In other words, Nigerian firms are obligated to be the initiators of the terms and conditions. This presupposes that the use of standard form insurance policies and wording issued by foreign firms will not be acceptable or legitimate under Nigerian law.[112] Where this is the case, there is the likelihood that the application could be rejected by NAICOM or approval already granted can be withdrawn.

When an application is made to NAICOM, its grant of waiver or approval to insure the excess offshore is not automatic, usually it takes a number of factors into consideration. One of these factors is the financial strength or credit rating of the foreign insurance or reinsurance firm. The minimum acceptable rating by NAICOM is an A-rating from Standards and Poor's or an "A" rating from A.M. Best.[113] This is a commendable step by the Nigerian regulators, especially because it has no other means to determine the strength and financial capacity of a foreign insurer. While this approach appears safe, one must also raise the caution that it cannot be without its dangers. This is in the light of the revelations about the role played by credit rating agencies in the period leading up to the global financial crisis of 2007/2008.[114]

It should be noted that there is no well-structured system for domestic insurance firms to be rated; hence, testing their soundness and resilience is questionable. There is therefore the need for a local robust credit rating system to be introduced. Accurately ascertaining the credit rating and insurance capacity of a foreign insurer participating or likely to participate in the Nigerian market, is factored into the calculation of the capacity of Nigerian firms, which are into treaty reinsurance arrangements with such firms.[115]

A calculation of the capacity of Nigerian firms, which factors in the capacity of foreign firms, can be deemed to be a 'gross capacity calculation methods,' but where the calculation excludes the capacity of its foreign partners, that can be deemed to be its net

[111] ibid, paragraph 2.7(ii)
[112] ibid, paragraph 2.7
[113] ibid, paragraph 4.1.
[114] Maurice Mullard, 'The Credit Rating Agencies and their Contribution to the Financial Crisis' (2012) 83 The Political Quarterly
[115] O & G Guidelines (n 104), paragraph 4.2.

capacity. From the wording of paragraph 3.2, it appears that NAICOM applies the gross capacity approach to ascertain the capacity of firms.

The restriction within the Nigerian Insurance space and the oil and gas industry extends beyond just the insured, insurers and reinsurers, it also applies to insurance intermediaries**.** These restrictions extend to brokers, lost adjusters and other insurance intermediaries as contained in section 49(1) of Nigeria Oil and Gas Industry Content Development Act 2010 and paragraph 10.5 of the Guidelines for Oil and Gas Insurance Business.[116] These provisions specifically require that all operators in the Nigerian oil and gas industry must insure all insurable risks related to their oil and gas businesses through an insurance broker registered in Nigeria.*[117]*

The above prohibition applies to insurance brokers, while paragraph 10.5 of the NAICOM Oil and Gas Guidelines extends the prohibition to loss adjusters.[118] This offends Nigeria's specific commitments to grant full markets access on a cross-border basis and consumption abroad basis to services auxiliary to insurance, which include consultancy, actuarial, risk assessment and claim management services.[119] This highly protectionist stance of the Nigerian insurance regulators gives rise to two negatives, the first is that it prevents healthy competition and by extension, denies the Nigerian insurance sector the opportunity to grow and to benefit from innovation and state of the arts industry practice. The second negative is that Nigeria breaches and violates its international obligations and therefore loses the respect and cooperation of other countries and state actors. The above analysis has established that Nigerian insurance regulations have been pegged at a level that is far below the regulatory standard and the expectations from a global perspective. Whatever the motivation is, be it protectionism, neglect, or bureaucracy, twenty eight years is a lot of time for a serious nation to comply with its international obligations.

This state of affair was noticed by the EC; as a result, it made a request to Nigeria through the WTO for Nigeria to improve its GATS commitments and make clarification on its existing commitments.[120] The details of the EC requests will be discussed briefly in this part of the work.

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[116] Nigerian Oil and Gas Industry Content Development Act 2010, s 49(1) (NOGID Act 2010)
[117] NOGID Act 2010, s 49(1)
[118] O & G Guidelines (n 104), paragraph 10.5.
[119] WTO Annex on Financial Services, paragraph 5(iv).
[120] European Commission, 'Request from the EC and Its Member States (Hereafter the EC) to Nigeria under GATS' (2000).

In its request, the EC made specific reference to ten service sectors, including financial services, which incorporates insurance.[121] The EC observed correctly that Nigeria's GATS commitments in the financial services sector is only partial, on the basis of which it requested that the existence of an economic needs assessment be conducted and compulsory cession of reinsurance to admitted reinsurers[122] should be removed from Nigerian law. As pointed out earlier, this practice by Nigeria does not accord well with international trade and globalisation. The EC also requested that the requirement that all government properties in Nigeria must be insured with the National Insurance Corporation (NICON) be expunged from the law. This concern was expressed by the EU based on the provisions of Section 4 of the National Insurance Corporation Act 1969, which creates a monopoly for NICON to insure all buildings owned by the Federal Government or any State Government.[123] Quite commendably, following the concerns expressed by the EC, that provision was repealed and has been expunged from NICON Act 1969.[124] One other step taken by the Nigerian government is the repeal of Section 7 of the Nigerian Reinsurance Corporation Act 1977, which made it mandatory for all insurers to reinsure a minimum of twenty percent of the sum insured in any policy with the Nigerian Reinsurance Corporation.[125]

However, these steps have still not shown sufficient commitment from Nigerian regulators and there is still a strong absence of political will to fully open up the market to non-admitted insurers. This is evident in the fact that the attempt to repeal laws backing government monopoly in some areas of the insurance market was not extended to the insurance of agricultural produce, which under the Nigerian Agricultural Insurance Corporation Act 1993, made it mandatory to insure agricultural produce with Nigerian Agricultural Insurance Corporation (NAIC) including all Agricultural produce and assets that are designated by NAIC as falling within the Agricultural Insurance Scheme Nigeria.[126]

Nigeria needs to show genuine commitment that it wants to make progress in its insurance sector reforms. There are numerous examples of progress being made by other countries

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[121] Ibid 1.
[122] Nigerian law including Section 72(2)(f) of the Nigerian Insurance Act 2003 and Paragraph 4 of the Market Conduct and Business Practice Guidelines for Insurance Institutions 2018 all require that before non-admitted insurance can be obtained, available local capacity must be exhausted.
[123] National Insurance Commission Act 1969, s 4.
[124] Nigerian Insurance Act 2003, s 99.
[125] Nigerian Insurance Act 2003, s 99 and Nigerian Reinsurance Corporation Act, s 7.
[126] Nigerian Agricultural Insurance Corporation Act 1993, s 7 and 13.

with similar characteristics like Nigeria; for example, South Africa and India. With this level of protectionism and with the hypocritical and weak attempts at reforms, Nigeria has been unable to grow its insurance sector and the contribution of the sector to Nigeria's GDP has remained at 0.40% in 2017, the lowest in Africa.[127] Whereas, in India, in 2017 the insurance sector contributed 3.1% to the GDP, even higher than the banking sector, which stood at 2.9% of GDP.[128] In South Africa, the Finance and Insurance Sub-Sector contributed about 9.5% to the GDP in 2015.[129] The variance is clear as crystal and points to the fact that this is the time for Nigeria to make the needed progress by pulling down protectionism, which will ultimately benefit its economy, raise the trust in the insurance sector, result in deeper insurance penetration, attract foreign participants and increase the expertise and capacity in the sector.

[127] Daniel Ayomide, 'Insurance Sector Contribution to GDP Poorest in Africa' *The Nation Newspaper* (Lagos, 15th October, 2018).
[128] Insurance Information Institute, 'A Firm Foundation: How Insurance Support the Economy' < https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/driving-economic-progress/contribution-to-gdp> accessed on 22 October 2018
[129] E. Botes and K Kuhn, 'Notes on the Output of the Finance, Insurance, Real Estate and Business Services Sector' (2017) South African Reserve Bank Quarterly Bulletin.

4.4 Non-Protectionist Issues and Challenges Affecting the Implementation of Multinational Insurance Programmes

The earlier issues discussed focused on protectionist issues that characterise the implementation of multinational insurance programmes in Nigeria. This section of Chapter Five will focus on the non-protectionist issues that affect multinational insurance programmes in Nigeria.

4.4.1 Excessive Reporting Obligations on Insurers and Reinsurers

Beyond the challenges posed by the protectionist regulatory framework operating in Nigeria, additional challenges are faced by operators of multinational insurance in Nigeria, notable of which are some excessive reporting obligations introduced by the Nigerian Content Monitoring Board (NCMB)[130] under the Nigeria Oil and Gas Content Development Board Act (NOGID Act 2010). These requirements are in addition to mandatory reporting obligations to NAICOM for any insurer that has operated in Nigeria. Under the NOGID Act 2010, it is obligatory that annually a performance report is forwarded to the NCMB, detailing the product and activity of the operator/insured for the previous year.[131] The operator/insured is obliged to inform its contractual counter-parties about its reporting obligations[132] and to procure the cooperation of such counter-parties in the event that the NCMB decides to conduct an assessment and verification of the compliance by operators/insured and its counter-parties. This is capable of impacting a non-admitted insurer or reinsurer that has, with the authorisation of NAICOM, provided cover for exceptional risks.[133] Such non-admitted will be required to file additional returns with NAICOM in Nigeria, and where they have provided cover in the oil and gas industry, they will have to contend with the additional requirement of filing returns with NCMB. This is capable of increasing costs for non-admitted insurance because this will be an additional cost component, which will be distinct from returns they will have to file in their home country and before their home regulators. Where an operator/insured contravenes this provision it will be considered to have committed an offence, and upon conviction it will be liable to either a fine, which is equivalent to five percent of the project sum or to a cancellation of the project or contract.[134] For the insurance sector, this penalty

[130] The NCMB was established pursuant to Section 4 of the NOGID Act 2010.
[131] NOGID Act 2010, s 60
[132] NOGID Act 2010, s 65 & 66
[133] Insurance Act 2003, s 72.
[134] NOGID Act 2010, s 68

is in addition to the penalty that can be introduced under the Nigerian insurance regulatory framework for provision of non-admitted cover.

In the context of multinational insurance covering oil and gas risk, a violation of the authorisation requirement from NAICOM attracts the sanctions and penalties that operate under the relevant laws. However, where the violations relate to reporting of local content requirements, the violation will be addressed not by NAICOM but by NCMB, which could initiate a criminal trial alone before the Federal High Court.[135]

The scope of liabilities and sanctions that can be imposed for breach of reporting obligations, goes beyond the operators in the oil and gas industry and insured. The Act has applied the word "contractor or sub-contractor" which can be interpreted to include contractors providing insurance cover either as domestic insurers or as authorised foreign insurers. This means that foreign insurers and reinsurers that may have obtained the required NAICOM authorization for foreign ceding, stand the risk of breaching this regulatory obligation by simply failing to respond to a reporting request.

Interestingly, the annual reporting obligation is not placed only on the local insured and local insurer. The local insured must notify the insurer (foreign or local) that NCMB can request information at any time from them. Without doubt, this requirement if triggered, is capable of adding compliance cost to most insurers and it would have been more suitable for NCMB and NAICOM to form a bi-lateral and multi-lateral exchange of information agreement with other regulators; this is a trend in line with global best practices and one encouraged by the International Association of Insurance Supervisors and the Financial Stability Board (FSB).[136]

Instead of having dual and concurrent reporting lines, it is more cost efficient and effective if the Nigerian regulatory framework is reviewed so that there is just one reporting line and perhaps, both regulators can rely on the information provided jointly. That way, costs and time would be saved for both the regulator and the regulated.

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[135] CFRN 2010, s 251

[136] Financial Stability Board, 'Global Adherence to Regulatory and Supervisory Standard on International Co-operation and Information Exchange' (2013) FSB Publication

4.4.2 Prohibition of "Cut-Through" Clauses and its Effect on Effectively Managing Multinational Insurance Programmes

A cut-through provision is a clause contained in a reinsurance contract or an insurance contract or both, which entitles the insured of a primary insurer the right to claim cover directly from the reinsurer in the event that the primary insurer becomes insolvent or suffers other financial impairment.[137] The basic effect of a cut-through clause is that it entitles the primary insured to claim directly from the reinsurer by conferring a form of contractual privity on the primary insured.[138]

Normally, cut-through clauses are utilised in a number of circumstances including where the ceding company does not have the kind of financial rating that can attract big commercial policyholders. Hence, the cut-through clause is introduced as an incentive or for comfort and a guarantee that in the event that the ceding company/primary insurer becomes insolvent, the insured will have recourse to the reinsurer through the cut-through clause.[139] A cut-through clause is the perfect tool to design multinational insurance programmes for non-admitted jurisdictions, in the sense that it can be utilised in a fronting arrangement, where the primary insurer, which is the fronting agent, is a locally licenced insurer and it is structured in a manner that all the risk will be reinsured with the non-admitted reinsurer.[140]

In other words, a cut-through clause can be designed to serve a number of purposes; the most common of which is the right vested in the primary insured to take direct action against the reinsurer. This can be activated when specified events/triggers are present, like insolvency or financial distress of the primary insurer.[141] Another motivation for negotiating and including a cut-through clause, is to enable insurers that do not have adequate financial rating and financial capital to succeed in procuring the patronage of sophisticated insurers, enabling them to operate in the same market with the large, strong

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[137] Moira Saville, Peter Stockdale and Philip Ward, 'Cut-Through Reinsurance Clauses – Enforceability' 1

[138] Larry Shiffer, 'Playing the Name Game – An Update on Cut Through Clauses' (2009) IRMI Expert Commentary < https://www.irmi.com/articles/expert-commentary/an-update-on-cut-through-clauses> accessed on 27 October 2018.

[139] John Elison, Evagora, Campbell, Skeet and Hardy, 'Taking Rights Over Third Party Insurances' (2016) Reed Smiths Clients Alert < https://www.reedsmith.com/en/perspectives/2016/05/taking-rights-over-third-party-insurances> accessed on 27 October 2018.

[140] Larry Schiffer, 'Cut Through Provisions in Reinsurance Agreements' (2001) IRMI Expert Commentary < https://www.irmi.com/articles/expert-commentary/cut-through-provisions> accessed on 26 October 2018.

[141] Robert M Hall, 'Cut-through and Gurantee Clauses' Robert Hall Publications

and rich insurers.[142] Apparently, several commercial insureds will not procure the services of an insurer without the assurance of a capable reinsurer and the legal entitlement to claim directly from the reinsurer.[143] Within the context of multinational insurance, a cut-through clause can be used in fronting arrangements in a manner in which the reinsurer will become the actual insurer and the primary insurer will act only as a dummy, hence the cut-through clause will authorise the direct payment of the premium to the reinsurer and the direct payment of the claim by the reinsurer to the primary insured. In effect, even though the domestic insurer is visible in the contractual arrangement, no substantive role is assigned to it and it is usually designed to satisfy the requirement of the letters of the law; hence it could be a potent tool for dealing with protectionism.[144]

A cut-through clause does not have a particular form; hence the parties are at liberty to draft/ design it in a manner that suits their purpose and desire. Usually, the clause could be included in the reinsurance contract, endorsed in the primary insurance policy or in both sets of policies.[145] There could also be a cut- through endorsement which is a separate agreement between the primary insured and the reinsurer. Where the cut-through clause is made part of the primary policy, it assigns to the primary insured the rights to recover under the reinsurance contract, which would otherwise have been available to the primary insurer. With respect to the cut-through clause contained in the reinsurance policy, it entitles the cedant with rights to bind the reinsurer to a cut-through or guarantee when necessary to write the business.[146]

The use of cut-through clauses has not been without challenges in many jurisdictions because a number of objections have been raised regarding its use, particularly with respect to the absence of privity of contract, its apparent lack of regulatory authorisation and the question of priority in insolvency claims.[147] In Nigeria, NAICOM has openly prohibited the use of cut-through clauses or direct premium payments, which allow direct payment of premium by an insured to the reinsurer or the agent of the reinsurer.[148] This

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[142] ibid.
[143] Larry Schiffer, 'Playing the Name Game – An Update on Cut-Through Clauses' (2009) IRMI Publication
[144] ibid.
[145] ibid
[146] ibid
[147] Saville (n 137) 1
[148] Market Conduct and Business Practice Guidelines for Insurance Institutions in Nigeria, paragraph 4.2.0. (h).

limited and restricted the efficacy of using fronting arrangements in planning multinational insurance programmes that incorporate a cut-through clause in Nigeria.

The issues that have continued to bedevil the use of cut-through clauses in Nigeria are the legality and enforceability in the light of total absence of any form of privity of contract between the insured and the non–admitted reinsurer, the apparent lack of regulatory authorisation and the question of priority in insolvency claims. The issues of privity of contract and priority of the local insured in cases of insolvency and winding up will be analysed briefly below:

4.5.2.1. Privity of Contract:

Typically, a cut-through allows an insured that is not in privy with a reinsurer to have and exercise rights against the reinsurer under a reinsurance arrangement.[149] The doctrine of privity of contract is to the effect that only parties to a contract can benefit from rights inherent in the contract and can be bound by obligations that arise under that contract. Hence, a third party that has not been a party to an original contract cannot take benefit or burden, neither can there be an enforcement of any rights under the contract. A stranger cannot take benefit under a contract that he is not a party to.[150] This principle was restated empathically in the case ***Dunlop Pneumatic Tyre V. Selfridge &Co Ltd*** where Lord Haldane emphasised that the common law does not recognise jus quaestum tertio arising under a contract**.**[151] The doctrine is also invoked where a party is to furnish or show that it has furnished consideration in a contract.[152] Assessing the doctrine of privity of contract within the context of multinational insurance, reinsurance and cut-through clauses, it is apparent that the insured, within the underlying insurance contract, is not a party to any reinsurance contract covering the underlying contract; therefore, based on a strict application of the doctrine of privity of contract, the insured, under the

[149] Larry Schiffer, 'Cut Through Provisions in Reinsurance Agreements' (2001) IRMI Expert Commentary < https://www.irmi.com/articles/expert-commentary/cut-through-provisions> accessed on 26 October 2018.
[150] Olusegun Yerokun, Insurance Law in Nigeria (1st Edition, 2013, Princeton Publishing Company) 377 – 378.
[151] [1915] AC 847, see also Flannigan, 'Privity of Contract – The End of An Era' (Error)' (1987) LQR 103
[152] Vernon Palmer, *The Paths to Privity: A History of Third Party Benefeciary Contract at English Law* (2006) The Lawbook Exchange Ltd

underlying insurance contract, cannot be a party to the reinsurance contract and cannot therefore benefit under it by way of a claim.[153]

The common law doctrine of privity of contract has been made applicable in Nigeria through numerous decisions of courts in Nigeria. In ***Liberty Insurance Company v John***[154] the claimant lost her husband in a fatal car accident. The deceased was driving a Volkswagen when one Patrick Igbokwe, who was driving a Peugeot 504 saloon, collided with the deceased, resulting in his death. Upon discovery that Mr. Patrick Igbowke had a subsisting insurance cover for third-party motor liability, the widow to the deceased instituted an action against the insurer. The insurer did not deny the existence of an insurance cover, but it argued in its defence that the widow to the deceased does not have sufficient locus standi to institute the action. The High Court, being the court of first instance, rejected the defence of the insurer and decided in favour of the deceased's widow. However, upon appeal to the Court of Appeal, it reversed the decision of the High Court and affirmed the defence of the insurer, agreeing that there was no privity of contract between the insurer and the widow to the deceased as a representative of the deceased's estate.

The reasoning of the Court of Appeal in the case of Liberty Insurance is that the foundations of the insurance industry would be destroyed and result in a flood of suits if third parties are allowed to sue insurers. This point and policy decision of the Court of Appeal is quite accurate and apt. Indeed, an avalanche of disputes would be unleashed on the sector, resulting in a litigation run on insurance companies, which would result in the total collapse of the sector. However, despite the accuracy of the policy decision of the Court of Appeal, it is important for the courts to also remember that where there is a wrong, there should be a remedy. Hence, there is the need to balance the need to protect the insurance sector and the need to protect third parties that may not have any other recourse than to pursue a cover.

The Supreme Court of Nigeria, seems to have recognised the need for a balance; hence, in the case of ***Andrew Ajufor v Chritopher Ajarboor & Others***[155], the Supreme Court held that even where an injured party does not have the locus standi

[153] Saville (n 137)
[154] *Liberty Insurance Company Ltd v John* [1995] 1 NWLR (Pt. 423) 192.
[155] *Andrew Ajufor v Chritopher Ajarboor* [1978] 1 LRN 295.

to institute an action against an insurer, the appropriate alternative is to initiate third party proceedings based on the contract or indemnity. In this case, the plaintiff was injured by a lorry driver and an action was brought against the insurer providing cover to the lorry driver for third-party liability. The court held that the plaintiff lacked locus standi to join the insurer as co-defendants; however, they should have been joined as third parties.

Under Nigerian law, this will be the only procedural option available for an injured party or a party seeking to exercise a right against an insurer or reinsurer. The third party procedure is one where a defendant seeks the leave of the court to join a third party that is not yet a party to the suit. This arises where a party to the suit that should share in the liability that is likely to arise from the suit.[156] The essence of the third party procedure is that the defendant in the suit has a claim against the third party in the form of an indemnity; hence, it is convenient for all parties for the disputes to be heard at the same time.[157] Based on the Civil Procedure Rules of the High Court of the Federal Capital Territory 2004, it provides that a third-party application could be brought where – the defendant is or claims to be entitled to an indemnity or contribution from the third party or where the defendant is entitled to a relief or remedy against the third party relating to the action that is substantially the same as the relief or remedy claimed by the plaintiff.[158]

The option for third-party proceedings under Nigerian law is a good option, but it has its limitation, which is that a third-party application can only be initiated by a defendant (primary insurer) and not by the plaintiff (primary insured). The plaintiff's absence of locus standi will act as a constraint, this therefore means that the third-party proceeding is not a perfect option even though it has been recommended by the Supreme Court of Nigeria. It is therefore, important to examine and analyse the approach in other common law jurisdictions so that appropriate lessons can be noted and recommendations that could improve the Nigerian approach can be made. It should be noted that even though the above

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[156] Ernest Ojukwu and Chudi Ojukwu, *Introduction to Civil Procedure* ((3rd Edition, 2009, Helen-Roberts Publishers) 92 – 93.
[157] ibid.
[158] Civil Procedure Rules of the High Court of the Federal Capital Territory 2004, Order 19 Rule 18. See also *UBN v Edionseri* [1988] 2 NWLR (Pt 74) 93 at 95 and *Okonkwo v Mode (Nig) Ltd* [2002] 14 NWLR (Pt 788) 588.

analysis on Nigeria law relates to primary insurance, it is the same principle that applies to reinsurance arrangements as well.

