

## Insolvency & Restructuring - Nigeria

Restructuring the banking sector in the wake of the financial crisis

Contributed by [Punuka Attorneys & Solicitors](#)

June 17 2011

[Introduction](#)  
[Background](#)  
[Issues](#)  
[Comment](#)

### Introduction

The reforms and measures initiated by the government and the Central Bank of Nigeria (CBN), led by Mallam Sanusi Lamido,<sup>(1)</sup> in order to restructure the banking sector are having a major impact not only on the banking sector, but also on corporate restructuring.

The reform measures included the 2009 intervention in eight banks which cumulatively held 30% of all deposits. The CBN recently announced October 30 2011 as the deadline for the recapitalisation of these banks; otherwise, they risk being wound up or liquidated.<sup>(2)</sup>

Another aspect of the reform agenda was the reclassification of banking licences into regional, national and international. All banks were given a window in which to renew their licences in the most suitable category.

Further, the government restructured the business model for banks to enable them focus on the banking business. A bank must drop all non-core businesses or create a holding structure if it wishes to hold any non-core assets. This aspect of the reform has challenged the system in terms of legal structures for the rearrangement of rights and the transfer of assets, in a banking restructuring intended to satisfy the CBN's requirements.

This update focuses on the efforts of the Securities and Exchange Commission (SEC) and the banks to ascertain the proper interpretation and application of Section 539 of the Companies and Allied Matters Act 2004, which affects any compromise or arrangement between the members or creditors of a company.

### Background

In late 2010 the CBN promulgated the Regulation on the Scope of Banking Activities and Ancillary Matters (3/2010), which repealed the Universal Banking Guidelines 2000. Reminiscent of the US Glass-Steagall Act of 1933, which prohibited banks from carrying out commercial and investment banking businesses under one roof,<sup>(3)</sup> the new regulation provides for the categorisation of regional, national and international banks, in contrast to the previous model of universal banking – seen as one of the root causes of the systemic crisis that rocked the banking sector in 2009.

Article 5 of the regulation requires that no bank should operate any related enterprise unless it does so under express statutory provisions<sup>(4)</sup> and regulatory permission.<sup>(5)</sup> Articles 5(3) and 6 further required any bank operating under a universal banking licence to comply with the CBN regulation immediately by divesting itself of its shares, immovable property or real estate in any related enterprise no later than 90 days after November 15 2010. It must submit for CBN approval a compliance plan produced by the board of directors, containing a detailed proposal noting:

- how the bank intends to comply with the regulation;
- the business justification for the approach proposed; and
- the fairness of the proposal to all stakeholders, particularly depositors and shareholders.

Against this background, any bank that failed to submit a proposal within 90 days or

Authors

[Anthony I Idigbe](#)



**Okorie Kalu**

secure approval in principle from the CBN within 120 days from November 15 2010 was to face penalties from the banking regulator, including variation or revocation of its licence (Article 6(7) of the regulation).

As a result, several concerned banks or affiliated companies approached SEC expressing an intention to restructure their businesses with a holding company structure using the provisions of Section 539 of the Companies and Allied Matters Act 2004, which does not require *prima facie* reference and approval of SEC, unlike the corporate restructuring procedure available under Part XII of the Investments and Securities Act 2007 (particularly the provisions of Sections 117 to 130).(6)

Stakeholders have taken divergent views(7) on the correct position of the law as regards its interpretation and application. The key issue is the extent to which a group of companies can restructure under Section 539 of the Companies and Allied Matters Act 2004 without reference to SEC.

## Issues

Section 539 provides that:

*"(1) Where a compromise or arrangement is proposed between a Company and its creditors or any class of them, or between the Company and its members or any class of them, the court may, on the application, in a summary way of the Company or any of its creditors or members or, in the case of a Company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of members of the Company or class of members, as the case may be, to be summoned in such manner as the court directs.*

*(2) If a majority representing not less than three quarters in value of the shares of members or class of members, or of the interest of creditors or class of creditors, as the case maybe, being present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement may be referred by the court to the Securities and Exchange Commission which shall appoint one or more inspectors to investigate the fairness of the said compromise or arrangement and to make written report thereon to the court within the time specified by the court.*

*(3) If the court is satisfied as to the fairness of the compromise or arrangement, it shall sanction the same and the compromise or arrangement shall be binding on all creditors or the class of creditors or on the member or the class of members as the case maybe, and also the Company or in the case of a Company in the course of being wound-up, on the liquidator and contributories of the Company.*

*(4) An order made under subsection(3) of this section shall have no effect until a certified true copy of the order has been delivered by the Company to the Commission (8) for registration and a copy of every such order shall be annexed to every copy of the memorandum of the Company issued after the order has been made.*

*(5) If a Company makes default in complying with subsection(4) of this section, the Company and every officer of the Company who is in default shall be liable to a fine of N5 for each copy in respect of which default is made.*

*(6) In this section and section 540 of this Act, "Company" means any Company liable to be wound up under this Act."*

Under Nigerian corporate and insolvency law, the terms 'compromise' and 'arrangement' are not synonymous.(9) An agreement which enables the majority of the creditors to accept less than is due to them may be a compromise on the part of the creditors as a whole. However, where the shareholders do not give up anything, no compromise is involved and only an arrangement results.

