The case for Mergers and Acquisition in the Banking Sector in Nigeria

Introduction

The law on company mergers and acquisition is codified in the Nigeria Companies and Allied Matters Act of 1990. Like many sophisticated laws in Nigeria, the law on company mergers and acquisition has been largely untouched by the judiciary. There are very few decided cases in this area of the Nigerian law. In fact as noted by one pundit in an article recently in a Nigerian Newspaper, only two major Nigerian companies have merged since 1960. However, various multinational companies engaged in multi-billion Naira businesses in Nigeria have availed themselves of the benefits of mergers and acquisition.

The law Firm of Anthony O. Egbase & Associates (A.O.E Law & Associates) is an international business law firm with main offices in Lagos, Nigeria and Los Angeles, California. The Associates of the firm have among them four decades' experience in the pre-litigation and litigation of business laws ranging from companies' merger and acquisition, companies and individual business reorganization and liquidations.

The Associates of the firm are licensed to practice law in multiple jurisdictions including but not limited to Nigeria, California, the Fiji Islands and six other Jurisdictions in the United States. The law firm also has close association with reputable firms in the United Kingdom and other Asian countries.

A.O.E Law & Associates has practiced law in California for about a decade. California which remains the fifth largest economy in the world had its fair share of company mergers and acquisition with the bubble burst of the dot-com venture capitalist. Against this background, A.O.E Law & Associates is willing to offer the following "bare-bones synopsis" on mergers and acquisition in Nigeria.

Caveat

The following position paper which is meant for informational purposes only must not be construed as legal advice. A.O.E Law & Associates has not obtained any consent from its clients to reveal matters it has handled and thus no specific reference is made to any matter herein.

Mergers and Acquisition

Mergers and acquisition continue to be important and sound vehicles for corporate growth and productivity. [1] There may exist many and diverse reasons for merger and acquisitions from tax purposes, expansion, legal compliance and other business considerations but the most common reason being, the bottom line, better profits derived from more efficiency.

This treatise seeks to look at the legal issues that may be confronted in Mergers and Acquisition, especially making the case for the Banking sector on the backdrop of the new guidelines from Central Bank of Nigeria (CBN) regarding the N25 Billion minimum capital for Banks in Nigeria. [2] At face value, it is likely that only a few, if any, banks in Nigeria currently meet that requirement. The recommended solution from the Governor of CBN which echoes what professionals and informed persons in the Corporate Business Sector have emphasized that the time has come for Corporate mergers and acquisition in Nigeria for efficiency within the Banking Sector. This treatise also ventures to offer suggestions for the best way forward.

Definition of terms

While this legal discourse is a serious venture, we can lighten it up with our definition of terms with a "Fish Story" to make the imagery stick. "Merger" is when two near equal fishes come together and the one fish no longer has an identity afterwards. "Acquisition" is when 'A Big fish swallows a small fish' and "Consolidation" [3] is 'When two or more fishes

contribute to become one Big Fish with a completely brand new identity' under the law. On a serious note, the major distinguishing factor is in the resultant identity of the company and the treatment of the assets and liabilities therefrom. Fox & Fox, the American authority in this regard, have this to say:

To financial analysts, management consultants, bankers and accountants, a "merger" may be a transaction in which corporations of relatively equal size combine. An attorney would view a "merger" as a transaction in which two or more corporations combine under a state corporation law with the result that all but the one of the participating corporations loses its identity."

"Acquisition" on the other hand, is sometimes used in the financial community to mean a transaction in which a large corporation purchases a smaller corporation. An accountant probably would call this a transaction a "purchase". An attorney would describe any transaction in which one corporation obtains another by purchase, exchange merger, consolidation as an acquisition…

"Consolidation" is another term that is sometimes used interchangeably with "acquisition" and "merger" but should be distinguished from a "merger" or "acquisition". A "consolidation occurs when two or more organizations are combined into one legal entity. It is distinguishable from a "merger" in that neither of the consolidated corporation survives and the target corporation ceases to exist. [4]

In the Nigerian statute,

'"Merger" means any amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies corporate' [5]

Reasons for Mergers and Acquisitions

There can be many and varied reasons for the purchaser seeking to acquire other companies. These reasons may include;

To enter more profitable markets; To diversify or expand its products; To change the direction of its business; To increase its ability to secure financing by increasing asset base and cash flow; To avoid the expense of starting up in a new field or industry; To strengthen its management; To acquire new technologies or enhance existing capabilities; To utilize excess plant capacity or to acquire new plants; To increase its earnings per share by adding other companies' earnings to its own. While Sellers reasons for seeking to be acquired may include the following;

The company may not have developed managers capable of leading the business in the future;

New technological developments may have damaged its competitive position; The company may need, and be unable to secure, new or additional financing; Its owners may need liquid assets, such as the marketable securities of the acquirer, to pay death taxes; Its owners may want to retire; The company may want to block a takeover bid.