In Australia, it has been argued that the applicability of cut-through clauses, depends on how clearly the clause is drafted. Where a cut-through clause is drafted in a particular format, it could pass the obstacle and will become enforceable.[159] Particularly where the terms of the clause clearly specify the following - identity of the original insured, events that trigger the right of action and the entitlement of the original insured, where all these are present, the requirement of privity of contract will not defeat the applicability of a cut-through clause in favour of a primary insured against a reinsurer.

The Australian case of ***Trident General Insurance Co Ltd V McNiece***[160] provides authority for a third party to an insurance contract, which is protected as a non-party beneficiary to sue or enforce the rights under the contract. In this case, Blue Circle Cement obtained insurance cover from Trident, covering accident and loss arising from construction work on a particular construction site. The policy specified that the insured were Blue Circle being the main contractor and the sub-contractor (McNiece), even though the latter was not a party to the insurance agreement. Subsequently, McNiece assumed responsibility as the main contractor when a worker suffered serious injury on the construction site from which it sued McNiece. The latter sought to obtain indemnity under the insurance cover because it was a specified insured. Trident objected, arguing that it was a stranger to the contract and was therefore not entitled to the claim. The court held that with respect to contracts of indemnity and insurance policies, a third party can take benefit thereunder, if its inclusion was contemplated by the main parties to the contract.

Though this decision was with respect to an insurance and not a reinsurance contract, Australian commentators have argued that this should not be an "*impediment to the original insured being entitled to enforce the cut-through provision directly against the reinsurer where local law applies to the reinsurance contract.*"[161]

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[159] Larry Schiffer, 'Cut-Through Provisions in Reinsurance Agreements' (2001) IRMI
[160] *Trident General Insurance Co Ltd V McNiece* [1988] 165 CLR 107
[161] Saville (n 137)

This Australian approach is very apt and consideration was not given to the policy issue of flood gates that was raised by the Nigerian courts, particularly because the name of the third party was clearly mentioned in the Insurance contract; thus, it eliminates the risk of flood gates. I believe that this is a better approach to balance the interest of the insurer and third party, in a manner that justice can be achieved for everyone. This kind of approach is purely judicial and does not require any legislative intervention; it is an easy to implement solution that can be adopted by the courts. I recommend that in dealing with the problem associated with the Nigeria solution of using third-party proceedings, the Nigerian courts can adopt this Australian judicial solution. This is particularly important because an insolvent insurer may be unwilling to adopt the third-party proceedings option and may prefer to give preference to other creditors, thus leaving the insured stranded. It is expedient to examine the approaches adopted in England and the United States.

While the above treatment represents the approach adopted in Australia, in England, the problem of privity of contract does not arise because of the provisions of the Contracts (Rights of Third Parties) Act 1999, which amends the doctrine of privity of contract.[162] Under the 1999 Act, a person who is not a party to a contract, can exercise a right under the contract, insofar as it can show that such a right was expressly conferred by the contract[163] or in the alternative, the agreement confers a benefit to the third party and does not expressly or impliedly exclude the right to enforce the said right.[164] A condition for the application of this right is that the benefitting third party must be expressly mentioned in the contract by name, either as a member of a class or with respect to a particular description.[165] A Singapore version of the Contracts (Rights of Third Parties) Act was passed into law in 2011 and it was modelled in line with the UK version and will therefore attract the same implication as the UK Act.[166] However, a key question is whether the Contracts (Rights of Third Parties) Act 1999 and the Singapore version apply in relation to insurance contracts.

Under the English common law, where an insured, holding a liability insurance cover, incurs liability but falls into bankruptcy or liquidation before the claim is

[162] Kate Oveden, ‘Security options for Insurance Transactions’ (2012) Bedell Group Publication
[163] Contracts (Rights of Third Party) Act 1999, s 1(1) (CRTP Act)
[164] CRTP Act, s 1(2)(b) & (2)
[165] CRTP Act, s 1(3)
[166] David Howell, ‘Rights of Third Parties to a Contract’ (2001) International Law Office

settled, the injured third party is considered as an unsecured creditor and as a result will have to join the queue of creditors with the certain fact that secured creditors will have priority over unsecured creditors and the possibility of not obtaining any compensation even though the claim may have been paid by the insurer into the insured's assets. This situation places third parties injured by the insured in a position of difficulty.[167]

In response to the unfairness, the Third Parties (Rights against Insurers) Act 1930 was passed into law. Based on the 1930 Act, the third party received protection in the sense that even though an insured party injured a third party and before the claim is settled, the insured falls into bankruptcy, the injured third party is entitled to exercise the right of the insured against the insurer and the proceed of that effort cannot be added into the estate of the bankrupt or liquidated insured, in a manner that is described in **Colinvaux's Insurance** as "*statutory subrogation*".[168] Based on section 1(1) of the 1930 Act, the above right was exercisable only if the liability arose before any of the following occurrences:

- bankruptcy of the insured;
- composition between the insured and its creditors;
- the insured as a company is the subject of a winding up order, resolution for voluntary winding up, administration, appointment of a receiver manager, enforcement of a floating charge by or on behalf of a debenture holder;
- approval of a voluntary winding up.[169]

A downside to the 1930 Act is that it does not apply to reinsurance contracts because it excludes claims by persons acting "in the capacity of insurer under some other contract of insurance."[170] An important condition that must exist before the rights under the 1930 Act can be applicable, is that the third party must first establish and second quantify the liability that was incurred by the insured. This can be shown where there is a court judgment, an arbitration award or a settlement. In ***Post Office***

[167] Robert Merkin, *Colinvaux's Law of Insurance* (Sweet & Maxwell, 11th Edition) 1136 – 1138
[168] ibid.
[169] Based on the Limited Liability Partnership Act 2000 and the Limited Liability Partnership Regulations 2000, the above position has been extended to limited liability partnerships.
[170] Third Parties (Rights Against Insurers) Act 1930, s 1(5); See also Merkin Colinvaux's (n 167) 1139.

v Norwich Union Fire Insurance Society[171] the claimant neither showed that there was an existing judgment, an award or a settlement, the Court of Appeal held that the action was pre-mature in the sense that a condition precedent had not been satisfied.

With respect to the applicability of the Contracts (Rights of Third Parties) Act 1999 viz a viz the 1930 Act and its applicability to insurance contracts, it has been argued in Colinvaux's Insurance Law that the condition for the enforcement of the right under the 1930 Act is that the insured against whom a liability lies, must be insolvent, in the absence of which the right is not exercisable and that such inadequacy cannot be cured by the 1999 Act because the third party cannot be sufficiently identified.[172]

As a result of numerous inadequacies of the 1930 Act, a new Act was passed; hence the 1930 Act has been reinforced by the **Third Party (Rights against Insurers) Act 2010** which was enacted to provide legal protection for persons who suffer loss in instances where the insured party becomes insolvent before a claim is brought.

A very apt case in point that illustrates the exercise of the statutory right of subrogation is the case of ***Zurich v IEG***[173] the appeal relates to the English common rules developed by the House of Lords on liability and causation regarding claims arising from mesothelioma. These rules can be traced to the House of Lords 2002 decision in ***Fairchild v Glenhaven***[174] where it was established that a victim can recover compensation from all employers that negligently exposed him/her to asbestos. In 2006, the House of Lords altered the rule by holding in *Barker v Corus*[175] that an employer's liability is limited to the period of time he acted negligently and not the entire time the employee would have been exposed to asbestos. In 2006 the Compensation Act 2006 was passed that neutralised the effect of Baker's decision and entitled employees to recover full compensation from an employer but the employer can seek contribution from other employers of the employee who acted negligently.

[171] *Post Office v Norwich Union Fire Insurance Society* [1967] 1 All E.R. 577.
[172] Merkin Colinvaux's (n 167) 1136 – 1137.
[173] *Zurich v IEG* [2015] UKSC 33
[174] *Fairchild v Glenhaven* [2002] UKHL 22
[175] *Barker v Corus* [2006] UKHL 20

In 2012 the Supreme Court considered the ***Trigger case (BAI (Run Off) Ltd v Durham & Ors***[176] where insurance claims were made by relatives of persons who suffered injury (mesothelioma) or death from exposure to asbestos. The key issue was whether the appropriate insurer will be the insurer of the employer at the time the employees were exposed to the asbestos or whether the appropriate insurer will be the one that was the insurer at the time the injury manifested. In the first test case of the trigger cases, Mr. Screach was an employee of G & C Whittle Ltd who worked between 1963 and 1968. The employer obtained an Employer's liability insurance during the period from BAI. In 2003, Mr. Screach was diagnosed with cancer from which he died the same year. His daughter brought an action against BAI that was under a scheme of arrangement and G & C Whittle Ltd had since been wound up. The High Court held that based on the wording of the policy, the claimant was entitled to claim against the defendant. The decision was overturned at the Court of Appeal on the grounds that an injury was sustained when it occurred and that cover will not be mandatory when the injury occurred only on the onset of the mesothelioma. Upon appeal to the Supreme Court, the position of the insurer was dismissed, the Supreme Court held that an insurer's obligation to indemnify an employer for mesothelioma occurred at the time of exposure to the asbestos; that is, an employer that is liable under the Fairchild principle can claim insurance protection from its liability insurance provider. It is in the light of these principles that the ***Zurich v IEG***[177] case arose from the common law jurisdiction of Guernsey, not England; hence the Compensation Act 2006 was not applicable. Mr. Carre a former employee of Guernsey Gas Light Co Ltd ("GGLCL") worked for 27 years and was negligently exposed to asbestos for the duration of his employment. In July 2008 he was diagnosed with mesothelioma and died in 2009. During the period of his employment, IEG held insurance cover for only 8 years and from two separate insurers – Excess Insurance Co Ltd (1978 -1980) and Midland Assurance Ltd (later known as Zurich) (1982 – 1988). Mr. Carre's estate sued GGLCL's successor company, IEG, and recovered damages and interest of 250, 000 GBP and 15, 300 GBP as cost. GGLCL in turn sued its two liability insurance providers for the relevant period, which amounted to 2 years cover by EIC Ltd and 6 years by Midlands Assurance Ltd. Zurich argued that it was liable to provide cover for only

[176] *Trigger case (BAI (Run Off) Ltd v Durham & Ors* [2012] UKSC 14. The effect of this case is that it was distinguished from the case of *Bolton MBC v MMI Ltd* [2006] 1 WLR 1492.
[177] *Zurich v IEG* [2015] UKSC 33.

22.08% of the loss and defence cost. At the High Court, Mr. Justice Cooke held that Zurich was liable to compensate GGLCL for only 22.08% of the loss and 100% of the defence cost. The court further held that the basis for the pro rata computation was based on the fact that the risk was covered for a defined period of time. Dissatisfied with the decision, an appeal was filed at the Court of Appeal, where the court overturned the decision of the High Court and held that Zurich was liable to compensate GGLCL for 100% of both the loss and defence cost; heavy reliance was placed on the decision of the court in the Trigger case. Zurich appealed to the Supreme Court, where it was held that based on Baker's case, which is still applicable in the jurisdiction, Zurich was entitled to compensate GGLCL for only its proportional contribution to the loss and 100% of the defence cost. Lord Mance stated that although IEG was solvent, assuming it was insolvent, it would have been possible for Mr. Carre to recover full compensation directly from Zurich on the basis of the Third Party (Rights against Insurers) Act 1930 and 2010.[178]

One important issue relevant to multinational insurance programmes is the extra-territorial effect of the 1930 Act. This was clearly addressed in Colinvaux's Insurance Law, as follows:[179]

The 1930 Act is silent on the extent to which it has extra-territorial effect, and it is undecided whether the Act applies by virtue of the fact that the insolvency procedure is conducted in England or by virtue of the fact that the law applicable to the insurance contract is English law. In the event that insolvency proceedings are in effect against the assured in some other jurisdiction, the English court is required to recognize those proceedings, although the power of the English court to stay proceedings against the debtor may not affect any transfer of rights to the third party under the 1930 Act and any claim brought against the insurers under the 1930 Act.[180]

Unlike the statutory and judicial approach adopted in England and the statutory approach in Singapore, in the United States, the attitude towards cut-through clauses is dependent on the state jurisdiction where the claims and cause of action would

[178] See Merkin R, *Insurance and Reinsurance in the Fairchild Enclave*, Legal Studies Vol 36, No 2, 2016, pp 302-325.
[179] However, please note that issues on conflict of interest in insurance law and multinational insurance programmes are specifically addressed in a separate chapter of this work.
[180] Merkin Colinvaux's (n 167) 1139 – 1140.

have arisen. Although most states recognise the validity of cut-through clauses, this is done on the basis of case law and particular emphasis is placed on the preciseness of the words used in the cut-through clause. The clearer the wording the more likely the court will be to recognise and enforce the clause.[181]

In the US, generally, a court can enforce a cut-through contract based on the third party beneficiary theory.[182] Most courts in various states in the US recognise the validity of a cut-through clause; however, a common requirement that has been mentioned by the courts is that the wording of the clause must be clearly and precisely worded. In the US case of ***Jurupa Valley Spectrum, LLC v National Indem***[183] the obligee of a surety bond instituted a legal action against the surety's reinsurer because the surety became insolvent. The parties had included a clause in the reinsurance contract that became the subject of dispute. The clause provides that - *''The parties to this reinsurance intend that the reinsurer, through the Claims Administrator, shall pay all amounts ... due insured and other persons as and when due directly on behalf of the insured"*

The issue in contention was whether this clause equated to a cut-through clause because it specifically did not name the insured to be paid, the court held that it did not amount to a cut-through clause because it was not apparent on its face that it vested a direct right of action on the primary insured against the re-insurers. The same test of preciseness was applied in the case of ***Trans-Resource INC v Nausch Hogan & Murray***[184] in this case the contract expressly stated that the reinsurer is obliged to pay the insured and the court took the position that the clause amounted to a cut-through clause. The court took this position, notwithstanding the fact that the reinsurance contract contained another provision stating that the reinsurer "*shall have no obligation to the original insured or anyone claiming under the policy (ies) reinsured*."

[181] Larry Schiffer, 'Cutting-Through Provisions in Reinsurance Agreements' (2011) IRMI; see also Larry Schiffer, 'Playing the Name Game – An Update on Cut-Through Clauses' 2009
[182] *Bruckner – Michell, Inc. v Sun Indemnity* Co, 82 F2d 434 (DC Cir 1936)
[183] *Jurupa Valley Spectrum, LLC v National Indem* 555 F.3d 87 (2nd Cir 2009)
[184] *Trans-Resource INC v Nausch Hogan & Murray* 298 AD 2d 27 (1st Dep 2002)

As in the UK, some US states have statutes, which address concerns surrounding clauses that are cut-through. For example, a Pennsylvania statute provides as follows:

The amount recoverable by the liquidator from reinsurers shall not be reduced as a result of delinquency proceedings, regardless of any provision in the reinsurance contract or any other agreement. Payment made directly to an insured or other creditors shall not diminish the re-insurers obligation to the reinsurer's estate except where the reinsurance contract provided for direct coverage of an individual named insured and the payment was made in the discharge of that obligation.[185]

This provision has been the subject of interpretation in some Pennsylvania cases, including: ***Koken v Reliance Insurance Co***[186] and ***Koken v Legion Insurance Co***.[187]

A key challenge, which characterises cut-through clauses and frightens reinsurers from wanting to use it, is that of paying the same claim twice. This usually results where the reinsurer pays a party, possibly a primary insurer, and the liquidator of the reinsured obtains a court order compelling the reinsurer to pay the claimant. In the US case of ***Ainsworth v General Reinsurance Corporation***[188] a reinsured, being the primary insurer, suffered some financial difficulties and eventually became insolvent. The primary insured brought a claim that was settled by the reinsurer, pursuant to a cut-through clause. However, the receiver of the reinsured brought another claim, contending that the clause obligated the reinsurer to pay the proceeds to the receiver, who in-turn would distribute it equally amongst creditors in the same class. The court upon examination of the clause arrived at the same conclusion.

As mentioned earlier, in Nigeria, cut-through clauses have been completely prohibited because according to NAICOM, it is not supported by the doctrine of privity of contract.[189] It is therefore important to begin by questioning the basis

[185] 40 P.S. 221.34
[186] *Koken v Reliance Insurance Co* No 269 M.D. 2001 (April 2002)
[187] *Koken v Legion Insurance Co* No 831 A. 2 d 1196 (Pa. Commw 2003). Across Latin America, the use of cut-through clauses is uncommon because most re-insurers do not support them. But its use is expected to rise, particularly because of the political instability, which characterize that region. In Mexico, the insurance regulations prohibit direct payment of claims by reinsurers to primary insured, whereas, Chilean regulations authorizes the use of such clauses but the law in Colombia is completely silent on this.
[188] *Ainsworth v General Reinsurance Corporation* 751 F 2d 962 (8th Cir 1985)
[189] NAICOM 2013 (n 102), paragraph 4(ii)

advanced by NAICOM for its decision to administratively ban the use of cut-through clauses. NAICOM based its response partly on the doctrine of privity of contract. One may want to add that being a common law doctrine, founded on case law, it is not for NAICOM to conclude that the practice violates this doctrine. Such a conclusion ideally can only be reached by the court, where litigants that poses the required locus standi would have brought a claim contesting the rights of the insured to make recourse to such a clause. However, NAICOM also pointed out that the practice offends extant laws. This latter reason stands correct. NAICOM in itself, lacks the requisite legal standing to ban the use of cut-through clauses on the basis of privity of contract. Nigeria adopted the principle of privity of contract from England; however, England considered it expedient to improve its interpretation of the doctrine of privity of contract and to legislate upon it. This was informed by the need to recognise current insurance market needs. Modern regulations should be forward thinking and lessons should be learnt from other regulators around the world.

4.4.2.2. Inconsistency with Insolvency Laws:

One issue with cut-through clauses is that it distorts the hierarchy of creditors under insolvency law. Thus, even if the courts recognise the use of cut-through clauses in Nigeria, the question will be how to deal with the extant insolvency law on winding up. In Nigeria, the triggers for a company's winding up could be on any of the following five grounds: where members of the company pass a special resolution,[190] fails to file its statutory report or to hold mandatory statutory meeting,[191] if its members fall below two,[192] the company is insolvent or unable to pay its debt,[193] and where the court is of the opinion that it is just and equitable to wind up the company.[194] In addition to these grounds, contained in the Companies and Allied Matters Act 2004, the Insurance Act contains two additional grounds for winding up, which operate closely with the grounds contained in CAMA. The additional grounds are: where a minimum of 50 policy holders who have held such policies for not less than three years, seek the approval of NAICOM for the company to be

[190] Companies and Allied Matters Act 2004, s 408(a) (CAMA)
[191] CAMA, 408(b)
[192] CAMA 408(c)
[193] CAMA, s 408(d)
[194] CAMA, s 408(e)

wound up for any of the above five grounds under CAMA,[195] where NAICOM decides to revoke the licence of the insurer, [196] or where after an intervention by NAICOM, the company could not be revived.[197]

When winding up proceedings are initiated, the liquidator in charge of the assets of the company is expected to identify all the assets of the company and settle the debt and liabilities owed to creditors and other stakeholders based on their ranking or based on the seniority of claims. The acceptable ranking under the CAMA and Nigerian Bankruptcy Act grants priority to secured creditors over and above unsecured creditors. But very clear provision is made under the Insurance Act, where the priority list for settling debtors is as follows:

(a) liquidation fees;
(b) secured creditors;
(c) policy holders or insureds;
(d) other creditors;
(e) staff ; and
(f) shareholders and directors.[198]

Reviewing the above list from the insurance angle, it is evident that the cut through clause effectively moves the policyholder(s) of insured(s) of a primary insurer (or an insurer in the case of a reinsurance contract) from the third ranking position to the first. This means that the insured will automatically rank higher than the liquidator and secure creditors. This list points out the order that a liquidator must comply with when settling the liabilities of primary insurers. When the list is viewed against the terms of the cut-through clause, it raises the question whether or not a cut-through clause runs contrary to the binding and mandatory provisions of insolvency laws in Nigeria. This is because the cut-through clause contractually purports to confer priority on an unsecured creditor against the established statutory order.

Although, cut-through clauses are now acceptable across several States in the US, a court in the US once held it to be unfair because in insolvency proceedings, it

[195] Insurance Act, s 32(1)(a)
[196] Insurance Act, s 32(1)(b)(i)
[197] Insurance Act, s 32(1)(b)(ii)
[198] Insurance Act, s 32(3)(a-f)

distorts the established hierarchy and priority list in settlement of claims during such insolvency proceedings. Thus categories of persons that ordinarily should occupy a particular position, could look that ranking simply because the company being wound up had executed an Agreement containing a cut through clause.[199] Similarly, a Puerto Rican court held that allowing a cut-through clause to take effect would prevent a fair and equitable distribution of the assets of a primary insurer under receivership.[200]

It is expected that Nigerian courts will recognise the legality of a court through clauses as recommended above; however, the Nigerian legislature will have to deal with the ranking of creditors question by amending the CAMA, the Bankruptcy Act and the Insurance Act. It will also so be necessary for Nigeria to contemplate enacting a law similar to the **Third Party (Rights against Insurers) Act 2010**.[201]

4.6. Financial Interest Clause as a Technique and Strategy to Address the Domestic and International Regulatory Obstacles and its Legality

Despite the fact that that non-admitted cover can contribute to the development of local insurance capacity and raise revenue for the government through taxation, regulators around the world have continued to attack it.[202] Where this is the case, any non-admitted cover provided is illegal, except if a waiver has been obtained. Consequently, with these restrictions, multinational insurance experts have invented a novel method of providing cover for such risks; it is known as "*financial interest cover*" and several insurers have introduced financial interest clauses in their polices, drafting it in a manner that suits the prevailing exigencies at that time.[203]

A financial interest clause usually is a clause included in a policy that recognises that a parent company holds an insurable interest (in the form of a financial interest) in its

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[199] *Cummings Wholesale Electric Co v Home Owners Ins Co*, 492 F2d 268 (7th Cir 1974)
[200] *Warranty Association of Insurance of All Kinds v Commonwealth Insurance Co* R-80-334 (PR Sup CY 1983)
[201] In Brazil, the position of cut-through clauses appears to be certain because of the express provision of Article 14 of the Contemporary Law and Article 34 of Resolution 168/2007 both contain the same exact provision, which is clear on the fact that Brazilian law, expressly recognizes the validity of cut-through clauses. But this is dependent on the condition that the reinsurance contract is structured as a facultative one within the definition of Brazilian law and it contains a cut-through clause. Nigeria needs to learn from the US, England, Brazil and Singapore.