Or more importantly, there may be necessitated Merger and Acquisition situation to be in compliance with the CBN Directive, taking advantage of the carrot being offered as;

"The CBN would set up a technical committee of International and national consultants to provide free consulting services to banks intending to merge or are involved in the acquisitions".[6]

One may legitimately ask since we are in a Democracy, why do the Banks have to recapitalize? The answer is simply because that is the sensible thing to do to reposition the bonafide banks leaving behind the trading societies to conduct trade. Also in the spirit of Democracy, we can always find a middle road. It is our suggestion here that while State and Community

Banks be allowed to function under the proposed guidelines, to deal in Foreign Exchange Forex) and International Trade, these must meet the minimum capitalization guidelines.

Basic Strategic Planning

One would begin the plan for a Merger, Acquisition or Consolidation as one would the Traditional African courtship leading to the exchange of palm-wine and kola-nuts. Boy meets girl, boy inquires about girl. Girl is shy but curious about boy's family background. Boy tells parents; parents make enquiries, carry palm-wine and negotiate bride price based on the accrued honor of the family. Price is settled; wine exchanged, ceremony done and marriage consummated. In the case of corporate mergers in spite the various reasons, there are certain parameters that must of necessity be present. [7]

Compatibility

While it is true that a company is an artificial legal personality, it is still run by Directors and Managers and these real life persons have diverse ways and systems of running their business. Especially in the recent proliferation of banks with the very creative, if sometimes questionable ethical values, the issue of compatibility stands out if Banks are to contemplate a successful and profitable merger. Questions to ask to determine compatibility would be:

Why does A want to acquire Z? Why should Z sell to A and not to B? What is their management style? Will the buyer relocate the headquarters and offices? Will the seller be represented at the buyer's board of Director? How much freedom and responsibility will be accorded to the seller's management after the acquisition? What is the buyer's acquisition "track record"? What time frame for acquisition?[8]

Planning Considerations

There are so many issues for consideration that the team of Managers, Management consultants, auditors, accountants and attorneys would have to apply their expertise to, and these may include:

· Consultation, investigation and negotiation of contracts and favorable positions.

· Employee benefits employment and labor contracts and other management and staff benefit.

· Compliance to the laws, pertinent administrative rules, regulations and listing requirements.

· Management and legal changes to the structure of the corporation.

· Due diligence and disclosure issues regarding property.

· Resolving conflict of interest issues since management owes to the shareholders a fiduciary duty.

· Resolving positively the question; is the seller authorized to sell and the buyer to buy under their respective articles of incorporation?

Mergers

<u>Advantages:</u>

· There is a fairly wide choice in form of consideration.

· Procedures are relatively simple.

· Large numbers of conveyance are avoided because are made by operation of law.

· No minority stock interest remains.

· Certificate of incorporation can be amended as part of the transaction.

Disadvantages:

· Acquiring corporation assumes all of seller's liabilities –fixed, contingent, known or unknown.

· Corporate representations and warranties do not survive the closing.

· Shareholders of seller and buyer may dissent and exercise appraisal rights.

· Shareholders of the seller and the buyer must meet and vote in favor of a merger.

· Selling corporation loses its identity

Asset Acquisition

Advantages:

· Legal limitations on merger and consolidation can be avoided

· Buyer's directors ordinarily may approve purchase without shareholder vote (unless shares listed)

· Shareholders may not have appraisal rights.

· There is greater control over assumed liabilities than in mergers.

Disadvantages:

· Procedures are relatively complex because every conveyance must be separately made.

· De facto merger doctrine may be invoked

· State and local transfer taxes might be payable

· Disruption of customers and suppliers is more likely than in mergers

· Transaction may give rise to "bulk sales" law problems.