[202] Susan Kelly, 'New Approach Seen to Challenges of Global Insurance Coverage' (2014) Fierce CFO Financial and Business Newsletter
[203] Sue Copman, 'Global Programmes' (2011) Strategic Risk Magazine

subsidiaries; thus, where the subsidiary suffers certain losses, it will be deemed to be a loss to the financial interest of the parent company, for which the parent company will be indemnified. In summary, it is a method of insuring the interest of a parent company across its global operations, by protecting losses to its balance sheet, arising from incidents involving its global subsidiaries.[204]

The idea of a financial interest in the subsidiaries of a multinational company operates on the assumption that the parent company has economic, operational and strategic interests in the welfare of its subsidiaries and will be directly affected by any adverse occurrence that affects them. A parent company has made investment in time, money, goodwill, intellectual property and human capital development. Thus, these interests can be insured even in jurisdictions where the parent company cannot legally obtain non-admitted cover, but it can obtain a foreign non-admitted cover for its financial interest in non-admitted *Jurisdiction*s.[205]

Technically, the insured risk is not in the subsidiary, rather it is in the books of the parent company and it's deemed to be situated in its home jurisdiction.[206] This invention is founded on the English law principle of insurable interest, discussed in Chapter One of this work, which is to the effect, for an insurance contract to be valid there must be insurable interest.[207]

In drafting a financial interest clause, there are three possible options or scenarios, to wit: first, the parent company purchases a global insurance policy with a financial interest clause that covers loss or damage to its local subsidiary and it names the local subsidiary as co-insured in the policy. Based on the second option or scenario, the parent company purchases a global policy with financial interest clause that covers loss or damage to assets of its local subsidiary; however, the local subsidiaries are not included as co-insureds in order not to contravene domestic regulations, particularly compulsory local

[204] Ben Norris, 'Financial Interest Cover Now Accepted as Legal Alternative by Market' (2015) Commercial Risk Europe.
[205] International Network of Insurance, 'Financial Insurance Cover' (2015) Financial Interest Cover White Paper 3
[206] International Network of Insurance, 'Financial Insurance Cover' (2015) Financial Interest Cover White Paper 3.
[207] Merkin Colinvaux's (n 167) 161.

insurance. The third scenario covers situations where the parent company simply purchase insurance cover for its financial interest in its foreign subsidiary.[208]

In closely examining option two, it is important to note that it may be difficult for it to satisfy the basic test of insurable interest under English law and as enunciated by the House of Lords in ***Macaura v Northern Assurance Company***.[209] In this case, the House of Lords established that with respect to property insurance, insurable interest will be present if the insured has either legal or equitable interest in the property and it further held that insurable interest will not exist only by reason of the fact that the parent company has shares in the subsidiary, which in turn owns the property. Thus, shareholding alone should not confer insurable interest.

In Macaura's case, Macaura was the owner of a stock of timber and he sold some to a company but was not paid in cash, rather the entire issued share capital in the company was allotted to him as consideration for the timber. After the transaction was concluded, the timber was destroyed in a fire and Macaura made a claim under an insurance cover he had taken out for the timber. The claim was refused by the insurers because Macaura no longer had an interest in the timber. The only interest in the timber was held by the company and even though Macaura was the sole shareholder, he was still not entitled to a claim because he insured the timber in his name.

The Macaura decision has huge implications for multinational insurance programmes and the restrictions imposed by non-admitted jurisdictions. Normally, a non-admitted insurance jurisdiction imposes restrictions on insurers that are not licenced to provide insurance services within that jurisdiction. Where such unlicenced services are provided, the local insurance authorities treat it as illegal and invalid. However, in order to circumvent these restrictions, multinational insurers have introduced the financial interest clause as a device adopted to provide cover for a foreign parent company having shares in a local company operating within a non-admitted jurisdiction. Based on this device, the interest of the parent company is treated as its financial interest in that company and consequent on it, an offshore insurance policy is obtained to protect this financial interest. Thus, where a loss is suffered by the local subsidiary, the offshore parent company will be deemed to have suffered a loss as a result of its financial interest in the local company;

[208] Christopher Cardona and Geoffrey Conlin, 'Latin American Jurisdictions – A Discussion of Global Insurance Programmes and the Challenges they Face' (2018) Holman Fenwick Wilan Publication.
[209] *Macaura v Northern Assurance Company* [1925] AC 619.

thus recognising a kind of indirect interest. However, the legality of the financial interest clause is in doubt in view of the decision in Macuara's case that states that a shareholder does not have an insurable interest in the company's property; in simple terms, the shareholders interest is in the company itself and not in the assets of the company.[210]

With respect to the third option or scenario, when the losses are in the form of financial losses or liability to third parties, the requirement of insurable interest could be readily satisfied.[211] This is because loss of profit and other forms of consequential loss would satisfy the requirement of insurable interest if they are described in the policy and insured.[212]

The introduction of financial interest cover apparently is a clever way of providing non-admitted cover within the ambit of the law, but it is not without its drawbacks. When financial interest cover is included in a policy, the need to pay local taxes and local premium taxes is dispensed with. But tax concerns are triggered when a claim payment is to be made to the parent company.

First the sum received by the parent company will be subjected to tax in its home jurisdiction, which is usually quite high; for example in the United States the applicable tax rate will be over thirty percent. These tax payments will represent a huge reduction in the proceeds of the insurance, and the quantum of the sum left will be significantly reduced. If the parent company decides to transfer the funds to its subsidiary, it will have to adopt a method that will be tax-efficient because doing otherwise could subject the remaining sum to greater tax liability. One suitable method to transfer such sums to the subsidiary could be an intra-group loan, subject to transfer pricing rules applicable in the relevant local jurisdiction.

However, the above difficulties can be avoided or minimised if the parent company is located in a tax haven where the main claim payment will not be assessed to tax and if well-structured, an intra-group loan will also not be assessed for tax; giving rise to interest income by the parent company and the subsidiary will be entitled to deduct any interest payment made on the loan, before it is assessed for tax. However, such tax saving options

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[210] Ellis Ferran and Look Chan Ho, *Principles of Corporate Finance Law* (Oxford University Press, 2nd Edition, 2014) 129.
[211] *Maurice v Goldsborough [1939] AC 452*
[212] Kyriaki Noussia, *The Principle of Indemnity in Marine Insurance: A Comparative Approach* (Springer, 2007) 2000.

are being threatened by the new and aggressive attack from the G20 nations, targeted at base erosion and profit shifting.[213]

Another drawback that results from adopting a financial interest cover is that where the subsidiary has a problem that requires litigation; it will be unable to rely on the insurance policy to finance the court action because the cover would be technically illegal in its home jurisdiction and the parent company would also have been named as the beneficiary of the policy. That is, the insurance cover and its benefits will be available to only the parent company and defence cost cover would not be available to the subsidiary (ies).

These drawbacks do not take away the fact that financial interest clause still constitutes a very potent tool in dealing with protectionism that characterises the insurance market and that has been pushed back very little by the WTO.

4.7. Conclusion

This chapter focused on the legal issues involving the use of multinational insurance programmes in Nigeria, by critically analysing the provisions of the Nigerian Insurance Act 2003, which forms the fulcrum of protectionism in Nigeria (i.e. Sections 3, 4 and 72). The chapter argues that even though the insurance legal framework in Nigeria, pretends to be protectionist in nature, it leaves huge gaps that can be exploited to provide non-admitted cover through multinational insurance programmes. For example, the prohibition not to procure non-admitted insurance and the penalty imposed for breach of this provision is targeted and applicable only to Nigerian based insured and insurance intermediaries. The Insurance Act 2003, does not contain any penalty or sanction for breach of this provision by a foreign insurer. In other words, there is no provision prohibiting a foreign insurer from selling insurance products in Nigeria; the applicable prohibition applies to only persons buying insurance cover in Nigeria. Thus, even where a breach occurs, a foreign insurer that sold a non-admitted product in Nigeria will stricto sensu cannot be sanctioned under Section 72(3) of the Insurance Act 2003.[214] The chapter further argues that the approach in Ghana is more restrictive because this gap does not exist and the Ghanaian Insurance Act expressly prohibits and criminalises direct or

[213] OECD, 'Action Plan on Base Erosion and Profit Shifting' (2013) OECD Publications 7 – 24.
[214] Insurance Act 2003, s 72(3).

indirect participation of non-admitted insurers, including solicitation of insurance business in Ghana.

The chapter proceeds to argue that globally, despite the push back of globalisation, other jurisdictions are also beginning to open up their markets and reform their laws on non-admitted cover; for example, South Africa and India. For example, unlike Nigeria, South Africa does not require a company to be incorporated locally before it can apply for an insurance licence; similarly it permits a foreign reinsurer to conduct insurance business if it obtains a licence locally, establishes a representative or branch office in South Africa or creates a trust.[215] These same market access rights are available for Lloyd's underwriters. It was also argued that the South African approach is more likely to attract more foreign investment, build local capacity and generate more tax revenues for the South African government while at the same time creating a window for regulators to engage in collaborative prudential regulation of these non-admitted insurance participants.

This chapter also attempted a comparative analysis between Nigeria and India. The chapter highlighted lessons that Nigeria can learn from both jurisdictions in terms of creating a balanced market that is non-protectionist, while at the same time creating room for local gains to be made. The chapter further argues that despite the progress that has been made in non-admitted jurisdictions such as, India, Brazil and Nigeria, there is still room to improve, and that the regulatory push backs in the form of enforcement actions against users of multinational insurance programmes have to be checked.

The chapter discussed challenging legal and regulatory issues bedevilling multinational insurance programmes in Nigeria, especially licensing issues like the decade-long ban on issuance of new insurance licences in Nigeria. The chapter analysed this ban and established that it is illegal and ultra vires the powers of NAICOM and recommends that there is sufficient legal basis for judicial review to be sought because discretionary powers must be exercised judiciously but the ban has taken away the right to even apply. The chapter argues that the prohibition and directive that interested foreign investors should buy into existing local companies as opposed to setting up green field insurance companies in Nigeria, contravening Nigeria's express commitments under GATS on commercial presence, which requires that foreign-service providers in all sectors of the

[215] South Africa Insurance Act 2018, s 6(1).

Nigerian economy would need to and be entitled to incorporate or establish the business locally in Nigeria.[216] This also breaches Nigeria's transparency obligations under GATS because the prohibition was never published by NAICOM rather it was applied discretely for a decade until recently when it mentioned that a prohibition had been in place.

The chapter also discussed the legal issues surrounding the right of a non-admitted insurer to sue and be sued in Nigeria under a multinational insurance programme. It was established that Sections 54 and 55 of CAMA require that a foreign company conducting business in Nigeria must be registered locally; the question therefore was whether this section applies to non-admitted insurers in Nigeria. Based on the analysis of these sections of CAMA, it was established that a non-admitted insurer under a multinational insurance programme, which has some level of coverage in Nigeria under its master policy or global policy, perhaps based on a DIC/DIL arrangement, would not be deemed to be conducting or carrying out business in Nigeria, particularly because the transaction is likely to be a one off arrangement between those particular parties or an arrangement that may be quite infrequent. In such circumstances, the non-admitted insurer can exercise the right under Section 60 of CAMA to sue or be sued in Nigeria in its name or in the name of its agent. Where the activities of the non-admitted insurer with a particular counter-party becomes too frequent, then it can be interpreted as conducting business in Nigeria and the non-admitted insurer could lose this right of action.

Regarding protectionism in Nigeria, statutory authorisation to cede risk abroad and non-compliance with Nigeria's GATS Specific Commitments Obligations, it was established that Nigeria made Specific Commitments to grant market access with respect to cross-border supply of insurance services and consumption abroad in relation to the following categories of services: maritime shipping and commercial aviation,[217] goods in international transit,[218] reinsurance and retrocession and the services auxiliary to insurance that is insurance based consultancy, actuarial, risk assessment and claim settlement services.[219] However, Nigeria is still in breach of these specific commitments,

[216] General Agreement on Trade in Services 1994, Schedule of Specific Commitments, GATS/SC/65 1.
[217] World Trade Organization, Nigeria – Schedule of Specific Commitments – Supplement 1, 26 February 1998 (GATS/SC/65/Suppl.1), paragraph 7(ii), 2 and GATS Understanding on Commitments in Financial Services, paragraph B(a)(i).
[218] World Trade Organization, Nigeria – Schedule of Specific Commitments – Supplement 1, 26 February 1998 (GATS/SC/65/Suppl.1), paragraph 7(ii), 2 and GATS Understanding on Commitments in Financial Services, paragraph B(a)(ii) and GATS Annex on Financial Services, paragraph 5(iv).
[219] World Trade Organization, Nigeria – Schedule of Specific Commitments – Supplement 1, 26 February 1998 (GATS/SC/65/Suppl.1), paragraph 7(ii), 2 and GATS Understanding on Commitments in Financial Services, paragraph B(b) and GATS Annex on Financial Services, paragraph 5(iv).

and as far back as 2000 the EC had already made a complaint against Nigeria, yet nothing significant has been done to comply with these commitments.

This chapter also analysed other non-protectionist legal issues affecting multinational insurance programmes in Nigeria; for example, excessive reporting obligations on insurers and reinsurers and prohibition of “cut-through” clauses and their effect on effectively managing multinational insurance programmes. The chapter argued that NAICOMs prohibition of cut-through clauses is not backed by the Insurance Act and that its reliance on absence of privity of contract as a basis for banning the use of cut-through clauses, is an attempt to take over the powers of the court. The chapter argued that Nigeria’s option to enforce cut-through clauses through third-party proceedings was good; however, there was a need to adopt more positive solutions as contained in the English Contracts (Rights of Third Parties) Act 1999 and Third Party (Rights against Insurers) Act 2010 and the tests laid down in US case law. This chapter also analysed the relationship and inconsistency between cut-through clauses and insolvency law in Nigeria.

Finally, the chapter also analysed the use of financial interest clauses as an option to provide multinational insurance cover in a legal and less risky manner.

The next chapter will focus on the tax aspects of and tax related issues involving multinational insurance programme. As a result of the ban on issuance of new insurance licencing in Nigeria, some global insurers that considered investing in Nigeria, decided to buy into local insurance companies in the hope of using them as fronting agents in Nigeria while they target the reinsurance market. This therefore makes tax issues affecting local insurers worth considering because they impact on global insurers that have equity interests in local insurance companies. Hence, tax issues affecting local insurers will be discussed in the next chapter. In addition, transfer pricing issues that impact on multinational insurance programmes will also be discussed in the next chapter.

CHAPTER FIVE

NIGERIAN AND GLOBAL TAX ISSUES AFFECTING MULTINATIONAL INSURANCE PROGRAMMES

5.0 Introduction

Earlier chapters of this work highlighted the fact that the insurance market in most jurisdictions is founded on protectionism, wherein, regulators apply tactics that are aimed at restricting market access of foreign and non-admitted insurance players. It was however pointed out that this approach has not been beneficial to individual markets and to the global insurance market.[1] Consequently, to combat these protectionist menaces, reliance was placed on the efforts of the World Trade Organization (WTO), which has robust legal frameworks that seek to promote the liberalisation of trade in services.[2] Examples of these Framework Agreements are the GATS, GATTS and the TRIPS. These Framework Agreements rely on principles like the Most Favoured Nation and National Treatment to push forward the agenda for liberalisation and market access. Most WTO members are signatories to these Framework Agreements and have made specific commitments to comply with some obligations under these Agreements.[3] Despite these commitments, the Framework Agreements including GATS permit signatories to exempt themselves from some commitments, the implication of this is that it stalls the full implementation of WTOs liberalisation agenda.[4]

In order to deal with these drags and hitches, subsequent chapters of this work argue that the most viable options available is for recourse to be made to Multinational Insurance Programmes as a window to deal with the issue of protectionism in international and cross-border insurance coverage. Consequently, the structures and workings of

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[1] Harold Skipper Jnr, 'Protectionism in the Provision of International Insurance Services' (1987) 54(1) The Journal of Risk and Insurance 55 – 85. See also Luke Gallin, 'Swiss Re Highlights Rising Global Protectionism' (2018) Reinsurance News

[2] Yonov Agah, 'An Insurance Policy Against Protectionism' (Papar delivered at the G7 The Schloss Elmau Summit 2015)

[3] Rudolf Adlung, 'Scope and Limits of the MFN – Obligations Under GATS' < https://artnet.unescap.org/tid/artnet/mtg/std_s5_rudolf.pdf> visited on 7 December 2018.

[4] General Agreement on Trade in Services, Article II and Annex on Article II Exemptions. See also Rudolf Adlung and Antonia Carzaniga, 'MFN Exemptions Under the General Agreement on Trade in Services: Grandfathers Striving for Immortality' (2009) 12(2)1 Journal of International Economic Law 357 – 392.

multinational insurance programmes are discussed and analysed in some details. Very importantly, it is argued that despite the progress that has been made and can be made through multinational insurance programme, there are still challenges that characterise and bedevil it.

In the light of the above, the previous chapter examined the legality of multinational insurance programmes, legal challenges that have be-devilled multinational insurance programmes and the solutions and analysis of possible alternatives. The preceding chapter also critically analysed specific legal issues that impact on insurance sector liberalisation and protectionism in Nigeria in the context of multinational insurance programmes, including issues like the discriminatory insurance sector licencing regime in Nigeria, restricted rights of foreign insurers to seek legal redress in Nigerian courts, overregulation and restrictions in the exercise of the right of local insurers to seek approval to cede risk with offshore insurers and reinsurers. The chapter also dealt with the problem of prohibition of cut-through clauses in the designing of multinational insurance programmes in Nigeria.

The chapter further discussed non-protectionist issues affecting the implementation of multinational insurance programmes in Nigeria. Some of the specific issues discussed were, the excessive reporting obligations for insurers and reinsurers operating in the oil and gas sector, prohibition in the use of cut-through clauses in Nigeria and the challenge with relying on financial interest clause. Each of these issues were discussed in the context of legal solutions and the approach in most instances was comparative in nature, aimed at identifying solutions that are applicable in non-Nigerian jurisdictions. An important point to note is that despite the challenges that bedevil reliance on the multinational insurance programme as a tool for dealing with the problem of protectionism, it remains the most viable option available until a holistic global and multilateral solution has evolved to liberalise international trade in services.

In light of the above, I will take it a step further from the legal issues by focusing on the tax related issues that affect the implementation of multinational insurance programmes in Nigeria. Generally, taxation is a huge tool for controlling cross-border trade in goods and services. Thus, where attempts are made to restrict trade and introduce protectionist measures, a quick option to promote such an agenda is to raise the taxes that apply to foreign participants, suppliers of foreign goods or services or to apply tax measures to restrict supply of non-admitted services. In discussing the tax-based issues, the analysis

will be divided into two parts; the first part will discuss domestic issues in Nigeria affecting insurance businesses generally and the second part will discuss international tax issues and their impact on multinational insurance programmes.

The need to discuss these domestic issues first is based on the fact that in designing multinational insurance programmes, there are structures that rely on utilising admitted insurers providing some level of local coverage; for example, controlled master programmes that rely on Difference in Limits (DIL) and Difference in Condition (DIC) policies, particularly those relying on the broadest possible local cover and a non-admitted DIC/DIL cover, or where there is the use of one non-admitted master policy, local policies and policies from network partners and where reliance is placed on the use of admitted fronting agents. Hence, even though the issues are domestic, they have direct bearing on multinational insurance programmes that rely on any of the above models that incorporate local coverage.

Furthermore, it has been established in prior chapters that Nigeria is an admitted jurisdiction which still has strong protectionist laws that seeks to protect domestic insurers against competition from non-admitted insurers. This policy is premised on the belief that protectionism will promote growth in the sector, even though it has been proven to be a faulty model and there is no evidence of protectionist stimulated growth in the Nigerian insurance sector. For example, the fixed assets of the entire insurance industry has not grown significantly between 2012 and 2017. This is reflected in the table below:

S/N	VALUE OF FIXED ASSETS (N)	YEAR
1	116,970,860,798	2012
2	111,872,430,283	2013
3	67,889,112,861	2014
4	177,453,976,785	2015
5	129,753,229,210	2017

Table 1 - Source: 2012 – 2017 NAICOM Industry Balance Sheet (see <https://www.naicom.gov.ng/index.php/about-us/directorates/research-statistics-and-corporate-strategy> accessed 1st September, 2019)

By way of contrast and contradiction, Nigerian regultors that in one breath, advance protectionist laws as a tool for protecting local insurance players, in another breath, they introduce laws that apply a discriminatory and unfair tax regime to the insurance sector, hence, stunting its growth from a fiscal and investment perspective. In other words, because of the unfair and discriminatory tax laws that apply to the insurance sector in Nigeria, local and domestic investors will be discouraged from investing in the sector. When this disincentive is juxtposed with the problem of protectionism, it creates a complete state of confusion, investor apathy and stunted growth in the sector. The details of these tax discrimination and tax protectionism will be expatiated in this chapter.

Having laid a proper foundation and by way of an introduction to this aspect of the work, I will start by emphasising that tax is a necessity and is mandatory for all governments to operate effectively. In a letter written by one of the founding fathers of the US, Benjamin Franklin to Jean-Baptiste Leroy, in 1789, he stated that – "... *but in this world nothing can be said to be certain, except death and taxes."*[5] This statement was true in 1789 and remains so today. Taxes in their various forms remain the life-blood of many economies; hence the emphasis on it. It is in this light that taxes are imposed in most forms of transactions involving goods and/or services. Insurance is not an exception, taxation arises in a number of real issues in the structuring and implementation of multinational insurance programmes and for international insurance as a whole. These issues could have strong domestic roots or could even be international in nature such as, transfer pricing, arms-length dealings, and taxation of premium allocations, double-taxation risks, base erosion and profit shifting among others. The initial focus will be on domestic issues within the context of multinational insurance and subsequently the focus will shift to more cross-border tax focused insurance issues.

The choice for the inclusion of the domestic issues even in the context of multinational insurance, is hinged on the fact that in structuring global programmes that will be deployed in non-admitted jurisdictions, the risk manager and the insurer could include the use of local insurance subsidiaries, network partners and fronting agents or financial interest clauses. Where local insurers and admitted network partners are involved, it means that the local insurer and local coverage will be subject fully to the taxing jurisdiction of the domestic tax authorities, which, apparently, will ultimately affect the tax efficiency and profitability of all multinational insurance programmes. Even where

[5] Full text of Benjamin Franklin's letter to Jean Baptiste Le Roy dated 13 November 1789.

the use of a financial interest clause is adopted, the receipt by the parent company of any claim payment will be taxable in its home country and any transfers to the subsidiary will be subjected to local taxes too, giving rise to a case of double taxation of the same revenue.[6] This aspect of the work will therefore examine the Nigerian tax framework to ascertain whether or not there are incidences of excessive taxation for the insurance sector and to determine whether or not there are incidences of multiple and double taxation. The chapter will also slightly examine the impact of any such scenarios on the Nigerian insurance sector.

It is important to mention that there is a dearth of academic material on these issues; hence, in this chapter, reliance is placed on primary sources of laws, particularly legislation and occasionally on case law. In Nigeria, taxation and insurance are still emerging areas and there is a huge knowledge gap and lack of widespread expertise. This accounts for the dearth of academic writing in these areas, particularly with respect to the thorny issues. However, the parts of the work that have academic writing, reference will be made to them.

5.1 An Assessment of the Current Nigerian Focussed Tax Issues affecting Insurance Sector Generally and Multinational Insurance Programmes in Particular

Without doubt, the Nigerian insurance industry is expected to play a huge role in the Nigerian economy through the mobilisation of savings for investment in infrastructure and for funding the real sector of the economy.[7] However, over the years, the insurance sector in Nigeria has failed to meet this expectation and has been under-performing significantly. The insurance industry in Nigeria has failed to attract the required level of investment and to mobilise savings from customers.[8] One way that Nigeria can energise and turn around the fortunes of its insurance sector is to make the insurance sector tax competitive with other sectors and other jurisdictions.

When a multinational insurance programme is being structured with the Nigerian market in focus, the programme may involve the use of a local fronting agent, a local subsidiary,

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[6] International Network of Insurance, 'Financial Insurance Cover' (2015) Financial Interest Cover White Paper 3.

[7] Mfon Ukpong and Ikechukwu Acha, 'Insurance and Econmic Development in Nigeria: Co-Integration and Causality Analysis' (2017) 4(4) Scholedge International Journal of Management and Development 28 – 39.

[8] Uduak Ubom, 'Investment Portfolio of Insurance Firms and Economic Development in Nigeria' (2014) 3(5) International Journal of Finance and Banking 286 – 294.

a captive or even an express permit allowing a non-admitted insurer/reinsurer to operate within the Nigerian market. Any of these options have key implications. This underscores the need for analysis of some notable issues that may impact on a multinational insurance programme in whatever form it is structured.

Presently in Nigeria there are a number of issues that negatively affect the insurance industry, and by extension they must be considered when planning the right approach in structuring multinational programmes and multinational insurance as a whole. In other words, there are local tax issues that affect the insurance sector in Nigeria, but their impact is not restricted to domestic insurance alone because they indirectly affect multinational insurance programmes that involve Nigeria. This connection exists through the inclusion of local insurance cover obtained from Nigerian insurance that are directly affected by these local tax issues. The first issue to be considered is that of loss relief.

5.1.1 Restriction in the Carry Forward of Loss Relief

Generally, businesses experience comprises good and bad days, which normally is called the business cycle.[9] During the good days, businesses make profits, whereas during the bad days, they make losses.[10] Tax laws recognises the reality of business cycles and make provision for it. In the tax laws of many countries including Nigeria, when a business suffers losses, the business is entitled to deduct these losses in future years when profits are made.[11] This practice is called 'carry forward of tax losses.[12] A very realistic way by which such support is given is through the tax law specifically, by permitting a loss relief for a company; an insurance company in this context. A loss relief presupposes that when an insurance company computes its tax for each year, it is entitled to deduct losses it has suffered in the previous year(s) up to a specified and acceptable limit, after which the

[9] Philip Alege, 'A Business Cycle Model for Nigeria' (Presentation at the African Econometric Conference, Abuja, 2009)
[10] Olaniyan O, Oladipo and Yusuff, 'Business Cycle, Macroeconomic Variables and Economic Growth in Nigeria (1986 – 2014); A Time Series of Econometric Approach' (2017) 17(6-E) Global Journal Massachusetts Incorporated.
[11] O. Aguolu, 'Tax Relief for Business Losses of Individuals and Companies in Nigeria – A Comparative Analysis' 63(2) Bulletin for International Taxation.
[12] Business Day, 'Loss Relief under CITA – The Dichotomy within the Tax Law' *Business Day* (Lagos, 31 July 2014).

remainder of its profit is subjected to tax.[13] This is a practice that is recognised globally and applied in many jurisdictions around the world including in Nigeria.[14]

The problem with the application of loss relief in Nigeria in the insurance sector is that there is some level of discrimination in its application that is unfavourable to insurance companies including local insurers that have MIP portfolios. Generally, under the Companies Income Tax Act 2007, where a company makes a tax loss, it is entitled to treat it in its books as a deferred tax credit to be relied upon to offset future tax obligations. In other words, such a loss can be deducted from future years' profit before computing tax.[15] Any unutilised portion of the tax loss can be carried forward indefinitely, the problem however, is if the company having a tax loss is an insurance company, it can only carry it forward for a maximum period of four years, that is, while other companies can carry forward their tax losses indefinitely, insurance companies can carry it forward for a maximum of four years and any outstanding loss relief will be forfeited.[16]

This issue becomes relevant for a multinational insurance programme when designing a programme, it incorporates a local insurance company in Nigeria, perhaps a local subsidiary of the non-admitted insurer, a fronting agent or a captive insurer. In such a case where the local insurer suffers losses, it will be entitled to deduct the losses suffered from subsequent years' profit before it is assessed to income taxes. Where the local insurer is unable to fully utilise the deferred tax credit within four years, it will forfeit that tax asset.[17]

The law in Nigeria regarding the extent to which loss relief can be claimed, has been plagued and dubbed with controversy for many years. But before delving into the details of that issue, it may be necessary to illustrate the workings and application loss relief through a clear example.

Example: ABC Insurance Nigeria Plc prepared its accounts for the 2013 accounting where it posted profit N10 million and in 2009 it made a loss of N5 million, N10 million

[13] Aguolu O, 'Tax Relief for Business Losses of Individuals and Companies in Nigeria – A Comparative Analysis' (2009) Bulletin for International Taxation.
[14] ICAN, 'Preparing Tax Computations and Returns for Accounting Technician Scheme of West Africa' ICAN Study Pack.
[15] Deloitte, 'Taxation of Insurance Business – Restating the Case for Legislative Review' Deloitte Publications (2017).
[16] Companies Income Tax Act 2007, s 16(7).
[17] Deloitte, 'Taxation of Insurance Business – Restating the Case for Legislative Review' Deloitte Publications (2017).

in 2010, ₦6 million in 2011, ₦5million in 2012. The break-down of its tax computation in the context of the loss relief it is entitled to claim from profits from its insurance business is as follows:

2010 Tax Assessment Year	**₦**
Profit	Nil
Losses Carried Forward	25m
Tax Payable on Insurance Business	Nil
2011 Tax Assessment Year	**₦**
Profit	10m
Losses Carried Forward	10m
Tax Payable on Insurance Business	Nil
2012 Tax Assessment Year	**₦**
Profit	6m
Loss Carried Forward	6m
Tax Payable on Insurance Business	Nil
2013 Tax Assessment Year	**₦**
Profit	30m
Loss Carried Forward	9m
Tax Payable on Insurance Business	30% of 21m (because 30% is the applicable corporate income tax rate)

For more examples see Joseph Arogundade, *Nigerian Income Tax & Its International Dimension* (Spectrum Books Ltd 2005) 193 - 194[18]

In effect, where an insurer suffers losses, it is entitled to deduct the losses from subsequent profits made by the company. Consequently, even where the local aspect of the multinational insurance programme suffers loss, the loss relief can be claimed from subsequent years in a manner that it will reduce future taxes to be paid by the local component of the programme.[19]

The issue that hangs around the loss relief relates to the duration of years for which it can be deducted. Can the losses be deducted for an indefinite period of time like other

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[18] Joseph Arogundade, *Nigerian Income Tax & Its International Dimension* (Spectrum Books Ltd 2005) 193 - 194

[19] Ken Igbokwe, Aitken, Russell and Oyedele, 'Nigeria at Fifty: Top 50 Tax Issues' (2010) PWC Publication.

companies or for a specified period of time? Strangely, there is raging controversy as to the exact law that applies to loss relief in Nigeria. This is of relevance to the insurance industry because the loss relief applicable to it appears to have been restricted to four years and the loss relief claimable in each year cannot exceed the assessable profit of the company for that year.[20]

The position of the law on this issue has over the years been controversial, and attempts to amend the law has resulted in bigger and more complicated problems. The progression of the controversy will be analysed briefly below:[21]

The relevant provisions of the law on carry forward of loss relief are Section 31(2)(a) of the Companies Income Tax Act 2004[22] (which is the erstwhile section 27(2)(a) Companies Income Tax Act 1990)[23] and Section 8 Companies Income Tax Act 2007, which amended section 27(2)(a)(iii) of the earlier Acts. To understand the controversy appropriately, it will be necessary to reproduce the amendments made at various stages to the provisions of section 27(2)(a) of the Companies Income Tax Act 1990.

The 1990 version of the Companies Income Tax Act is reproduced below:

Subject to the provision of subsection (4) of this section, there shall be deducted

(a) the amount of a loss which the Board is satisfied has been incurred by the company in any trade or business during any preceding year of assessment provided that:

i. *in no circumstance shall the aggregate deduction from assessable profits or income in respect of any such loss exceed the amount of such loss.*
ii. *A deduction under this section for any particular year of assessment shall not exceed the amount, if any, of the assessable profit, included in the total profits for that year of assessment, from the trade or business in which the loss was incurred and shall be made as far as possible from the amount of such assessable profit of the first year of assessment after that in which the loss was incurred, and so for as it cannot be so made, then from such amount of such assessable profits the next year of assessment, and so on;*

[20] ibid.
[21] Nike James, 'Insurance Taxation in Nigeria – Time Bomb for Businesses' (8th NBA Section on Business Law Annual Conference, May 2014)
[22] CITA 2004, S 31(2)(a)
[23] CITA 1990, s 27(2)(a)

but such deductions shall not be made against the profit of the company after the fourth year from the year of commencement of such business.

iii. *The period for carrying forwarding loss on sub-paragraph of the paragraph shall be limited to four years after which period, any such loss shall lapse.*[24]

A close perusal of this provision reveals that it recognises and permits companies generally (including insurance companies) to claim loss relief; however, paragraphs (ii) and (iii) states that this can only be enjoyed for a period of four years, and it must equally not exceed the assessable profit of each year.[25] Other points that can be identified from the above provision is that the loss relief is the loss of the preceding year because taxes in Nigeria are assessed on a preceding year basis.[26]

Based on the above provision, the loss relief to be claimed by the company (insurer) must be from the immediately preceding year and if it is not completely used, it can be carried forward to future years until it is completely utilised.[27] Furthermore, the only recognised exception to the four-year rule under the 1990 Act is agricultural/trade or business.

Five years after the publication of the 1990 Act by the Federal Government of Nigeria, the Federal Tax Authority, known as the Federal Inland Revenue Service (FIRS), published "The Nigerian Tax Laws" which is a compendium or collection of tax laws in Nigeria. Although the compendium purportedly reproduced the provision of the 1990 Act, it omitted the last sentence of section 27(2)(a)(ii) of the 1990 Act, which states thus: "*such deductions shall not be made against the profit of the company after the fourth year from the year of commencement of such business*." The implication of which was that the four-year restriction for the claim of loss relief had been lifted.

Although no reason was given for this omission or deletion, it could be an attempt to eliminate the repetition of the four-year loss relief rule, which is contained in the last

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[24] CITA 1990, s 27(2)(a)

[25] Lolade Osasomi, 'Loss Relief Under CITA – The Dichotomy Within Tax Laws' *BusinessDay* (31 July 2014)

[26] Arogundade (n 18) 193

[27] ibid 193

sentence of paragraph (ii) and in the whole paragraph (iii) of section of 27(a) of the 1990 Act.[28]

One must however reiterate that the legality of deletion by the FIRS is questionable because of the provisions of Section 4 of the Nigerian Constitution that vests such legislative powers exclusively in the National Assembly, which is the legislative arm of government.[29] The Constitution of the Federal Republic of Nigeria enshrines the doctrine of separation of powers; hence, it clearly delineates the law-making powers between its three arms of government the Executive, Judiciary and Legislature.[30] The law-making power rests squarely in the National Assembly.[31] Where any law offends the provision of the Nigerian Constitution, that law becomes null and void because the Nigerian Constitution is the grund norm and is supreme, over and above any other law and any conflicting law automatically becomes null and void and of no effect.[32]

Reading the deletion of section 27(a)(ii) of CITA 1990 in the context of the above, it becomes apparent that the deletion is invalid and ultra vires the powers of the FIRS.[33] In practical terms, it is an executive amendment of a legislative instrument, which is unknown to Nigerian law. Although Section 315 of the Constitution of the Federal Republic of Nigeria allows certain amendments to be made to existing laws by executive bodies, this is strictly where such amendments bring that law into conformity with the Nigerian Constitution. However, the amendment of Section 27(a)(ii) of CITA 1990 by the FIRS does not fall within this category and cannot legally be considered to be valid.[34] Furthermore, assuming without conceding that the deletion in paragraph (ii) has legitimacy, it still would not have eliminated the four-year rule because of the retention of the four-year rule in paragraph (iii) of Section 27 of CITA 1990.

The controversy regarding the four-year rule continued in 2007, when in exercise of its constitutional powers,[35] the Nigerian National Assembly amended the Companies Income

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[28] Osasomi (n 25)
[29] Constitution of the Federal Republic 1999, s 4.
[30] Constitution of the Federal Republic of Nigeria 1999, s 4, 5 and 5 (CFRN 1999)
[31] CFRN 1999, s 4
[32] CFRN 1999, s 1(3)
[33] *Nigerian Ports Authority v Abu Ajobi* (2006) SC.402/2001.
[34] Nike James, 'Insurance Taxation in Nigeria – Time Bomb for Businesses' (8th NBA Section on Business Law Annual Conference, May 2014)
[35] Constitution of the Federal Republic of Nigeria 1999, s 3.

Tax Act 2004 as contained in the Laws of the Federation 1980 and the 2004 Act by deleting section 27(a)(iii) of CITA 1990; thus giving birth to the following provisions:

Subject to the provision of subsection (4) of this section, there shall be deducted-

(a) the amount of loss which the Board is satisfied has been incurred by the company in any trade or business during any preceding year of assessment, provided that:

i. *in no-circumstances shall the aggregate deduction from assessable profit or income in respect of any such loss exceed the amount of such loss; and*
ii. *a deduction under this section for any particular year of assessment shall not exceed the amount, if any, of the assessable profit from the trade or business in which the loss was incurred and shall be made as far as possible from the amount of such assessment profits of the first year of assessment after that in which the loss was incurred and, so far as it cannot be so made then from such amount of such assessable profits the next year of assessment and so on but such deductions shall not be made against the profit of the company after the fourth year from the year of commencement of such business.*
iii. *(deleted by 2007 No 56, 5.8) forward role.*

The implication of the above is that if the above amendment of 27(a)(iii) of CITA 1990 is read in the context of the amendment of Section 27(a)(ii) of CITA 1990 by the FIRS as contained in the FIRS "Compendium of Tax Laws", it will mean that both the sentence in paragraph (ii) and the whole of paragraph (iii) would have been deleted; hence, the elimination of the four-year loss carry forward rule for companies generally.

On another hand, despite the purported deletion of the four-year rule for companies generally, Section 16(7) of CITA 2007 retained the application of the four-year rule to all insurance companies in Nigeria.[36] Meaning that even though the four-year rule had been purportedly repealed from the tax laws, it has been retained exclusively and solely for insurance companies, with huge implications. Section 16(7) of CITA 2007 provides as follows:

[36] Nike James, 'Insurance Taxation in Nigeria – Time Bomb for Businesses' (8th NBA Section on Business Law Annual Conference, May 2014)

Each class of insurance shall be assessed separately as 'life insurance and non-life other insurance assessment" and in respect of each class of insurance business where there are more than one type of insurance in the same class, they form one type of business and shall not be allowed against the income from another type of insurance business but the loss shall be available to be carried forward against the same class of insurance business and, in all causes, the period of carrying forward of a loss shall be limited to four years of assessment.[37]

This gives rise to a situation where insurance companies are compelled to remit taxes even when they have an accumulation of losses from previous years.[38] This state of affairs offends the fundamental principle of a good insurance tax system, which requires that insurance law and practice should promote fairness and equality. The issue of the need for fairness and equality in a tax system is one that has been canvassed for repeatedly by Adam Smith. In the 19th century, Adam Smith propagated the four main Canons of Taxation, which are that a tax system must promote equality, certainty, convenience and economy.[39] These principles have been adopted in the Nigerian National Tax Policy, which states that '*Nigeria tax system should be fair and equitable devoid of discrimination. Taxpayers should be required to pay according to their ability*.'[40] Notwithstanding these principles, the wording of Section 16(7) of CITA 2007 is a departure from the provisions of the National Tax Policy because it is unfair and discriminatory against the insurance sector. Fairness presupposes that similarly situated taxpayers should be taxed similarly,[41] but the Nigerian tax systems has failed to meet the requirement of fairness and equality because participants in the insurance sector are discriminated against and the law is unfair and inequitable towards them.

This has not gone down well with insurers in Nigeria, particularly the *Nigerian Insurers Association* (NIA), which has made efforts to galvanise the relevant regulators - FIRS and NAICOM, to present an amendment bill before the Nigerian National Assembly that will correct the anomaly by repealing the provisions of Section 16(7) of CITA 2007.[42] Efforts have also been made by key stakeholders to communicate this challenge to the

[37] CITA 1990 (as amended in 2007), s 14(7)
[38] Nike James, 'Insurance Taxation in Nigeria – Time Bomb for Businesses' (8th NBA Section on Business Law Annual Conference, May 2014)
[39] Adams Smith, *Wealth of Nations* (1776).
[40] Nigerian National Tax Policy 2017, para 2.1.
[41] Calvin Kent, 'Principles of Good Tax System' West Virginia Legislative Joint Select Committee on Tax Reform 4 May 2015.
[42] Sola Alabadan, 'NIA Restates Objection to Company Income Tax Act' *Daily Independent*

Minister of Finance, being the highest officer exercising supervision and oversight with respect to tax and insurance matters.[43] However, this challenge is bigger than one that should stop at just communicating to the Minister of Finance; proactive efforts will have to be put in and a coordinated response will have to be organised to raise public awareness and engage with the National Assembly to ensure that this anomaly is corrected. This is particularly the case because such a clear case of discrimination against an entire sector of the economy can discourage investors from making investment in that sector and will also render Nigeria unattractive and unprofitable in the course of designing multinational insurance programmes.

This position of the law appears not to be unique to Nigeria, because under Ghanaian law, carry-over for losses is for 5 years, and the applications are restricted to manufacturing, mining, venture capital investment on losses incurred on disposal of share, agro processing, tourism and ICT.[44] Loss relief is not available to other categories of businesses in Ghana; hence, the responsibility to bear losses, remains that of a company and will not be defrayed from future profits, unless it falls within the designated category of business. In Ghana, this tax incentive is not available for insurance companies, this presupposes that a multinational programme that factors Ghana into its global structure will be required to forfeit such a huge tax advantage, making it an important point that must be taken into consideration when structuring a multinational insurance programme. This means that notwithstanding the restriction of its loss relief to four years, the Nigerian insurance tax laws appears to be even more favourable and beneficial for insurance companies when compared to Ghana. In Ghana, insurance companies can only benefit if they suffer losses under their venture capital investment activities, and the recovery applies strictly to the category of loss suffered.

However, in other jurisdictions, the law is more favourable when compared with Nigeria and Ghana. In India, unabsorbed losses of a business or profession that is not a speculation loss, can be carried forward for up to eight subsequent assessments. In Cyprus, the

[43] Thisday, 'Amended Company Income Tax Act 2007' *Thisday* (Lagos, 7 July 2014)
[44] Ghana International Revenue Act, s 22; see also PKF, 'Ghana Tax Guide' (2013) PKF Publication

restriction is for 5years;[45] countries like South Africa, Malaysia and Brazil[46] do not impose restrictions, and hence, losses can be carried forward indefinitely.[47]

It is appropriate for Nigeria to amend its income tax law on the carry forward of tax losses in other to eliminate the inequality and unfairness towards insurance companies.[48] This way, Nigeria will open up its market and set the stage to attract foreign investors to its insurance market in grand style and in significant numbers. I therefore recommend the immediate amendment of Section 16(7) of CITA 2007 by permitting insurance companies to carry forward their losses indefinitely.[49] This is one of the most appropriate ways to incentivise investment and interest in the Nigerian insurance sector, particularly in view of the fact that the level of insurance penetration is very low.