· It may be necessary to secure consents to transfers and assignments that could have been avoided in merger.

Stock Acquisition

Advantages:

· Procedures are simple if selling shareholder group is small.

· Asset transfers and need for consents are avoided.

· Appraisal rights do not arise

· Transaction may be in the form of takeover bid without consent of seller's management.

· Insurance and unemployment ratings may be maintained

· Transactions might be consummated faster than merger or sale of assets.

Disadvantages:

· Asset transfers will not be avoided if corporation acquired by purchase of stock is liquidated into its new parent

· Unknown and contingent liabilities are assumed

· Sellers of control may be deemed to owe fiduciary duty to minority and offer may have to be extended by purchaser to minority shareholders.

· Transaction is likely to require registration with SEC.

· Minority interests might remain outstanding unless all shareholders sell their stock to the purchaser

Legal Issues to be addressed

The very first to be dealt with would be the legal provision for the regulation. It goes without saying that the CBN has the legal oversight authority to dole out regulations for the Banking Sector in Nigeria. Some commentators have ventured that the guidelines, while necessary, are unduly overreaching. [9] It is our view that the law permits the CBN Governor to issue the said guidelines, and he is right to do so. While in the normal course of events, companies have re-positioned for the synergy created by bigger corporate entities, the CBN Governor has boldly ventured to challenge the Nigerian Banking system to compete in a global system. N25 Billion may sound like a lot of money (and it is a lot of money) in Nigeria, but if compared to the International competitors these banks intend to do business with; it does not amount to much. Why should the CBN Governor care? Because that is part of the Governor's job to reposition the industry to be able to compete for funds and investment from serious International players.

Banks operate only as corporate legal persons incorporated under the Companies and Allied Matters Act 1990(CAMA) in addition to any other ancillary law depending on their area of concentration. Mergers and Acquisition of companies in Nigeria is governed by Sections 590 through section 920.of the Companies and Allied Matters Act. Practically speaking, there are Negotiated acquisitions and Hostile takeovers. Here, we shall deal mainly with Friendly Negotiated Acquisitions, as indeed that was the import of the guidelines from the CBN.

The special case of Nigerian merger is that the process is backed and fully guided by statute. To the extent that any scheme, proposal for a compromise, arrangement or reconstruction between two or more companies, the court may on the application in summary way of any of the companies to be affected, order separate meetings of the companies to be summoned in such a manner as the court may direct. [10]

Successor Liability

However, in all situations, whether statutory or through asset acquisition, the issue of successor liability might come up. In the United States for instance, the courts have approached the issue of successor liability from the common law perspective through statutory legislation. The common law position is that the purchasing corporation assumes the sellers liability when 1) it expressly agrees to assume them; 2) the asset sale amounts to a de facto merger; 3) the purchaser is a mere continuation of the seller; 4) the sale is for the fraudulent purpose of escaping liability for the seller's obligations E.g., Ruiz v. Blentech Corporation (7th Cir. 1996).[11] California law for instance contemplates the kind of situation banks may find themselves in when they merge regarding successor liability. The California product line exception provides that a company that procures a business and continues in the same line of business assumes strict liability in tort for defects in unit of the same product line previously manufactured by the acquired company. Ray v. Alad Corp (Cal 1977).[12] Note that there are some states in the USA like Michigan that has relaxed this continuity exception. which requires that the selling firm owners take stock in the purchasing firm.

The Nigerian position as codified in Section 591(5) of the Companies and Allied Matters Act 1990 seems to be in line with the common law position as reflected above.

Steps to or Formalities for Mergers

From a legal perspective, the following business steps are taken in every classic merger situation

Preliminary agreement between the lawfully authorized Management team Issuance of a Press Release detailing the fact of the merger proposal within a time frame (this, to forestall the leak of information or insider trading) Boards of Directors of both the Target and Acquiring Company in Resolution adopt the Merger Agreement Both or all Companies notify their shareholders of Merger Proposals for approval by majority vote in compliance with their respective Articles of association. In the event of a public quoted companies, notification would have to include Proxy Statements which would detail:

1. Terms of merger

2. Consideration to be offered (cash, stock or a mixture)

3. Information about the companies involved

4. Upon approval, shareholders receive an exchange of stocks for pre-approved consideration

5. Shareholders who opt out of the merger agreement can demand to be bought out at "fair value".

After approval by the Shareholders by themselves or through voting by proxy, the Articles of merger filed at the Corporate Affairs Commission with a stated effective date.