5.1.2 Contradiction in the Basis for Calculation of Reserve of Unexpired Risk

This part of Chapter Five continues the analysis on the key tax issues affecting providers of admitted insurance cover in Nigeria and by extension limiting the growth rate of the insurance industry in Nigeria. This section will discuss the problems associated with computation of corporate income taxes for admitted insurers based on application of percentage basis reserves for calculating unexpired risks as opposed to time apportionment basis. The tax liability of an insurance company is based on the figures stated in its Financial Statements; hence, it becomes problematic dealing with unexpired risks, that is risks that are still being covered and liability has not arisen.[50]

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[45] Chris Damianou and Eylem Philippou, 'Circular Issued on the Carry Forward of Tax Losses' *Tax and Weekly News* (11 July 2013)

[46] PKF, 'Brazil Tax Guide 2013' (2013) PKF Publication < http://www.pkf.com/media/1954326/brazil%20pkf%20tax%20guide%202013.pdf> accessed 20 February 2016.

[47] Rick Jensen and Claude Gallello, 'Non-Admitted Coverage and Premium Taxes: No Standard Solution' (2011) Willis International Alert.

[48] Rosemary Onuoha, 'Multiple Taxation Poses Threat to Insurance Sector – Operators' *Vanguard* (Lagos, 8 October 2018).

[49] Chinedu Ezomike and Samuel Bamidele, 'Nigerian Insurance Industry – Achieving Tax Neutrality to Attract the Needed Investments' (2018) Andersen Tax LP Publication.

[50] Partachi Ion, Oleg, Marcel and Victoria, 'The Role of Unexpired Risks Reserves and Outstanding Loss Reserves In General Insurance Business' (2009) 12(2) Economia Seria Management 58 – 66.

Under Nigeria law, different tax principles apply to life insurance and general insurance businesses, whereas all other companies are taxed based on the general rules of taxation. One other issue is that there is a mismatch in the requirement of insurance regulations and the tax laws for insurance companies. For example, Section 16(8)(a) of CITA 2004 (as amended) requires the application of percentage basis in the calculation of reserves for unexpired risks in the computation of taxes for insurance companies.[51] Whereas, Section 20(1)(a) of the Nigerian Insurance Act 2003, requires that time apportionment basis should be applied in the calculation of unexpired risks for insurance regulatory purpose.[52] In other words, the insurance law requires the application of percentage basis to calculate unexpired risk, while the tax laws requires the application of time apportionment basis. This mismatch creates significant strain on insurance companies, especially because the tax option gives rise to payment of higher taxes, more regulatory costs and contravenes international accounting standards.

The provisions of the Insurance Act 2003 are in tandem with the provisions of paragraph 34(4.4) of the International Financial Reporting Standards (IFRS) No 4 which deals with accounting for tax for insurance companies.[53] This means that Nigerian tax law conflicts with the Insurance Act and the IFRS, which is the global accounting standard for preparation of insurance sector Financial Statements.

To calculate the taxable profit of a non-life insurance business, Section 16(1)(b) of CITA requires that profit should be ascertained by deductuing qualifying expenses from the revenue (which includes gross premium, interest and other receivables) – first, the reinsurance cost and second, a reserve for unexpired risks.[54] Thus, the reinsurance cost and the unexpired risk are to be deducted from the insurance revenue and the balance will be treated as the taxable income. Despite making provision for the deduction of unexpired risk, CITA proceeds to cap and impose a restriction on the percentage of unexpired risks that can be deducted.[55] Section 16(8)(a) of CITA states that only 45 percent of total premium can be deducted as unexpired risk for general insurance business and only 25 percent of premium can be deducted as unexpired risk for marine insurance.[56] The question that arises is what happens to the remaining 55 percent and 75 percent

[51] Companies Income Tax Act 2004 (as amended), s 16(8)(a).
[52] Nigerian Insurance Act 2003, s 20(1)(a).
[53] International Financial Reporting Standards (IFRS) No 4, paragraph 34(4.4).
[54] James (n 34)
[55] Companies Income Tax Act 2004, s. 16(8)(a).
[56] CITA (Amendment) Act 2007, Section 14(1)(a & b), 14(5)(a)

respectively? Who bears those burdens for the taxation of these percentages of premium on risks that have not expired? The answer is that the tax costs of these percentages are to be borne by the admitted insurance companies.

Although this provision appears straightforward because it involves the addition of income, the deduction of reinsurance cost and the reserve for unexpired risk. But the provisions of the law yet contain some inherent contradictions and some shocking implications. One notable concern in this respect, relates to the formulae or basis for calculating the unexpired risk to determine the applicable reserve. Two distinct and contradictory formulae are provided for in two separate Nigerian laws -the Insurance Act 2003 and in the Companies Income Tax (Amendment) Act 2007. The Insurance Act 2003 requires and mandates general or non-life insurers to create separate reserves – one for its insurance business and the second reserve for its unexpired risk, which will be determined on a time apportionment basis.[57]

The implication of this provision is that non-life insurers are restricted in deducting their total unexpired risk from the total premium and revenue received before assessing themselves to tax.[58] Ideally, the total unexpired risks should be deductible because for operational reasons and based on standard practice, when unexpired risk is calculated, it more often than not includes an unearned premium. This means that the general insurer will be compelled to pay taxes on unearned premiums, which is still futuristic and uncertain, notwithstanding the fact that there may be some uncertainty as to whether or not the unearned premium will be paid.[59].

Also, paying taxes on income that has not been received, short-changes the insurer and raises its operational loss(es) because the insurer is required to pay taxes on a futuristic income whose value could be eroded by inflation or may even be extinguished by termination or frustration. Such provisions in the tax law that run contrary to the Insurance Act 2003 and IFRS global standards hurts the insurance industry in Nigeria.[60] It contributes in making the conduct of admitted insurance business unprofitable and prohibitively expensive. The extended implication is that inclusion of Nigerian licenced

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[57] CITA (Amendment) Act 2007, s 14(8)(a)
[58] James (n 34)
[59] National Insurance Commission, Nigerian Insurance Taxation Regime – Based on the Provisions of Section 16 of the Companies Income Tax Act (2007)' (2015, Presentation to the Nigerian Presidential Transition Committee) 4 – 7.
[60] - -, 'Nigeria's Insurance Industry Shoulders Unfair Tax Burden' International Tax Review 2018

insurance companies in the designing of multinational insurance programme will extend these tax inefficiencies and losses to a global programme, at least from a local perspective. This certainly could be a reason for excluding jurisdictions like Nigeria from multinational programmes even where the programme is one that can legally be implemented in Nigeria.

Repeated calls have been made for an amendment of Section 16(8)(a) of CITA 2007 and for insurers to be taxed on the basis of their actual unexpired risk; a strong call has repeatedly been made by the leadership of the Nigerian Insurance Association.[61] Based on a recent visit of the NIA to the Federal Ministry of Finance, the Minister of State for Finance expressed shock at the existence of such a law since 2007 and assured them of his commitment to set up a committee to respond to the concern.[62] But again the gravity of such concerns should demand serious action and not rhetoric. There is the need for more action and concerted effort to amend the law to reflect the global standards required by IFRS and to reconcile the tax law with the insurance regulation.

This issue cannot be overlooked or glossed over because it raises the risk of double taxation on un-earned income of admitted insurers considering the fact that income tax is imposed at of 30% of taxable income. These issues of unexpired risk possess serious risk to the solvency of admitted insurers and more importantly to their profitability.[63]

In India, the limits on unexpired risk for non-life insurance companies are far more realistic and business friendly than the Nigeria provision. The rate allowed for fire and terrorism based insurance business is 100% of the net premium income of such business for the preceding year.[64] On the other hand, if the insurance business does not provide terrorism cover, the unexpired risk reserve will be 50% of the premium income for the preceding year.[65] The unexpired risk reserve for marine insurance is 100 percent of the net premium income for the preceding year.[66] To prevent the abuse of this provision in aggressive tax planning schemes, the Indian law contains a provision that prohibits

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[61] Chuks Udo Okonta, 'CITA 2007: NIA Take Case to Government' (2014) InspenOnline Blog
[62] ibid
[63] Thisday, 'Amended Company Income Tax Act 2007 is Obnoxious to Insurers' *Thisday* (Lagos 7 July 2014)
[64] Indian Tax Act 1961 (as amended), Rule 6E(A)
[65] Indian Tax Act 1961 (as amended), Rule 6E(aa)
[66] Indian Tax Act 1961 (as amended), Rule 6E(A)

amounts, which have been disallowed in previous years from being included in the total income of the succeeding year.[67]

When these provisions of the Nigerian CITA 2007 are compared with the practice in other jurisdictions like India and the provisions of the IFRS and the Insurance Act 2003, it becomes apparent that the provisions need to be amended in order to correct this anomaly and to reduce the unfair tax burden created on admitted insurers in Nigeria. Adopting the Indian realistic approach could provide the best and most balanced option to Nigeria, especially because it is less susceptible to abuse and arbitrariness.

This recommendation is supported by the fact that calculation of unexpired risk on a time apportionment basis, is quite simply the most realistic option for determining an insurer's realised income and taxes. In addition, this recommendation is supported by the fact that the Insurance Act 1997, which pre-dates the Insurance Act 2003, adopted the application of percentage basis for calculation of unexpired risk,[68] but was later repealed in 2003 and replaced with the time apportionment basis. Unfortunately, four years later, in the course of amending CITA in 2007, the legislators decided in error, to rely on the approach stipulated in the Insurance Act 1997, which was a repealed law instead of adopting the approach in the Insurance Act 2003. This error is the reason for the above anomaly and has led to significant tax losses for the entire insurance sector. It is therefore important to right the wrongs and create room for a more tax friendly market, which will attract foreign players in the Nigeria insurance market.

5.1.3 Deductibility of Certain Expenses

This part of the work continues with the analysis of tax issues affecting the insurance sector in Nigeria and by extension affecting admitted insurers in a multinational insurance programme operating in Nigeria. It is standard practice that before a company reaches a taxable profit, it is entitled to deduct certain expenses from the profit before tax, which will give rise to the taxable profit.[69] The application of this principle under Nigerian tax

[67] Indian Tax Act 1961 (as amended), Rule 6E(b)
[68] Nigerian Insurance Act 1997, s 24(2).
[69] Deloitte, 'Taxation of Insurance Business – Restating the Case for Legislative Review' (2017) Deloitte Publication 2.

law has been twisted and applied discriminatorily towards insurance companies in Nigeria.[70]

Universally, the profits of companies are assessed to tax, but it is not the total profit that is subjected to tax. The taxpayer is authorised to deduct specific qualifying expenses, and the remaining profit is then subject to tax; for insurers the gross income is first calculated, after which reinsurance cost is deducted and other qualifying or allowable expenses are deducted, the remnant is then subjected to tax.[71]

Under Nigerian law, regarding non-life or general insurance business, two broad categories of deductions from the premium are allowed, the unexpired risk reserve, which is 45% of the total premium and 25% for marine cargo insurance on the one hand, and on the other hand, expenses and claims that must not exceed 25% of the total premium are to be deducted.[72] In other words, paragraph b of Section 16(8)(b) of CITA (as amended) imposes a deductibility ceiling on the expenses an insurance company can deduct before assessment for tax.

This provision is discriminatory against insurance companies because for other categories of companies, the law permits them to deduct 100% of all qualifying expenses (before tax), that is expenses that have been incurred Wholly, Exclusively, Necessarily and reasonably in the making of the taxable profit (this is also called the *WENR test*).[73] The implication of this is that while a 25 percent test is applied to insurance companies, all other companies apply a test that is based on objective considerations of whether those expenses were legitimate and necessary and can thereafter claim 100% of the expenses. In interpreting the meaning of these words contained in the WENR test, the Nigerian court in ***Gulf Oil Co (Nig) Ltd v Federal Board of Internal Revenue***,[74] Belgore J defined the meaning of "wholly, exclusively and necessarily" as meaning that the expense was incurred exclusively, substantially and inevitably by the company.[75] Once a company can satisfy these requirements, it can deduct any expense, which also translates to the fact that if a company incurs 100 percent of its expenses in satisfaction of the WENR test, it can

[70] Deloitte, 'Taxation of Insurance Business – Restating the Case for Legislative Review' (2017) Deloitte Publication 2.
[71] CITA 2007, s 4.
[72] CITA 2007, s 16(8)(b).
[73] CITA 2007, s 24 and PPTA 2004, s 10(1)(g).
[74] *Gulf Oil Co (Nig) Ltd v Federal Board of Internal Revenue* [2003] FHCLR 1 at 13
[75] ibid

deduct the entire 100 percent of the expense from its profit before its tax assessment. But this is not the case for insurers in Nigeria.

The Companies Income Tax Act contains an open-ended list of items that could be deemed to have satisfied the deductibility test. The rationale behind this approach for other companies towards taxation around the world is to encourage businesses and investments as well as to increase the return on investment. While the approach applies broadly to companies generally, it becomes incomprehensible and unjustifiable for insurance companies to be treated differently. The situation for insurers is absurd because the deductibility of claims paid out is capped alongside the ceiling on expenses incurred. The expenses incurred in the course of making the profit will be borne by the insurer who will bear a minimum of 75%, while the government will bear a maximum of 25%, Insurers have complained repeatedly about this policy and the fiscal discrimination, heaping the blame on the widespread ignorance and absence of understanding on the workings and operational models of insurance companies.[76]

The challenge posed to insurance companies seems to have crept beyond the limits of general insurance business, because apart from statutory deductions allowed at a stated percentage into its general reserve fund and special reserve fund, insurers involved in life insurance business are permitted to deduct all expenses but up to a maximum cap of 20 percent of their gross income. There remains no legal justification for this provision of the law. It is for this reason that the former Commissioner for Insurance in Nigeria, Mr. Fola Daniel, accompanied the leadership of the Nigerian Insurers Association to visit to the Minister of Finance, where he implored the Minister to intervene.[77]

To address this problem, it will be appropriate for an exemption to be granted to insurance companies from the application of the provisions of Section 16(8)(b) of CITA and the application of the WENR test should be extended to insurers. Normally, an amendment of the law could be initiated at the National Assembly of Nigeria, which is the Federal Parliament.[78] This route would be long and difficult because of the politicking involved

[76] Sola Alabadan, 'NIA Restates Objection to Company Income Tax Act' *Daily Independent* (Lagos, December 2013)
[77] Joshua Nse, 'Nigeria: NIA Takes Income Tax Issues to Government' *The Guardian* (6 October 2014, Lagos)
[78] Constitution of the Federal Republic of Nigeria 1999 (as altered), s 2, 3 and 4.

in passing laws in Nigeria.[79] However, to ameliorate the hardship these tax problems have caused for the insurance sector, the President of Nigeria can exercise his powers to exempt a company from the application of certain provisions of the tax laws.[80] This power is exercisable under Section 23(2) of CITA 2007 and is the quickest solution available within the law to deal with this challenge and to reverse and stop the discrimination against the insurance sector, which has made doing business in the Nigerian insurance sector unprofitable and of course scaring off potential foreign investors. This option will also end the double standards and discrimination against the insurance sector in Nigeria, at least with respect to the deduction of allowable expenses.

5.1.4 Discriminatory Minimum Tax Imposed on Nigerian Insurance Companies

This aspect of the work continues to highlight the unfairness, inequality and discrimination that exist against admitted insurance companies from the angle of the Nigerian tax law. Generally, under Nigerian tax law, there is a taxing method known as minimum tax, which means that where a company does not make a profit in a particular year or makes less than the profit expected from such a business, the company will be subjected to the payment of minimum tax.[81] The applicable minimum tax rates for companies in Nigeria are categorised as follows:

- where the turnover of the company is 500,000 Naira or less, the minimum tax will be the highest of 0.5 percent or gross profits, or 0.5 percent of net assets, or 0.25 percent of paid up capital or 0.25 percent of turnover of the company;[82] or
- where the turnover of the company is more than 500,000, the minimum tax will be the highest of 0.5 percent or gross profits, or 0.5 percent of net assets, or 0.25 percent of paid up capital or 0.25 percent of turnover of the company, in addition to 0,125 percent of any turnover above 500, 000 Naira.[83] This effectively results in an effective tax rate of 0.125 percent of turnover, which is a very reasonable rate for a company that is either struggling or operating at a loss.

[79] Normally, to pass a bill in the National Assembly, it will have to go through First Reading, Second Reading, Committee Stage/Public Hearings, and Third Reading, presentation for assent, Presidential assent and gazette.
[80] Companies Income Tax Act 2004 (as amended), s. 23(2).
[81] CITA 2007, s 33(1).
[82] CITA 2007, s 33(2)(a)
[83] CITA 2007, s 33(2)(b).

The concept of minimum tax is government's means of supporting struggling businesses instead of placing them in dormancy, and CITA further creates options for certain companies to be exempted from minimum tax; for example, companies involved in agricultural trade or business[84] and companies that have a minimum of 25 percent imported equity capital.[85] Whenever these exempted companies are operating in a loss position, they will not be required to pay income tax.

Unfortunately, the above tax comforts are not applicable to insurance companies, rather Section 16(8)(b) of CITA 2004 introduces a deemed profit of 15 percent of total profit for non-life or general insurance business,[86] while, Section 16(9)(c) of CITA introduces a deemed profit margin of 20 percent of gross income.[87] This deemed profit that has been pegged, forms the basis on which corporate income taxes will be computed at the corporate tax rate of 30 percent.[88] This deemed profit margin means that even if the insurance company operates at a tax loss and does not have any taxable profit for a particular year, the law expects that it will assessed to minimum tax based on the above specified percentage of its gross income and taxed at the corporate tax rate of 30 percent, leading to an effective tax rate of 4.5 percent of total profit and 6 percent of gross income. These rates are significantly higher than the minimum tax rate that is applicable to other categories of companies, which is 0.125 percent of turnover. The margins are significantly different and it goes to show the discrimination and unfairness that players in the insurance sector in Nigeria suffer when compared with other sectors of the economy. This targeted and direct level of discrimination and undermining of the insurance industry cannot be justified and it accounts for one of the reasons why the Nigerian insurance sector has remained comatosed and stagnant for a long period of time. There is the need to amend these discriminatory laws and expunge these provisions that are negative and targeted at the insurance sector. (See Table 1 in Chapter 5).

It will be appropriate for an exemption from the application of these provisions to be granted to insurance companies by the President of the Federal Republic of Nigeria under his powers contained in Section 23(2) of CITA 2007.[89] This will enable insurance companies operating in a loss position or taxable loss to apply the minimum tax applicable

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[84] CITA 2007, s 33(3)(a).
[85] CITA 2007, s 33(3)(b).
[86] Companies Income Tax Act 2004 (as amended), 16(8)(b).
[87] Companies Income Tax Act 2004 (as amended), 2 16(9)(c).
[88] CITA 2007, s 40(1).
[89] CITA 2007, s 23(2).

to other companies, and where such a loss making insurance company has a minimum of 25 percent of foreign equity capital, it will completely be exempt from paying income tax until it returns to a profit-making position. This will be a huge attraction to foreign investors in the insurance market in Nigeria and will constitute an incentive for foreign investors to be attracted into the sector.

The above challenges are specific to taxation of insurance businesses in Nigeria and a few other jurisdictions mentioned. These concerns may appear to be specific to the local laws of each of these countries but as explained in earlier chapters, multinational insurance programmes are always a string of several local policies and linked up under a master policy. Where weaknesses are experienced in any of the local programmes they impact significantly on the other policies and reduce the overall profitability of the multinational programme designed, while at the same time increasing the operational cost of the programme. For example, losses that have been incurred in a jurisdiction cannot be mitigated through tax relief, whereas in some other jurisdictions such tax relief can be claimed, it renders one jurisdiction to be less profitable for the entire cover. There is also the downside to reluctance to include such jurisdictions in the design or in raising the premium that will be due from such a jurisdiction. Overall, such thorny tax issues negatively impact on a multinational insurance programmes that include admitted policies in Nigeria.

5.1.5 Challenges with Taxation and Tax Deduction of Premium Expense

One challenge that confronts insurers and insured in Nigeria and other jurisdictions is the tax treatment of premium payments made for insurance cover purchased on a non-admitted basis. There is always the danger that the tax authorities will not allow such payments to be deducted before payment of taxes and there is also the danger of double taxation.

A multinational insurance programme purchased by a parent company and covering subsidiaries that are resident in a non-admitted jurisdiction, poses serious tax challenges for all the parties involved,[90] particularly with respect to payments for premiums and premium allocations.[91] In a standard arrangement, the entire premium payment is made

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[90] Roseanne Ehite Geisel, 'Multinational Insurance Programs Should be Vetted for Risk Scenario' (2013) Business Insurance.
[91] ibid.

by the parent company and the premium is subsequently allocated among all beneficiaries, which comprises both the parent company and its subsidiaries.[92] Premium allocation is defined as the distribution of insurance premium and other fees incurred amongst the insured parties that are involved in a multinational insurance programme.[93]

Each of the beneficiaries will be required to reimburse or recharge the parent company for payment of the whole premium on the global policy. However, this process is not without its challenges; first, the premium allocation must be fairly and accurately done, otherwise it will attract negative tax/regulatory scrutiny from the authorities in any of the relevant jurisdictions.[94]

A far more significant challenge facing premium payments in a multinational insurance programme in this context is tax deductibility. Ordinarily, a company is entitled to deduct all expenses that it has wholly, exclusively, necessarily and reasonably (WENRly) incurred.[95] This is a basic tax law principle; hence, in a multinational insurance programme, the parent company will be entitled to deduct its share of the premium expense before it is assessed for income tax. However, whether the premium contribution paid by a subsidiary will be allowed to be expensed WENRly by that subsidiary will depend on whether the subsidiary is based in an admitted jurisdiction or a non-admitted jurisdiction. Premium payment deduction made in an admitted jurisdiction will be legal and allowable under tax laws; however, similar deductions in a non-admitted jurisdiction like Nigeria will not be deductible. The reason is because the premium payment is illegal ab initio and it is settled tax law and illegal expenses cannot be claimed as allowable deductions.[96] For example, under Section 27 of CITA 2007, there is a prohibition against deducting any expense that is incurred outside Nigeria, for or on behalf of a company, except if the FIRS considers such an expense to be an allowable deduction.[97] The implication of this is that prior approval may have to be sort by the insured subsidiary in Nigeria that is benefitting from a global cover and seek to pay its share of the premium allocation. Where the insured Nigerian subsidiary goes ahead to pay such premium,

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[92] AIG, 'Global Program Premium Allocation: Why it Matters More than You Think' (2014) Risk & Insurance.
[93] ibid.
[94] ibid.
[95] IPSE, 'Tax Treatment of Business Expense' (2015) IPSE Advice
[96] Douglas Kahn and Howard Bromberg, 'The Tax Provision Denying A Deduction of Illegal Expense and Expenses of Illegal Business Should Be Repealed' (2016) 18 University of Michigan Law Scholarship Repository 207b- 208.
[97] CITA 2007, s 27(i).

allocated to it without any assurance of its deductibility from the FIRS, it would be barred from claiming it later as an allowable deduction, it will not satisfy the WENRly test, in view of the fact that it cannot be said to have been reasonably incurred.

Where it becomes the case that the premium expense is not deductible by a local subsidiary, the multinational insurance programme would have failed to achieve tax efficiency and would be exposing the local subsidiaries to significantly higher tax payments in Nigeria, which is capable of eroding most of the non-tax gains achieved from the programme. Another side to the tax inefficiency is the likelihood that whenever a premium is paid by the parent company in its home jurisdiction, it is likely to attract premium taxes and when a premium is paid (legally) by a subsidiary (in an admitted jurisdiction), the premium is likely to be subjected to another premium tax payment. The implication of which is that double taxation may arise.[98]

5.1.6 Taxation of Claim Payment at a Minimum of Two Points

Any transaction always has a tax angle to it and it is important for transaction parties to look at the tax exposures they may suffer and carefully plan their taxes by developing an efficient tax design to manage the tax impact of the transaction. Multinational insurance programmes are equally exposed to this danger of tax inefficiencies and if not well planned, they can result in a situation where the parties may have to pay taxes at various points; hence leading to double or multiple taxation at various points. This aspect of the work addresses this problem briefly.

The ultimate aim of any insured in a multinational insurance programme is for their cover to be sufficiently tax efficient, otherwise, all payments made or received will attract the attention and demands of tax authorities in multiple jurisdictions. A very common possibility in such a programme is that when a claim payment is made to a parent company for a loss that directly affects its subsidiary in another jurisdiction, the claim payment to the parent company will be subject to tax in its home jurisdiction;[99] the parent company will equally not have any legal basis for claiming loss relief on the actual loss suffered by its subsidiary,[100] and ultimately any payment made to its subsidiary will

[98] Peter Paternostro and Erin Scott, 'The Art of Taxation for Multinational Insurance Programs The Art of Taxation for Multinational Insurance Programs' RIMS Publication.
[99] Christian Hunter, 'Tax and Regulatory Pitfalls of Multinational Insurance Programme' (2012) Marsh Publication.
[100] ibid 8.

equally be subjected to tax payment in that jurisdiction.[101] For example, Section 27(b) of CITA 2007 states that any sum recoverable under an insurance or contract of indemnity will not be treated as an allowable deduction and based on Section 28 of CITA 2007, such a payment received will be added back and assessed for tax if it had previously been expensed.

This point will be best understood with the illustration given by Peter Paternostro and Erin Scott – a US parent company negotiates and purchases a global policy with no local policies for risks situated in its Brazilian subsidiary. The subsidiary suffers a loss that is valued at about USD 30 million, based on which the claim payment is made to the parent company. The parent company has no loss to offset income from the claim payment, consequently the claim payment results in it paying a tax of USD 10.5 million, with no opportunity to claim loss relief. The parent company will have to eventually contribute some of the claim payment to the subsidiary, which is likely to be assessed for tax.[102]

A table detailing the implications of both taxation and tax deductibility of premium payment expense and taxation of claim payment at a minimum of two points has been inserted below. The details of the table clearly show some tax implications and drawbacks of a multinational insurance programme. [103]

[101] ibid.
[102] Peter Paternostro and Erin Scott, 'The Art of Taxation for Multinational Insurance Programs: The Art of Taxation for Multinational Insurance Programs' RIMS Publication.
[103] Christian Hunter, 'Tax and Regulatory Pitfalls of Multinational Insurance Programme' (2012) Marsh Publication 8.

DETAILS	OVERSEAS SUBSIDIARY (NON-ADMITTED INSURER NOT PERMITTED)	ULTIMATE USA PARENT COMPANY
Premium expense paid to insurer centrally –		**(1,000,000)**
Premium recharged – may not be tax deductible at subsidiary level	**(500,000)**	**500,000**
Insurance Premium Tax – average of 11%	**55,000**	
Loss suffered by the overseas subsidiary	**10,000,000**	
Claims received from non-admitted insurer may be treated as "Taxable Income" by local tax authorities.		**(2,500,000)**
Transfer of net cash by ultimate parent to overseas subsidiary – may be treated as income and suffer additional income tax locally		**7,500,000**
Potential Risk of Double Taxation: Tax liability by the overseas parent subsidiary on the amount received by the parent company.	**(1,875,000)**	

A vital question is what is the solution to this danger of double taxation of income? First, countries will need to amend their laws to be more accommodating to multinational insurance programmes and to allow companies to treat premium payments made abroad as allowable deductions, while at the same time exempting claim payments received from abroad or domestically being subjected to tax. Because a sum received as claim payment should be directed at restoring a party to a position he was at before a loss, where such receipt of payment is subject to tax, there is the likelihood that it will affect the income position of the insured. Currently, Section 23 of CITA 2007 lists that income exempt from tax does not include claim payment or compensation received by an insured. This law will need to be amended as soon as possible, or the Nigerian President will need to issue an exemption for insurance claim payments.

This section of the work will be concluded by stating that overall, the regulatory experience of admitted insurance within Nigeria has been appalling and characterised by discriminatory tax legislation that places insurance business, and by extension the insurance sector, at a disadvantage when compared to other companies. The effect of this

is that the sector has remained comparatively less profitable, less attractive to foreign investors, expensive for multinational insurance cover and on a broader scale places a drag on the Nigerian economy.The only way forward on a long-term basis is for the legislature to be amended, but on a short-term basis there is the need to exercise the powers of the President to exempt certain income or activities from taxes.

5.2 Taxation of Providers of Non-Admitted Multinational Insurance Programmes in Nigeria

This section of the work will examine whether non-admitted providers of multinational insurance programmes are taxable in Nigeria and whether these taxes are discriminatory or similar to the taxes payable by local insurers. The question is intertwined with the issue of taxation of non-resident companies in Nigeria because such companies may not have any physical presence in Nigeria, it therefore raises the question, should they be taxed in Nigeria?

Therefore, is an insurer without any presence in Nigeria that has provided insurance services to a Nigerian resident or for a risk situate in Nigeria liable to Nigerian taxes? Generally, the transaction taxes that apply to the insurance sector in Nigeria is Companies income tax, withholding tax and value added tax. Withholding tax is not a separate form of taxation, but it is an advanced method of paying corporate income taxes, notwithstanding, it will be considered under a separate heading. The issues to be discussed under this section will be assessed based on each of these forms of transaction taxes. The overall implication that could arise in this situation is that the non-admitted insurer would be taxable in Nigeria and in its jurisdiction of residence (and possibly some other jurisdictions); hence, giving rise to a case of double or multiple taxation of the same business income or revenue.

5.2.1 Corporate Income Tax in Nigeria and Multinational Insurance Programmes

Generally, the profits of a company would be taxable in Nigeria if part of its profit accrued in, was derived from, was received in or brought into Nigeria.[104] Where any of these four situations arise, the profit of that entity would be taxable in Nigeria.[105] But the key question then is, when will the profits of a non-admitted, albeit, foreign company be

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[104] Companies Income Tax Act 2004, s 9.
[105] Taiwo Oyedele, 'Taxation of Foreign Companies Operating in Nigeria' (2014) PWC Publication.

deemed to be derived in Nigeria? To bring the point closer home, when will the profits of a non-admitted insurer that provides some form of cover to a Nigerian company or for a risk domiciled in Nigeria, be deemed to have made or derived profits in Nigeria?[106]

In an attempt to answer this question, the Companies Income Tax Act 2004 (CITA) outlines four situations when a foreign company would be deemed to derive profits in Nigeria. The first is where the foreign company has a fixed base in Nigeria, the profit attributable to that fixed base would be taxable in Nigeria.[107] Second, is where the foreign company habitually concludes contracts in Nigeria through a company it has control over or that controls it, in other words, a related entity.[108] Third, if the transaction relates to a turnkey project[109] and fourth where the tax authority believes the whole arrangement is artificial and fictitious in nature and it is for tax evasion purposes.[110]

The first and the second have more direct relevance to the issues we are discussing in this aspect of the work. The question that arises is whether the non–admitted multinational insurer would be considered to have a fixed base by providing direct or indirect cover to a Nigerian entity or a Nigerian domiciled risk.[111] A fixed base, for the purpose of taxation, is any significant territorial connection to Nigeria. [112] A fixed base is a place, a facility, an activity or a service that creates a taxable connection to Nigeria. According to the FIRS Circular No: 9302, a fixed base implies that the place must be easily identifiable and must possess some degree of permanence and could take the form of a facility, activity and provision of services.[113]

The question then remains, does provision of an offshore non-admitted insurance service create a fixed base? The outright answer is to the negative; however, where the parties conduct their affairs in a manner that can be interpreted as creating a connection to Nigeria, it will be deemed that a fixed base has been created.[114] For example, when a team or representatives of the non-admitted insurer visit Nigeria and use an office facility within the country during their visit(s), could making arrangements for the cover be

[106] PML, 'Taxation of Special Businesses' (2017) PML Publication.
[107] Companies Income Tax Act 2004, s 13(2)(a).
[108] Companies Income Tax Act 2004, s 13(2)(b).
[109] Companies Income Tax Act 2004, s 13(2)(c)
[110] Companies Income Tax Act 2004, s 13(2)(d).
[111] Meshach Umenweke, 'The Relevancy of Residency in the Assessment of Tax Liability in Nigeria' (2010) JILI
[112] *JGC v FIRS* (2014) 15 TLRN 65 @ 115.
[113] Federal Inland Revenue Information Circular No 9302.
[114] Etigwe Uwa, 'Tax Disputes and Litigation Reviews' (2018) 6 The Law Reviews.

interpreted as creating a fixed base? This point is buttressed in the decision of ***Shell Petroleum International Mattscgappij v Federal Board of Internal Revenue,***[115] where the appellant was a non-resident company and sought to gather data from Nigeria that would be utilised in the provision of offshore services to a Nigerian company that is within Shell Global Group. In the course of gathering the data, the staff of the offshore company visited Nigeria occasionally and used offices within the Shell Nigeria Building in Lagos. When the issue arose, as to whether that constituted a fixed base, the Court held that it amounted to a fixed base within the meaning of the tax laws. Consequently, the offshore Shell Company was deemed to be deriving profit in Nigeria and was assessed for tax in Nigeria.[116]

This approach to interpretation of the concept of fixed base is quite extreme and uncertain because even limited use of facilities in Nigeria can been interpreted as sufficient connection to Nigeria for tax purpose, which appears to be a subjective test.[117] The Court should have adopted a more objective approach where some level of frequency should be introduced; for example, a requirement for personnel of an offshore company to spend a minimum number of days in Nigeria will be deemed to create a fixed base in Nigeria and would give rise to a fixed base in Nigeria. The approach adopted in determining residency and taxability for personal income tax purposes, is that the personnel should have spent 183 days in Nigeria,[118] which is more objective and certain. A similar approach could be introduced in corporate income tax in the determination of fixed base, but for purposes of balance, the number of days could be pegged at 50 days within a calendar year. This will introduce some level of certainty in the interpretation of the concept of fixed base and in determining the tax liability of foreign companies, including non-admitted insurers.[119]

One other situation that could give rise to a non-admitted insurer being deemed to have a fixed base in Nigeria is where the master policy issued by the insurer inserts the name of a Nigerian company as both an insured and a party to the master policy. This will automatically mean that a Nigerian company is a party to an offshore agreement and the provision of insurance service will automatically give rise to a fixed base. The situation

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[115] *Shell Petroleum International Mattscgappij v Federal Board of Internal Revenue,* (2004) 3 NWLR (Pt 856) 46.
[116] ibid.
[117] International Centre for Tax and Development, 'Taxation of Digital Companies: Facebook as a Case Study' (2018) ICTD Publication.
[118] Personal Income Tax Act 2004, s 10(1)(a)(ii).
[119] Osita Aguolu, 'Taxation of Non Residents in Nigeria' (2008) 62(11) Bulletin for International Taxation 517 – 513.

will be different where the master policy is between the non-admitted insurer and the offshore parent company whose subsidiary is in Nigeria and whose financial interest is insured in Nigeria. In such a situation, it will be difficult to tie the transaction to Nigeria and to create a taxable connection. This point is evident in the decision of the Federal High Court in ***Saipem Contracting Nigeria Ltd and others v FIRS***[120] where a consortium of related entities, comprising Saipem Nigeria, Saipem Portugal and Saipem's Parent Company (France), entered into a contract with Shell for the construction, fabrication and installation. The construction and fabrication were to be performed in Portugal to be handled by Saipem Portugal and another set of construction and fabrications were to be performed in Nigeria by Saipem Nigeria. The entire arrangement was written in a single contract involving Shell as the awarding party and Saipem Nigeria, Saipem Portugal and Saipem France as the awardee/contractor. The offshore component was not split from the onshore component of the contract. The issue that arose later was whether or not Saipem Portugal was required to pay corporate income tax to the FIRS for the income and profit it would derive in Nigeria from the transaction. The Federal High Court held that since the contract is a single consortium contract the income on the entire sum attributable to Nigeria would be taxable in Nigeria. The court held further that there was in existence a fixed base by reason of how the transaction was structured and the fact that payments were made from Nigeria.

Without doubt, the decision in the Saipem case flowed from the wording of the agreement, but the Court should have looked beyond the form, rather attention and emphasis should have been placed on the substance of the transaction. Therefore, from the substance of the transaction, the offshore components of the transaction were done 100 percent outside Nigeria and should not have been treated as service rendered in Nigeria, neither should the income have been treated as derived in Nigeria. The transaction was purely to be executed in Portugal and the delivery offshore; it is like telling a person who buys a television in the England to pay Nigerian taxes because the television would be shipped to and used in Nigeria. This would be completely out of place, because the transaction was done in England. The fact that the payment was done with a Nigerian card or that the payment was by wire transfer or ordinary transfer from Nigeria is completely immaterial.

[120] *Saipem Contracting Nigeria Ltd and others v FIRS* (Suit No.: FHC/L/CS/1081/09)

But overall, to avoid the problems of double or multiple taxation, it is important for providers of multinational insurance programmes to, as much as possible, reduce physical contact with Nigeria and ensure that the drafting of agreements excludes Nigeria on paper from the master policy,[121] except if they are willing to bear the tax liabilities for an inclusion of the Nigerian insured in the master policy. Alternatively, the master policy could exclude Nigeria, while the local policy could expressly include Nigeria, but there could in DIL/DIC clause that ties back to the master policy. This approach is like a split of the offshore component and the onshore component of the multinational insurance programme in a manner that is tax efficient and that eliminates the risk of double or multiple taxation. It has been held by the Nigerian Federal High Court that where a contract is split into offshore and onshore components, the offshore component will not attract corporate income tax in Nigeria but the onshore component will attract corporate income tax.

In ***JGC Corporation vs FIRS***[122] Mobil Production Nigeria Unlimited (MPNU) awarded two contracts to its EPC3 Bonny Terminal Project. The offshore component of the project was awarded to JGC Global, while the onshore component of the project was awarded to JGC Nigeria (a Nigerian subsidiary of JGC Global) and to Daewoo Nigeria Ltd. The offshore component of the transaction was performed completely outside Nigeria and in the course of executing that contract, none of the employees of JGC Global visited Nigeria, neither did they work from Nigeria. But the FIRS after a tax audit, assessed JGC for tax on the basis that the contract was performed jointly with the onshore component of the contract and that the project site for the equipment created a fixed base. The initial appeal was heard by the Tax Appeal Tribunal and it failed to evaluate material facts, rather it decided in favour of the tax authority on the grounds that by simply executing the contract, it created a fixed base for JGC Global. As a result it assessed JGC for tax on the entire contract sum and not on the part of the profit that was attributable to the alleged fixed base. As a result, an appeal was filed at the Federal High Court with JGC argued that the Tax Appeal Tribunal was wrong in law to have held that there was a fixed base created by executing the contract and by reason of the construction site. JGC also argued that the tribunal erred in law by imposing income tax on the entire turnover and not on the profit. In deciding this matter, the Federal High Court held that the conditions for

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[121] Osita Aguolu, 'Taxation of Non Residents in Nigeria' (2008) 62(11) Bulletin for International Taxation 517 – 513.
[122] *JGC Corporation v FIRS* (2016) 10 CLRN 25

taxation of a foreign company were not present and that there was no connection to Nigeria to warrant the existence of a fixed base, especially in view of the fact that none of the performance of the offshore component of the contract took place in Nigeria. The court also held that the fact that a foreign company was contracted to perform a project to be sited in Nigeria was insufficient to create a fixed base. The court also held that where a foreign entity has a fixed base, the tax authority must first segregate the part of the profit attributable to that fixed base and assess it for tax. It was wrong to assess the entire contract sum to tax.

The decision of the Federal High Court in JGC case is quite commendable because the court objectively examined the issues and was quick to note that the case was one in which there was a split contract. The tax authorities were overzealous to impute the existence of a fixed base where there was none. Normally, the wording of the tax laws needs to be looked into and examined closely and juxtapose with the facts on the ground. In the context of a multinational insurance programme, if the master policy does not have any direct connection to Nigeria based on the decision in JGC's case, it would not be subjected to corporate income taxes in Nigeria; however, where it includes a Nigerian entity, it could easily be argued by the tax authorities that it creates a kind of fixed base in Nigeria because it will mean that some form of service is provided to a Nigerian insured.

The second basis for creating a fixed base in Nigeria, is where the foreign company habitually concludes contracts in Nigeria through a company[123] that it has control over or that controls it, in other words, a related entity.[124]

This part of the work will continue to examine the question whether non-admitted multinational insurance programme is over taxed in Nigeria. This aspect of the work argues that based on a careful analysis of the tax laws in Nigeria, multinational insurers that operate through a dependent agent will have to pay higher taxes and suffer from some form of multiple taxation. The income that is derived from the programme could be taxed in Nigeria in the hands of the non-admitted insurer and will also be taxed in the hands of the agent in Nigeria. At the same time, the profit on the transaction, will be taxed by the

[123] Oluseyi Bickerseth and Nduka Ikeyi, 'Taxation of Non-Resident Companies in Nigeria' (1999) 4 Oil and Gas Law and Taxation Review 106 – 113.
[124] Companies Income Tax Act 2004, s 13(2)(b).

local tax authority of the country of residence of the non-admitted insurer. This aspect of this chapter will examine and analyse these issues.

Under the Companies Income Tax Act 2004, Section 13(2) (b) imposes corporate income tax on a non-admitted company if it is established that another company in Nigeria or an agent concludes insurance contracts in Nigeria on its behalf. From a tax perspective, such agents are referred to as dependent agents and it is mandatory that for an agent to qualify to be treated as a dependent agent, it must be entitled to conclude contracts on behalf of a non-admitted company. This presupposes that a non-admitted insurer can have an independent agent that it operates through and that will not fall within the ambits of *Section 13(2) (b) of CITA 2004.* But the key question will be what or who is an independent agent as opposed to a dependent agent?[125] An independent agent is one that provides services to the non-admitted company on a one off basis, it is done in the ordinary course of their business and they provide similar services to other clients.[126] On the other hand, where an agent provides regular and exclusive services to a non-admitted company, it would be treated as a dependent agent. CITA 2004 uses the word habitually, which presupposes that for an agency to be dependent, some level of frequency and regularity must exist.[127] Consequently, a one off transaction or series of intermittent transactions will not constitute nor create a dependent agency relationship, rather such an arrangement will be treated as an independent agency.[128]

Where a trade arrangement involves a dependent agent, then automatically the income of the non-admitted company, which is attributable to the dependent agent, will be taxable in Nigeria.[129] In addition, the profit of the dependent agent from the same transaction will be subject to corporate income tax in Nigeria at thirty percent.[130] In addition, the non-admitted insurer will be taxable in its home jurisdiction in line with the applicable tax laws. This will automatically create a situation where the same income will be taxable at several points, a minimum of three points, the implication of which is that it will reduce the profitability of the transaction and over a period, parties will be discouraged and will

[125] Federal Inland Revenue Explanatory Notes on the Application of Withholding Tax Provisions to Contracts and Agency Arrangements 1998 (IN 9801).
[126] Federal Inland Revenue Information Circular, 'The Taxation of Non-Residents in Nigeria' (1993) IC No: 9302, 4.
[127] Federal Inland Revenue Information Circular, 'The Taxation of Non-Residents in Nigeria' (1993) IC No: 9302, 5.
[128] Federal Inland Revenue Information Circular, 'The Taxation of Non-Residents in Nigeria' (1993) IC No: 9302, 5.
[129] Companies Income Tax Act 2004, s 13(2)(b).
[130] Companies Income Tax Act 2004, s 9(1) and 13(1).

discontinue such services. The effect of this will be the stifling of international trade in services, job losses for persons in the insurance sector and limited sectoral growth, or even negative growth.[131] This goes to show that multiplicity of taxes has its impact on international trade in services, including insurance services, hence, a country that seeks to grow its insurance sector, will always have to take the issues of multiple and excessive taxes into consideration.[132]

However, instead of waiting for a public sector approach towards dealing with the multiple and double tax problems, both non-admitted insurers and admitted insurers operating directly or indirectly within Nigeria will have to explore options to deal with this problem. One such option is to deal with a fronting agent in Nigeria. Under, this arrangement, the fronting agent operates as an admitted and licenced insurer in Nigeria, it concludes contracts in its name with the option to reinsure with the non-admitted insurer within permissible limits. A close analysis of such an arrangement, indicates that the admitted insurer/fronting agent operates in the normal course of its business and does not have an exclusive arrangement with the non-admitted insurer because it would have similar arrangements with other non-admitted insurers. This effectively, qualifies the fronting agent as an independent agent. In addition, fronting agents conclude insurance contracts in their name and not in the name of others; this implies that their relationship with the non-admitted insurer cannot be categorised as a dependent agency relationship because Section 13(2) (b) of CITA 2004 requires that one of the condition precedents for a dependent agency to be created is that it 'habitually' concludes contracts on behalf of the non-admitted company. However, where a multinational insurer enters into an exclusive arrangement with a fronting agent and it refers potential clients to them for direct cover and reinsurance with the non-admitted insurer and this is done with some level of frequency that can be equated with being habitual, then, it will be caught up by the provisions of Section 13(2) (b) of CITA 2004 and the above tax implications will kick in. It should however be noted that the status of an independent agent could change if it begins to act wholly or almost wholly for the non-admitted insurer.[133]

Where the structure of a multinational insurance programme is designed in a manner that does not include a dependent agent but rather an independent agent, the incidence of

[131] Seun Adu, 'When Does Doing Business in Another Country Cross the Tax Line' (2016) PWC Tax Bites 1 – 3.
[132] Taiwo Oyedele, 'How Nigeria's Tax System Discourages Investment' (2015) PWC Newsletter.
[133] Federal Inland Revenue Information Circular, 'The Taxation of Non-Residents in Nigeria' (1993) IC No: 9302, 4.

taxation will reduce and multinational insurers will be willing to get more involved in transactions involving Nigeria and global companies are more likely to rely on their non-admitted captive insurers and local fronting agents to arrange suitable cover for them. This remains the quickest option for the insurance sector, but as a long-term solution, I would recommend that some form of tax credit should be provided for non-admitted insurers that pay taxes in Nigeria, and where the taxes have been paid to a foreign jurisdiction with respect to the Nigerian transaction, the non-admitted insurer should be entitled to some tax credit.