On the effective date, the surviving Company takes over in law all the assets and liabilities of the Target Corporation including those that are unknown, undisclosed or unforeseen.[13]

The Need for Professional Consultants

In all successful mergers, there is a need for professional hands to be consulted. Accountants, Management Consultants and Attorney are inevitable for the corporations to properly evaluate their assets risks and to ensure a blow-by-blow implementation of the legal requirements. Of the three major players as with most professionals, the position of the attorney is primary.

The attorney's role in an acquisition is threefold: First, the attorney must participate in the formulation of the business bargain so that it will comply with federal and state law. Second, he or she must coordinate all investigations and analysis so that their results will be reflected in the purchase contract. Third, he or she must document the business bargain and implement its terms.

If these functions are to be performed effectively, the advice of the parties' attorney should be sought before or soon after negotiations have been initiated. Often, though, counsel for the buyer and the seller are called upon to prepare the contract of sale after the parties have reached substantial agreement as to the purchase price and other principal terms of the transaction. In this event the attorneys for the parties will be denied the opportunity to provide all the services they are capable of rendering. Furthermore, if the parties delay the entry of their attorneys into the negotiations, they may discover that a number of terms that they have tentatively agreed upon are unwise, illegal, unenforceable, or expensive. [14]

Conclusion

Because there can never be such a thing as a "handshake merger" or a "gentleman's agreement" regarding the process of a merger or acquisition, lawyers, love them or hate them, are necessary and central to the process of mergers and acquisition from the very beginning when the mating dance is commenced up to the consummation when the champagne bottles are popped. The attorneys, as experts are responsible for among others:

· Meetings of boards of directors of each corporation to approve tentative agreement (responsibility of counsel for respective parties)

· Commencement of investigations of each party's legal affairs (responsibility of counsel for respective parties).

· Preparation of the purchase contract (responsibility for first draft usually falls on purchaser's counsel)

· Preparation of subsidiary agreements such as employment or consulting contracts (responsibility is usually that of purchaser's counsel)

· Director's meetings to approve contracts, to authorize various acquisition steps, and to call shareholder's meetings (responsibility of counsel for respective parties)

· Execution of purchase contract (responsibility of counsel for respective parties)

· Preparation of material to be filed both in court and with Securities and Exchange Commission, e.g.; proxy statement, registration statement (responsibility may fall upon either counsel)

· Securing approval of deeds and mortgages by title company (responsibility of counsel for purchaser)

· Publication of notices of meetings of shareholders, as required under CAMA (responsibility of counsel for respective parties)

· Supervision of shareholders meetings (responsibility of counsel for respective parties)

· Preparation and filing of forms for qualification of purchaser to do business in the jurisdiction seller was qualified to do business (responsibility of counsel of purchaser)

· Closing (joint responsibility of counsel for buyer and seller).

[1] Fox & Fox, 2004 Corporate Acquisitions & Mergers

[2] As accessed at http://www.nigeriafirst.org/article_2637.shtml

[3] Although the CBN regulation does not speak of or recommend consolidation, it is our view that based on the Nigerian economic culture (where every CEO is skeptical of selling his company off on account of ego), the right option for Nigerian Banks may actually be consolidation.

[4] Fox & Fox p.1-5

[5] Section 590 Companies and Allied Matters Act 1990

[6] See http://www.nigeriafirst.org/article_2637.shtml

[7] Freud, James C. The Acquisition Mating Dance and other Essays on Negotiating 1987 Prentice Hall Law & Business Clifton NJ

[8] Fox & Fox P.1-14

[9] Ngama, Yerima Lawan Comments on Soludo's Consolidation of the Nigerian Banking Industry asaccessed on 7/23/04 at www.gamji.com

BusinessDay, 7/20/04 Banking Sector Reforms: Banker Advocates Cautious Implementation as accessed on 7/23/04 at http://businessdayonline.com

7/22/04, New N25b Capitalisation Will lead to Forced Mergers – CRIMA as accessed on 7/23/04 at http://businessdayonline.com

[10] Section 591 (1) CAMA

[11] See Oesterle, Dale A. Mergers and Acquisition 2001 West Group p.93[12] p.94 supra

[13] Fox & Fox p.2-3

[14] Fox p. 2-16