5.2.2 Imposition of Value Added Tax on Supply of Non-Admitted Multinational Insurance Programmes Involving Nigerian Companies

The section above analyses the issue of multiplicity of taxes on parties involved in a multinational insurance programme. The issue of multiple and excessive taxation does not stop at corporate income tax level, which is a form of direct tax. The issues still spiral into the area of indirect taxes, like Value Added Taxes (VAT) which are applicable to the supply of services (including insurance services) that are delivered in Nigeria. The question that arises is whether insurance services delivered on a non-admitted basis (without any physical contact with Nigeria, without any fixed base and dependent agency), should be subject to Nigerian VAT? This section explores the statute law on this and the emerging legal jurisprudence from a recent Nigerian court decision, and argues that the recent case laws are conflicting and the decision of higher court appears to be jurisprudentially faulty.

Generally, the Nigerian VAT Act 1993, imposes VAT on the supply of goods and services in Nigeria excluding goods or services that are exempted from VAT.[134] The VAT Act also specifically imposes VAT on goods that are imported into Nigeria but the relevant section does not mention imported services.[135] The application of VAT to non-resident companies comes alive with the VAT Act specifically requiring that all non-resident company carry on business in Nigeria must be registered with the tax authority for purposes of VAT remittance.[136] The implication of this is that a non-resident who is not

[134] Value Added Tax Act 1993 (as amended), S 2.
[135] Value Added Tax Act 1993 (as amended), S 6.
[136] Value Added Tax Act 1993 (as amended), S 10.

conducting business in Nigeria is not required to register for VAT purposes and by implication is not required to pay VAT because it is not providing services in Nigeria.

The question that arises is whether providers of multinational insurance programmes are providing insurance services in Nigeria or outside Nigeria. It has been argued in Chapter Five that the Nigerian Court of Appeal in ***Ritz & Co KG v Techno Ltd***[137] had the opportunity to define the meaning of carrying out business, which was defined as continuing activity by a company that could be in the form of supply of goods or services. The Court proceeded to add that it connotes to conduct or continue a particular business or enterprise as a continuous or permanent occupation. This therefore means that for a company to be deemed to be carrying out business, there must be some act of repetition in selling of goods and services as against just a one-off engagement.[138] The implication of the above point is that a transaction that occurs once would not be considered to have been conducting business in Nigeria and the parties would not be deemed to have violated Nigerian law.

While the *Ritz case* defines the meaning of carrying out business, the case of ***Gazprom Oil and Gas Nigeria Limited v Federal Inland Revenue Service***[139] addresses the question of the application of Nigerian VAT to services delivered offshore Nigeria by non-resident or non-admitted companies. In this case, Gazprom, being a Nigerian company, received consultancy and logistics services from non-resident companies. The services were wholly performed outside Nigeria and the non-resident companies did not send their employees to Nigeria, neither did they bring equipment into Nigeria. The FIRS subjected Gazprom to a tax audit exercise and concluded that VAT ought to have been imposed on the supply of consultancy and logistic services by the offshore entity. As a result, FIRS imposed additional taxes on Gazprom on the grounds that the services were enjoyed in Nigeria even though no employees were sent to Nigeria. The FIRS argued that based on the destination principle, VAT is charged at the destination where the services are enjoyed and that the destination is deemed to be the place where the business is conducted. The FIRS position contrasts with the origination principle, which is that VAT should be imposed in the jurisdiction where the transaction originated. Gazprom rejected the FIRS argument/position and appealed to the Tax Appeal Tribunal, where it argued that the VAT Act does not recognise the destination of principle of imposition of VAT because under

[137] *Ritz & Co KG v Techno Ltd* (1999) 4 NWLR Pt 598.
[138] *Ritz & Co KG v Techno Ltd* (1999) 4 NWLR Pt 598.
[139] *Gazprom Oil and Gas Nigeria Limited* (2015) TLRN ((TAT/ABJ/APP/030/***2014***))

the Act, a supplier with no physical presence or contact in Nigeria cannot be treated as carrying out business in Nigeria. The FIRS on the other hand, argued that by applying the words 'supplied in Nigeria', Section 10 of the VAT Act, which deals with registration of non-residents, effectively introduces the destination principle into Nigeria's VAT system. The Federal High Court restricted its decision to the interpretation of Section 10 of the VAT Act, holding that before a foreign company is liable to VAT, it must be conducting business in Nigeria in the sense that it must be conducting, operating a trade or vocation continuously within Nigeria and must be registered for VAT purposes. The tribunal further held that before VAT will be applicable to a foreign company, it must have an existing contract with a Nigerian company, whose address will be deemed to be the local address of the foreign company.

The decision of the tribunal is accurate and in line with the rules of interpretation of tax legislation, which states that tax laws must be interpreted literally and there is no room to import extraneous meanings to the legislation that is tax laws must be given their plain and ordinary meaning.[140] The attempt to import the destination principle into the VAT system in Nigeria, cannot be supported by a single provision of the law. Because tax statutes impose pecuniary burdens, it is expected that any attempt to impose such a burden must be expressly evident in the written tax laws. Doing otherwise will create room for abuse and extortion of private and corporate citizens. This accounts for the strict or literal approach to the interpretation of tax laws. If the tax authorities are uncomfortable with the refusal to recognise the destination principle, the best approach will be to push for an amendment of the VAT Act. The Gazprom case is a classic case of provision of offshore services and delivery of the services, offshore Nigeria. This is the structure that most multinational insurance programmes take and the implication is that if it is established that no physical taxable contact was made with Nigeria and it can be shown that the activities performed do not qualify as carrying out business in Nigeria, then VAT will not apply to the provision of such services.

The FIRS appealed the decision of the Tax Appeal Tribunal by filing a fresh appeal at the Tax Appeal Tribunal and the same set of arguments were reiterated by the parties. Unfortunately, in September 2018, the Federal High Court set aside the decision of the Tax Appeal Tribunal specifically on the grounds that even though the VAT Act does not expressly cover the kind of services rendered offshore by the non-resident company, the

[140] *Halliburton West Africa Limited v Federal Board of Inland Revenue* (2006) 7 CLRN 138.

intention of the legislature is for such services to be subject to VAT in Nigeria. Consequently, the Court held that the transaction between the non-resident company and Gazprom is subject to VAT in Nigeria. However, despite the criticism of the decision, for now it is still a binding precedent in Nigeria. The implication is that where a Nigerian company is part of the parties to a multinational insurance programme, the tax authorities are likely to deem the transaction as subject to Nigerian VAT. The implication is that if the same insurance programme is subject to VAT in other jurisdictions, then, the transaction will be subject to multiple VAT at various points and could significantly make the entire programme unprofitable. If this situation becomes widespread, it could affect the ability of parties to rely on multinational insurance programmes in dealing with protectionist barriers around the world.

In addition to the above, the decision by the Federal High Court is an attempt to stretch the wording of the tax law beyond its meaning. Normally, in tax cases, it is only the literal rule of interpretation that is applied; hence, applying the mischief rule in order to import meaning into the VAT Act, which is not ordinarily there, is extraneous and desperate. The Court has assumed the role of the legislature and has literally usurped the powers of the legislative arm of government. The decision of the Federal High Court can at best be described as ultra vires its powers and should be tested at the appellate courts.

Another recent decision by the Federal High Court on the application of VAT to offshore services is ***Vodacom v Federal Inland Revenue Service***,[141] where New Skies Satellites, a foreign company based in Holland, executed a contract with Vodacom Business Nigeria Limited (Vodacom) for the supply of bandwidth capacities to be used in Nigeria. The parties assumed that the transaction will not be liable to VAT; hence, VAT was not deducted and remitted to the FIRS. The FIRS conducted a tax audit exercise on Vodacom and concluded that VAT should have been deducted and remitted because the transaction is subject to VAT in Nigeria. Vodacom disagreed with the assessments and filed an appeal at the Tax Appeal Tribunal sitting in Lagos, Nigeria. Vodacom argued that based on Sections 10, 12 and 46 of the VAT Act 1993 (as amended), VAT applies to imported services, and however, the supply of bandwidth does not amount to imported services because it is delivered via satellite to Nigeria. Vodacom placed heavy reliance on the case of Gazprom, arguing that NSS did not perform or conduct business in Nigeria.

[141] *Vodacom v Federal Inland Revenue Service* (*TAT/LZ/VAT/016/2015)*

On the other hand, FIRS contented that the bandwidth services were received in Nigeria at earth stations, as a result, they qualify as exempted services. The FIRS also argued that such services are not listed as exempted services in the 1st Schedule to the VAT Act 1993, as such they should attract VAT. The tribunal, after evaluating the position of both parties, concluded that a careful review of the position of NSS, indicates that by simply signing the contract with Vodacom a Nigerian company, it was already conducting business in Nigeria. Dissatisfied with the decision, Vodacom appealed to the Federal High Court and one of the key issues considered was did the transaction give rise to a supply of service in Nigeria. In answering this question, the Federal High Court placed reliance on the destination principle to conclude that VAT ought to be levied in the jurisdiction where the service is consumed. The Federal High Court affirmed the decision and positions of the Tax Appeal Tribunal on these issues and concluded that VAT is to be charged in Nigeria. In arriving at its decision, the Federal High Court also placed reliance on OECD International Value Added Tax/General Sales Tax Guidelines 2017 as the one of the bases for the adoption of the destination principle, because the guidelines state that the destination principle should apply to international trade services or intangible goods. It is worth noting that the OECD International Value Added Tax/General Sales Tax Guidelines 2017 is not a legal instrument that is applicable in Nigeria. Hence, placing reliance on it was completely out of place. Courts are required to rely on binding legal instruments in tax laws because they impose pecuniary burdens on the taxpayers; thus, even binding laws are construed strictly, talk less of interpreting and applying non-binding persuasive legal instruments. Moreover, it was inappropriate to rely on the OECD International Value Added Tax/General Sales Tax Guidelines 2017 because the tax dispute in question predates the 2017 Guidelines, the implication of which was that the Court was applying a persuasive authority retrospectively, even a binding legal instrument is not applied retrospectively. The appropriate thing to have been done regarding the application of the destination principle, was for the Federal Inland Revenue Service to push for an amendment by the National Assembly of the Value Added Tax Act 1993 (as amended in 2007), instead, the court stretched judicial activism beyond its limits.

Furthermore, the decision of the Federal High Court strongly appears faulty because the destination principle introduced by the Tax Appeal Tribunal and validated by the Court has no legal foundation in Nigerian law. There is no legal basis for its direct application because the VAT Act 1993 (as amended) does not support, and because the yardstick of the destination principle is simply the location of the consumer of the service, which may

be different to the location of consumption, just like the Gazprom case, where although the consumer was located in Nigeria, the services was consumed offshore. There could be a myriad of instances where a Nigerian consumer could need a supporting service for a project it is undertaking abroad and the supporting services would be consumed at the location of the project; in such instances, it could be inappropriate to conclude that Nigerian VAT Act will apply because of the location of the consumer. The broad-based introduction of the destination principle could lead to a significant flood of additional tax assessments and tax appeals, which could be seriously overwhelming for the system regarding the prior year's taxes.

It should be noted that the Vodacom case can be distinguished from the Gazprom case because in 2007 when the VAT Act 1993 was amended, the meaning of imported services was altered so that imported services now include services ''rendered in Nigeria''.[142] Thus from a literal interpretation of that provision, services not rendered in Nigeria, would not be categorised as imported services. This is buttressed by the fact that there is a distinction between carrying out business in Nigeria and exporting services into Nigeria. In the Gazprom case, the services were not rendered in Nigeria, whereas, in the Vodacom case, the services were received in earth base stations within Nigeria, which creates some level of taxable connection to Nigeria. In addition, a careful perusal of the phrase ''rendered in Nigeria'' means that there must be some active performance, in the sense that it may not be sufficient that the service was received in Nigeria. Rendered presupposes doing, performance and not just delivery. This is a point that the Federal High Court missed and equated render with receiving,

The implication of the above on multinational insurance programmes is quite glaring because they basically supply a service. Where the contract is directly with a Nigerian entity, based on the Tax Appeal Tribunal decision in Vodacom case, VAT will be charged, deducted and remitted on the transaction. However, where the insurance contract is directly between a non-admitted insurer and a non-Nigeria resident parent company, the transaction will not be liable to Nigerian VAT because the services do not involve a Nigerian party and contracts, moreover, on paper the service is not to be consumed or rendered in Nigeria. Nigeria will only be one country out of several in the programme and often, the master policy will be between foreign parties. Generally, it is the local policy that involves a Nigerian insured and that part of the policy, which is local, will, on

[142] Value Added Tax Act 1993 as amended in 2007, S 12.

the strength of Section 2 of the VAT Act as amended, be subject to Nigeria VAT. Problems will arise where the tax authority during an audit or investigation become aware of the existence of a master policy between a foreign parent company and non-admitted insurer. In such a situation, the legal question of whether Nigerian VAT will be applicable will arise. Based on the current position of the VAT Act 1993 (as amended in 1999) and on the existing cases of Gazprom and Vodacom, it can be strongly argued that Nigerian VAT will not apply because the parties are non-Nigerian and the services are enjoyed by the parent company, which are in another jurisdiction and that jurisdiction will be required to deduct VAT or any applicable sales tax or indirect tax on the transaction. If Nigerian tax authorities attempt to insist, then it will be a case of double or multiple taxation and the affected party will be entitled to seek legal redress in the Tax Appeal Tribunal and the Federal High Court. If such is done, the position of the FIRS will be very weak because of the remote connection between Nigeria and the transaction.

5.3 Conclusion

In conclusion, it will be safe to say that Nigerian tax laws are unfriendly and inimical to the growth of the insurance sector, be they admitted or non-admitted. It negatively affects the tax efficiency of both admitted and non-admitted insurers that are involved in multinational insurance programmes in Nigeria. In simple terms, Nigerian tax laws exposes these insurers to higher taxes and far less profits compared to other companies and countries. The tax laws are directly discriminatory to the insurance industry and have stunted the growth of the Nigerian insurance sector. Some of the solution lies in making short-term steps through the President of the Federal Republic of Nigeria, exercising executive powers to grant tax exemptions to the insurance sector in a manner that will balance and level the tax field for all companies. The second option is a more long-term solution, which is to amend the tax laws that are discriminatory in nature; however, these routes could be more cumbersome and there is a lot of bureaucracy and politics required for this option to succeed.

This chapter discussed the domestic tax issues affecting the insurance sector, specifically, admitted insurers. It commenced by analysing the restrictions in the carry forward of loss relief under Nigerian tax law, pointing out that while other companies can carry forward their losses into future years, the insurance sector is restricted by the ability to carry forward losses to only four years. Numerous attempts by the Nigeria Insurers Association to amend the *Companies Income Tax Act 2007* has proved abortive. The situation of

things has continued to affect the profits of insurance companies negatively and there is an urgent need to correct this discriminatory anomaly, otherwise, the sector may not attract the required level of investment from Nigeria and abroad.

This chapter also discussed the contradiction in the basis of calculation of reserve for unexpired risk. In this chapter it was pointed out that based on Section 16(8)(a) of CITA 2007, only 45 percent of the total premium can be deducted as unexpired risk for non-life/general insurance business, and only 25 percent of the premium can be deducted as unexpired risk for marine insurance.[143] The implication of which is that the tax burden on the 55 percent and 75 percent respectively of the unexpired risk would be borne by an insurer, notwithstanding that some of the premium income is not yet earned and there is the possibility that the insurance contract would be terminated. It was argued that a more realistic and appropriate system would have been to adopt the time apportionment basis, which is contained in the Insurance Act 2003, as against the percentage basis contained in CITA 2007. The contradiction in both laws appears to have arisen in the course of amending CITA 2007, wherein, the legislators placed reliance on the provisions of the Insurance Act 1997 that provides for percentage basis, as against the extant Insurance Act 2003, which provides for time apportionment basis. Again, the solution to these problems, lies in an amendment of CITA 2007 or conferment of exemption on insurance companies by the President of the Federal Republic of Nigeria. Closely related to this, is the issue of deductibility of certain expenses, which was also discussed in this chapter, and it was pointed out that for other companies, if they can satisfy the WENR Test, they can deduct 100% of their qualifying expenses; however, for the insurance sector, it is pegged to percentages. These provisions are highly discriminatory and it appears that the insurance sector is targeted. The first part of this chapter also argued that with the structure of Nigerian tax laws, it raises a strong possibility that claims payment will be taxed at a minimum of two points.

The second part of this work focused on the taxation of providers of non-admitted multinational insurance programmes in Nigeria. It addressed issues bordering on the taxation of non-admitted insurers providing some form of cover in Nigeria; the conditions for them to be taxable were discussed extensively and circumstances when they will not be taxable were analysed. This chapter also analysed the issue of imposition of Value Added Tax on supply of non-admitted multinational insurance programmes involving

[143] CITA (Amendment) Act 2007, Section 14(1)(a & b), 14(5)(a).

Nigerian Companies. The chapter also analysed the extant case law on these issues as decided by both the Tax Appeal Tribunal and the Federal High Court.

The next chapter of the work is the conclusion. It will bring together the entire thesis and determine if the research questions has been adequately addressed.

CHAPTER SIX

SUMMARY, RECOMMENDATIONS AND CONCLUSION

6.0. Introduction

Chapter Six summarizes the findings in the thesis and it further identifies recommendations that have been made in earlier parts of the work and summarizes some of these key recommendations, although, other recommendations are not mentioned for fear of repetition. The Chapter also addresses areas for further research and the limitations of this research. The findings also factors in the research questions set out in Chapter One.

6.1. Summary of the Key Findings

Chapter one focused on introductory issues like the background to the research, the aims and objectives of the research, the research questions, the structure and research methodology, the choice of jurisdiction, limitation of the research, outcome and findings and area(s) for future research. It further addresses concepts including the meaning and legal principles applicable to key insurance concepts, like the insurance and key elements of insurance contract, insurable interest, the doctrine of utmost good faith, the duty of disclosure, the duty not to misrepresent and subrogation. This chapter set out the research questions, to wit:

What effect does the current insurance, investment and tax laws have on the Nigerian insurance industry, especially insurers providing multinational insurance programmes in Nigeria? Further research questions are detailed below-

a. Are the legal and regulatory criteria for participation of insurers in Nigeria, unfair and protectionist towards non-admitted insurers providing multinational insurance programmes?
b. What effect does the current insurance, investment and tax laws have on the Nigerian insurance industry, especially insurers providing multinational insurance programmes in Nigeria?
c. If Nigerian laws are protectionist against insurers providing multinational insurance programmes, how can it be rebalanced to reflect a fairer and balanced playing field?
d. Globally, tax authorities are tightening tax regulations to increase local revenue, how does this impact on insurers providing multinational insurance programmes in Nigeria?

Chapter Two of this Thesis focused on the regulation of multinational insurance programmes and the inter-play between the global and local regulations. It argued that when a multinational insurance programme is in place, there is always a strong correlation and interaction between insurance laws in several jurisdictions. Typically, some jurisdictions permit foreign insurers and reinsurers to conduct insurance business in their territory without mandating them to operate a local licence, these jurisdictions are admitted. However, some other jurisdictions prohibit unlicensed provision of insurance services by foreign firms and insist that a local licence must be obtained and that sometimes the insurer must incorporate locally. These categories are known as non-admitted insurers.

Generally, government and regulators utilise the insurance and tax laws as tools to protect their local firms and industries. Hence, in the services sector, they attempt to adopt policies and laws that are non-admitted in nature and prohibit liberalisation of trade within their markets. Chapter Two established that protectionism is the main motivation behind the restriction of trade and limitation on market access in non-admitted jurisdictions like Nigeria. The WTO has made attempts to promote liberalisation of trade in services and to achieve significant improvement in market access. This agenda has been pushed by the instrumentality of channels like the GATS and its Annexes, backed up by the WTO Treaty and other Covered Agreements. Through these instruments, principles like market access, non-discrimination, predictability and transparency and fair competition.

While, the WTO approach to unbundling protectionism including the insurance sector is commendable, it has not been water tight; hence, its effectiveness has been significantly compromised. This has been largely as a result of the exemptions created for members to exclude themselves from the full application of the framework. For example, the GATS permits exemption for the first 10 years and the exemption can be reviewed every 5 years. Hence, the less developed states are entitled to 5 renewals, developing states are entitled to 4 renewals and developed states, are entitled to 1 renewal. Other circumstances that can entitle a member state to depart from the MFN obligations are: existence or conclusions of economic integration agreements,[1] labour markets integration

[1] General Agreement on Trade in Services 1994, Art IV

agreements,[2] recognition agreements,[3] general exceptions,[4] security exceptions[5] and the prudential carve out detailed in the Annex to GATS on Financial Services. The extant of compliance of the Nigerian insurance regulatory framework with the WTO and GATS models is critically examined and it is established that Nigerian law does not substantially comply with GATS and Nigeria breaches some of its very important GATS obligations.

As a result of this, the effectiveness of GATS to unbundle protectionism in the insurance sector has been significantly compromised. It has been established that GATS has not achieved the required level of success because of the flexibilities and exemptions inherent in the WTO model. This has therefore reduced the efficacy and effectiveness of its efforts. There is also no strong indication that the approach on this multilateral level will change; hence, the insurance industry has evolved and adapted its option to deal with protectionism. The industry-based solution is the multinational insurance programme, but the question is how does it operate and what is its essential nature and modus operandi?

In the light of the above, Chapter Three operated as the commencement of the real analysis on multinational insurance and its historical evolution from the early to the modern era. The meaning of the multinational insurance programme was analysed, including the essential ingredients that must be present for a programme to qualify and fall within its scope. These essential ingredients are: the business conducted must be an insurance business, the multinational insurance business may be inbound or outbound and the insured risk, the insured or the insurer must be resident in another jurisdiction. Essentially, multinational insurance programmes can take any of the following forms: exporters' package, admitted insurance policy, non-admitted insurance policy, controlled master policies, difference in coverage/difference in limits policy, policies designed on network partners and fronting agents, reinsurance and captive insurance.

The question that therefore arises, is whether these types of multinational insurance programmes will be legally permissible or workable under Nigerian law. So, Chapter Three explored and analysed this issue, focusing on each types of programme.

Regarding exporters package, one question is its relevance to the Nigerian market, where establishing product liability of a manufacturer is always very difficult. Nigerian law on

[2] General Agreement on Trade in Services 1994, Art V bis
[3] General Agreement on Trade in Services 1994, Art VII
[4] General Agreement on Trade in Services 1994, Art XIV
[5] General Agreement on Trade in Services 1994, Art XIV bis

product liability is strictly fault-based and an injured party is required to establish fault on the part of the manufacturer or service provider and the law also recognises the defence of fool-proof systems of production. Based on the defence of fool-proof, even if a claimant proves a case of product liability or negligence on the part of a manufacturer or service provider, the latter will be exonerated if it proves that processes adopted in the manufacturing processes are in conformity with all required standards and procedures. Where the defence is successfully raised, the burden of proof shifts back to the injured party to disprove it. However, disproving this and discharging this burden is always herculean because secrecy and confidentiality characterise a manufacturer's process. An injured party is very unlikely to have the kind of information that is needed to prove culpability or negligence on the part of a manufacturer. A myriad of cases lend credence to this positon; for example in ***Nigerian Bottling Company v Olarewaju***[6]. Nigeria needs to shift from this fault-based approach to a strict approach adopted in jurisdictions like South Africa where there is a presumption that the manufacturer or supplier is liable for a product liability injury, until it can be proven otherwise.

Admittedly, the Nigerian law remains ambiguous as we see variation and pragmatism in other decisions like ***Nigerian Bottling Company v Constance Ngonadi***[7] and ***Okwejiminor v Gbakeji & Nigerian Bottling Co. Plc***[8]. In Okwejiminor's case, the Supreme Court of Nigeria held that a retailer cannot hide under the cover of ignorance or in the fact that it was not responsible for the manufacture of a defective product, especially in view of the fact an injured consumer that wants to sue in contract will normally have no privity of contract to bring a claim directly against the manufacturer;[9] hence, the only option available in that instance will be to bring a direct claim against the retailer, who in turn can bring a claim against the manufacturer in the form of joinder of parties under the High Court (Civil Procedure) Rules.[10]

In a product liability claim, an injured party has the option to bring a claim for breach of implied warranty that the products are not fit and suitable for the purpose for which they are supplied. Chapter Three further analysed the problems confronting multinational insurance and solutions to these problems offered by exporter's package.

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[6] *Nigerian Bottling Company v Olarewaju* (2007) Suit No.CA/IL/43/2004.
[7] *Nigerian Bottling Company v Constance Ngonadi* [1985] 1 NWLR (Pt 4) 739.
[8] *Okwejiminor v Gbakeji & Nigerian Bottling Co. Plc* [2008] 5 NWLR (Pt 1079) 172.
[9] John Adams and Hector Macqueen, *Atiyah's Sale of Goods* (12th Edition, Longman Publishers) 256.
[10] High Court of the Federal Capital Territory Rules 2018, Order 10 Rules 3.

Further to the above, Chapter Three analysed admitted insurance as a form of multinational insurance programme. Generally, admitted policy is an insurance cover that is issued by an insurer, holding a license to operate within a local territory wherein the insured and/or the risk is domiciled. Nigeria is a strictly admitted jurisdiction from an insurance perspective. From a corporate law perspective, Nigerian law generally allows non-Nigerians to own up to 100 percent equity in a company registered in Nigeria. Quite commendably, this is in compliance with WTO requirements; however, Nigerian law, particularly the provisions of the Insurance Act 2003 breaches Nigerian WTO obligations by prohibiting non-admitted insurers from participating in the Nigerian insurance market. Notwithstanding Nigerian prohibition of non-admitted insurers, multinational insurance programmes can be implemented in Nigeria through admitted insurance in the form of fronting agent or local network partner.

Hence, Chapter Three proceeded to analyse the solutions provided by an admitted insurance policy in a multinational insurance programme, some of these solutions are: compliance with domestic laws, access to local insurance pools, deductibility of local premium taxes and insurance premiums, taxability of claims payment and deductibility of premium payment, better policy and claims management, absence of local language barrier, most suitable for local compulsory insurance and local financing, availability of local control, access to dispute resolution windows, easy benefit of implicit state guarantees and less transaction cost.

Chapter Three further analysed non–admitted insurance as a form of a multinational insurance programme and solutions that are inherent in such a policy. These solutions are less expensive, have broader coverage, guarantee that persons with greater technical depth and skill will work on the programme, ensure that insurers with greater financial strength and capacity will work on the programme, guarantee flexibility on control of the programme, among others. The drawbacks of non-admitted insurance are discussed including key issues like its legality, tax deductibility of premium payment by the subsidiaries of a multinational company, imposition of withholding tax and value added tax on claim payments from the non-admitted insurer and the availability of required expertise at the local level to manage such a complex programme at that level,

Chapter Three, also analysed the various forms of non-admitted programmes, including: single global policies or master policies with worldwide coverage and combined or controlled master policies. The chapter further analysed the various forms of controlled

master policies to wit – the broadest possible local cover and a non-admitted DIC/DIL cover; compulsory insurance is covered by local programmes and others risks are covered by non-admitted DIC/DIL policy, insurance through a local insurer but re-insuring through a non-admitted captive insurer and the use of non-admitted master policies, local policies and policies from network partners

Chapter Three also examined and extensively discussed the interactions between master policies and the local policies and factors underlying the strength and problem-solving features of controlled master policies in addition to their drawbacks. The interplay of Difference in Limit (DIL), and a Difference in Condition (DIC) was also analysed along with the role of excess in limit and drop-down clause, including the difficulties that could arise; for example, where both the master policy and the local policy are not properly integrated or where the primary insurer has become insolvent or where appropriate treatment when the cover of a local policy is broader than that of the master policy. Chapter Three also analysed the factors underlying the strength and problem-solving features of a controlled master policy.

Chapter Three established that multinational insurance programme is a deep and complex programme and has to be properly crafted and designed because of the legal and tax implications that arises from its operations.

Unlike Chapter Three, Chapter Four focused on the legality of multinational insurance programmes, the legal challenges it faces, the solutions and analysis of possible alternatives, importantly. Chapter Four critically analysed specific legal issues that impact on insurance sector liberalisation and protectionism in Nigeria in the context of multinational insurance programmes, including issues like the discriminatory insurance sector licencing regime in Nigeria, restricted rights of foreign insurers to seek legal redress in Nigerian courts, overregulation and restrictions in the exercise of the right of local insurers to seek approval to cede risk with offshore insurers and reinsurers, dealing with the problem of prohibition of cut-through clauses in the designing of multinational insurance programmes in Nigeria. Chapter Four also analysed the legality of solutions inherent in multinational insurance programmes; for example fronting arrangements and the use of financial interest clauses. In summary, Chapter Four attempted to answer the question – ''*How can the protectionist stance of Nigerian law against insurers providing multinational insurance programmes, be rebalanced to reflect a fairer and balanced playing field?*'' Chapter Four commented on some recent regulatory enforcement on

violations to admitted insurance regulations; for example in the US, India and Brazil. Also analysed is the challenging legal and regulatory issues bedevilling multinational insurance programme in Nigeria; for example, it was established that the ban imposed on issuance of new insurance licences in Nigeria to both foreign and local prospective investors is illegal and therefore null and void and also breaches the Transparency obligations under GATS that Nigeria is a signatory to. Chapter Four further commented on the right of a non-admitted insurer to sue and be sued in Nigeria under a multinational insurance programme.

Further analysis was made on the complex interplay between protectionism in Nigeria, the statutory right of insurers in Nigeria to cede risk abroad and non-compliance with Nigeria's GATS specific commitments obligations. Other issues discussed are excessive reporting obligations on insurers and reinsurers, prohibition of "cut-through" clauses and their ability to effectively manage multinational insurance programmes because of legal principles like privity of contract, inconsistency of 'cut-through clauses' with Nigerian insolvency laws. Finally, Chapter Four discussed the financial interest clause as a technique and strategy to address the domestic and international regulatory obstacles and further analysed its legality in Nigeria.

Chapter Four concluded by arguing that even though the Insurance Legal Framework in Nigeria, pretends to be protectionist in nature, it leaves huge gaps that can be exploited to provide non-admitted cover through multinational insurance programmes; hence, to some extent, non-admitted cover can be legal in Nigeria depending on how carefully and efficiently it is designed. Hence, the protectionism inherent in the Nigerian insurance sector is not absolute and can be legitimately circumvented and arbitraged.

Chapter Five analysed the Nigerian and global tax issues affecting multinational insurance programmes and attempted to answer the question, of the impact of the tightening of tax regulations in Nigeria on multinational insurance programmes in Nigeria. Chapter Five focused on two major analyses of the tax issues – the first is the domestic tax issues in Nigeria that impact on multinational insurance programmes. The need to discuss these domestic issues is based on the premise that there are structures in multinational insurance programmes that rely on utilising admitted insurers providing some level of local coverage; for example controlled master programmes that rely on Difference in Limits (DIL) and Difference in Condition (DIC) policies. Hence, for such categories of multinational insurance programmes, the local tax laws and issues in Nigeria

will directly impact on them. The second part of Chapter Five, placed emphasis on Nigerian based tax issues that affects parties involved in cross border supply of multinational insurance programmes.

Hence, in line with the above, the first aspect of the work addressed issues like the discriminatory tax laws which restrict the ability of insurance companies in Nigeria to carry forward loss relief and peg it to just four years; whereas, other companies can carry it forward indefinitely. In addition, the chapter also analysed the contradiction that the basis for calculation of reserve of unexpired risk for insurance companies gives rise to payment of higher taxes, greater regulatory costs and contravenes international accounting standards like the IFRS. Closely related to this is the problem of deductibility of expenses for insurance companies before they are assessed for tax. Section 16(8)(b) of CITA (as amended) imposes a deductibility ceiling on the expenses an insurance company can deduct before assessment for tax. This provision is discriminatory against insurance companies because the law permits other categories of companies to deduct 100% of all qualifying expenses. Furthermore, the tax laws adopt a discriminatory approach to the insurance sector on the issue of minimum tax. For example, if an insurance company operates at a tax loss and has no taxable profit for a particular year, the tax laws impose a minimum tax of 4.5 percent of total profit and 6 percent of gross income. These rates are significantly higher than the minimum tax rate applicable to other categories of companies, which is 0.125 percent of turnover. It was established that these discriminations offend the principle that tax laws should be equitable, fair and non-discriminatory. It also runs contrary to the principles of fairness and equality enshrined in the Nigerian National Tax Policy.

As mentioned, the second aspect of the work focused on taxation of providers of non-admitted multinational insurance programmes in Nigeria. It attempts to answer the question whether Nigerian taxes will apply to a non-admitted insurer in Nigeria that has provided cover to a Nigerian resident or for a Nigerian based risk. This will however depend on whether the non-admitted insurer has a fixed base in Nigeria or a dependent agent that habitually concludes contracts in Nigeria on its behalf and there is a related-entity relationship with such an agent. The case law on the above issues has been changing, with even the current settled position facing criticism; it is argued that future cases can be distinguished from the current one. Thus, the law is still not well defined in this area.

Another tax issue that affects provision of cross-border insurance services is the imposition of value added tax on supply of non-admitted multinational insurance programmes involving Nigerian companies. The fundamental question addressed in this aspect of Chapter Five is whether insurance services delivered on a non-admitted basis (without any physical contact with Nigeria, without any fixed base and dependent agency), should be subject to Nigerian VAT? The decisions of the Federal High Court in ***Vodacom v Federal Inland Revenue Service***[11] and ***Gazprom Oil and Gas Nigeria Limited v Federal Inland Revenue Service***[12] were conflicting, with Vodacom stating that VAT is chargeable even though a transaction was provided offshore, and Gazprom's case decided along the opposite direction. However, the Court of Appeal in *Vodacom v Federal Inland Revenue Service* has temporarily laid the matter to rest by holding that even though a service is rendered offshore of Nigeria, Nigerian VAT will apply if the services will be enjoyed in Nigeria. This has created a type of excessive territorial taxing jurisdiction for the Nigerian tax authority.

The implication of the above is that where the contract is directly with a Nigerian entity, based on the Tax Appeal Tribunal decision in Vodacom case, VAT will be charged, deducted and remitted on the transaction. However, where the insurance contract is directly between a non-admitted insurer and a non-Nigeria resident parent company, the transaction will not be liable to Nigerian VAT because the services do not involve a Nigerian party and contracts, moreover, on paper the services is not to be consumed or rendered in Nigeria. However, in the course of a tax audit in Nigeria, the tax authority could attempt to argue that Nigerian VAT should apply, but from a strict interpretation of the VAT Act, Nigerian VAT should not be applicable and any attempt to do otherwise will result in a case of double taxation.

6.2. Recommendations

Recommendations have been made throughout the work in each chapter and in the course of analysing each of the issues. For fear of repetition, those recommendations will not be repeated in Chapter Six; however, key recommendations will be summarised succinctly.

One issue identified in the course of this research, particularly in Chapter One addressed key insurance concepts as the problem under Nigerian law which require premiums to be

[11] *Vodacom v Federal Inland Revenue Service* (*TAT/LZ/VAT/016/2015)*
[12] *Gazprom Oil and Gas Nigeria Limited* (2015) TLRN ((TAT/ABJ/APP/030/***2014***))

paid before cover and Section 50 of the Nigerian Insurance Act 2003 makes this a condition precedent for an insurance contract to be valid. A better approach to be adopted is for parties to be given the option to opt out of this requirement of full payment of premium before cover. This will be in line with the doctrine of freedom of contract and in order to balance any fear of undue influence that can be used by a party with stronger bargaining power, a law could be amended to strengthen the consumer protection provisions of the Nigerian Insurance Act to address such concerns.

Another issue that was addressed in Chapter Two is strong protectionism in the reinsurance market. *Section 7 of the Nigeria Re Act* obligates all Nigerian admitted insurers to reinsure twenty percent of their insured risks with Nigeria Re and equally pay twenty percent of the premium received to Nigeria Re[13] and the commission to be paid to the insurer is to be determined by Nigeria Re. In addition, Nigeria Re is entitled to the right of first refusal over the remaining eighty percent of the insured risks before it can be placed with any other reinsurer, local or foreign.[14] Furthermore, where such an offer is made to Nigeria Re and is declined, it must issue a certificate before the risk can be placed with another reinsurer.[15] Another layer of protectionism that exists in Nigeria, arises from the *Article 27(2) of the Agreement Establishing African Reinsurance Corporation*, which requires that a minimum of five percent of all insurance risks must be reinsured with the African Reinsurance Corporation. These protectionist laws have not changed the fortune of the reinsurance market in Nigeria and have rather created a monopoly that has made corporations complacent and non-competitive. The bulk of reinsurance cover is purchased from abroad, but after authorisation and approval has been obtained from NAICOM. It is therefore recommended that these legal instruments giving monopolistic backing to Nigeria Re and Africa Re should be repealed and cancelled. The market should be fully liberalised and foreign reinsurers should be allowed to operate freely, because, despite the protectionist's restrictions, they still provide the bulk of reinsurance cover to Nigeria. Hence, to what end have the barriers served? Because there is no tangible evidence of their benefits.

Throughout the work, one fact that has been emphasised is that Nigerian corporate and insurance laws permits only limited liabilities companies to apply for insurance licences and ancillary services licences.[16] This violates Article XVI(2)(e) of the GATS Annex B

[13] Nigeria Reinsurance Corporation Act 1977, S. 7(1).
[14] Nigeria Reinsurance Corporation Act 1977, S. 7(3).
[15] Nigeria Reinsurance Corporation Act 1977, S. 7(4).
[16] Insurance Act 2003, s. 3(a)&(b).

that prohibits any measure taken by a member that restricts or requires a specific type of corporate legal entity or joint venture for the supply of services.[17] Jurisdictions like South Africa and India have transitioned from similar requirements to regulations that permit non-admitted insurers to operate in their markets without necessarily incorporating a local company, rather, they can operate through branch offices or a representative. This has been instrumental in attracting more foreign investors in the insurance sector, building financial and human capacity and deepening the market and insurance penetration.

Further to the above, NAICOM has continually breached its transparency obligation under GATS that requires publication of all laws, policies, guidelines, decisions and subsidiary legislations so that regulators and insurance stakeholders in other jurisdictions can be aware of these positions. An example of this is the imposition of an embargo on licencing of new insurance companies. This embargo was never officially published and other important regulations and guidelines are also not on NAICOM website, nor are they readily available in Nigeria. Even from within Nigeria it is difficult to obtain its regulations; hence, obtaining from abroad is harder. It is therefore recommended that NAICOM should comply with its transparency obligations by publishing all its laws, regulations and guidelines on its website.[18]

Contrary to *GATS Annex on Movement of Natural Persons Supplying Services under the Agreement*, which imposes National Treatment obligations on Nigeria by requiring reduction of requirements for foreigners providing services in Nigeria, Nigeria breaches this requirement by imposition of stringent requirements for expatriate quota for foreign firms operating in Nigeria and a further requirement for Nigerian staff to understudy the expatriate and the requirement for supporting evidence establishing that Nigerian staff actually understudying the expatriate must be provided before an expatriate quota can be renewed for wholly owned foreign firms.[19] This requirement is discriminatory because it does not apply to domestic suppliers. Therfore, it is recommended that this obligation should be expunged from Nigerian law to allow a level of balance and fairness for all participants.

In Chapter Three, in the course of analysing the exporter's package as a form of multinational insurance programme, one of the legal issues that arose was product liability

[17] General Agreements on Trade in Services Annex B, Art XVI(2)(e).
[18] Nike Popoola, 'NAICOM Lifts Ban on New Licence Issuance' *Punch* (Lagos, 5 September 2018).
[19] Nigeria Immigration Service Revised Guidelines on Business Permit and Expatriate Quota, Paragraph B and C.

for exported products. It was mentioned that Nigerian law recognises the defence of fool-proof systems of production that presupposes where an injured party establishes that injury arose from the consumption of a particular product or service, the manufacturer or service provider will be exonerated if it can be established that the processes adopted in the manufacturing processes are in conformity with all required standards and procedures. It was equally established that this approach is insensitive and reliant on technicalities as opposed to substance, resulting in hardship on an injured party.[20] It is therefore recommended that the burden of proving nil-fault, where an injury results from the use of a product, should be placed on the manufacturer or supplier of a product because they have greater access to information and resources to establish their innocence, compared to the burden placed on an injured party to establish fault on the part of a manufacturer or supplier.

Furthermore, it is recommended that in order for Nigeria to relax its protectionist stance and attract more foreign participation in its insurance sector and growth, it should abolish its policy of prohibition of cut-through clauses. Although, it has earlier been argued that NAICOM prohibition of cut-through clauses lacks legal basis and cannot stand; however, an express cancellation of that policy will incentivise investment in the sector. In addition, Nigeria should enact a law akin to the **Third Party (Rights against Insurers) Act 2010.** This will go a long way to enable non-admitted insurers to provide more sophisticated coverage and products for the Nigerian market.

Finally, Nigerian tax laws are highly discriminatory against insurers and the insurance sector, these results in players in the sector paying higher taxes than other categories of companies. The main solution to this unfair and discriminatory practice is for steps to be initiated in the National Assembly aimed at amending the law. However, amending legislation in Nigeria is always a herculean task and could take a long time. Thus, a short-term solution would be for the President of the Federal Republic of Nigeria to exercise his executive powers to grant tax exemptions to the insurance sector in a manner that will balance and level the tax field for all companies.

6.3. Limitation of the Research and Areas for Further Research

A major limitation of this research has been the absence of readily available academic work on most of the issues that were discussed and analysed. Hence, much reliance was

[20] Dennis Odigie v Job Odion, 'Implication of Consumers' Protection Laws and The Regulatory Schemes in Nigeria' (2011) 2(1) International Journal of Advanced Legal Studies and Governance 142.

placed on primary sources and on limited Nigerian case laws that are available. The Nigerian insurance sector is not highly developed; hence, there is little academic interest in this area and this translates in less writing and few or non-existent experts in that area of the law and practice.

It is suggested that future research, should focus on developing a global insurance regulatory framework that could effectively reduce the influence of domestic law and shift the balance to lean more on global regulations. To some extent, the banking sector has achieved this through instruments like Basel I, II and III in addition to other global banking instruments. Further research should therefore seek to examine the possibility of replicating this in the insurance sector and drawing up draft instruments. This effort will be aimed to sit at the top of the efforts towards liberalisation being promoted by the WTO.

6.4. Conclusion

The ultimate conclusion is that the only option and pathway for the growth of the Nigerian insurance sector is for it to liberalise the market and dismantle its entire protectionist system, which has not attracted investors, neither has it led to a growth of the sector. In addition, the Nigerian tax laws will have to be reviewed to be fair and balanced, the discriminatory provisions will also have to be repealed and replaced.

There is also the need for the WTO to rethink its approach and strategy towards trade liberalisation and unbundling of protectionism. The slow pace must be altered to take a faster and proactive approach.

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