Section 537 of the Companies and Allied Matters Act defines an 'arrangement' as meaning:

*"any change in the rights and liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company other than a change effected under any other provision of this Act or by the unanimous agreement of all the parties affected thereby."*(10)

According to this provision, an arrangement extends to both the members and the creditors of a company. Typically, an arrangement can be made between members alone, although with the cooperation of the company's creditors, within the context of winding up – for example, for the purpose of selling a company's property (eg, Section 538 of the Companies and Allied Matters Act). An arrangement could also be made between the company, (a class of) its members and (a class of) its creditors.

On the other hand, a compromise appears to be restricted to an arrangement between a debtor and its creditor seeking to modify the creditor's right and, by extension, the debtor's liability. Section 539(1) further lends credence to this strict construction.(11)

The Investments and Securities Act and its subsidiary legislation, SEC Rules and Regulations, merely refer to compromise by reference to the additional obligation of "a registered market operator... to notify SEC at least three months before the meeting of creditors, of its intention to compromise with its creditors".<sup>(12)</sup> Therefore, Section 539 of the Companies and Allied Matters Act appears to imply that it applies to a compromise and an arrangement between a company and its creditors or any class of them (ie, an external restructuring).

However, a deeper reading of Section 539, specifically Section 539(3), shows that in the case of a compromise, it could also extend to internal restructuring of rights and liabilities (ie, an arrangement or compromise between the company and its members or any class of them, or when the company is being wound up). According to Orojo,<sup>(13)</sup> the procedure for effecting a compromise or arrangement is as set out in Sections 539 and 540, and court practice appears not to involve an SEC approval procedure.

Orojo's interpretation is understandable to the extent that Section 539(3) enjoins the court only to make an order approving the scheme if it is satisfied with its fairness based on SEC's report,<sup>(14)</sup> perhaps implying that only the court has discretion to obtain SEC's report on fairness, rather than SEC's prior approval. Section 539(2) appears to emphasise that reference of the scheme to SEC is discretionary.

Orojo states that the Companies and Allied Matters Act applies in respect of changes to or which affect the rights and liabilities of the company's members or creditors, or which affect the company's regulations.<sup>(15)</sup> His view is that the Companies and Allied Matters Act applies where only one company is involved, and that the Investments and Securities Act 1999 applies where more than one company is involved in the arrangement.<sup>(16)</sup> Orojo's view is based on the Investments and Securities Act 1999, which includes provisions regulating schemes of changes and reconstruction affecting two or more companies, specifically where there is to be a transfer of the property or undertaking of one company to another. However, if Sections 539(2) and (3) are read together, there is a case for significant involvement of SEC, since in every case the court must determine the fairness of the scheme in order to grant approval. Therefore, a prior approval report must be received from SEC before a court can approve a scheme.

However, under the Investments and Securities Act 2007, the focal point for SEC involvement is such factors as statutory thresholds, fairness and change of control. Thus, according to the Investment and Securities Act 2007, if the scheme will result in a change of control situation as contemplated under any of the scenarios envisaged by Sections 119 and 131 of the Investments and Securities Act 2007, it must be referred to SEC as the regulatory body for mergers and acquisitions (M&A). The express wordings of Sections 117 to 130 of the act appear to focus on M&A and takeovers, which typically involve two or more companies and a change of control of the target company leading to scrutiny of the scheme by SEC, while Section 539 of the Companies and Allied Matters Act appear to contemplate the internal restructuring of a single company.

Therefore, to the extent that a restructuring under Section 539 of the Companies and Allied Matters Act involves only a single company and there are no fairness concerns which could motivate the court to refer the scheme to SEC for investigation, such a transaction can be completed without reference to SEC. It is also arguable that Section 539 can apply to two or more companies where the companies belong to the same group and have a holding-subsidiary company relationship. This approach is justified by two reasons:

- a provision of the merger sections of the Investments and Securities Act 2007 exempts the application of the merger provisions of the act to holding companies acquiring shares solely for investment and not using such shares by voting or otherwise to cause or attempt to cause a substantial restraint of competition (Section 118 of the act); and
- in terms of merger control, a restructuring or arrangement within a group of companies with a holding and subsidiary relationship is unlikely to result in a significant change in market share.

Consequently, SEC involvement in holding and group company arrangements should be limited to circumstances allowed under Section 539 of the Companies and Allied Matters Act (fairness) and not under the provisions of the Investments and Securities Act 2007 (fairness and competition), unless there is a change of control which may trigger other provisions of the Investments and Securities Act 2007.

An arrangement under Section 539 includes a reorganisation of the share capital of a company by the consolidation of shares of different classes or by the division of shares into those of different classes. However, any change in members' or creditors' rights in the company may lead to a change of control, and may therefore require SEC approval (eg, a debt equity swap, where holders of convertible notes become shareholders in the company).

Therefore, the case for SEC consent to an arrangement under Section 539 depends on

the facts.

## Comment

It appears that SEC involvement in corporate restructuring under Section 539 is unnecessary unless there is a change of control situation in the restructuring. In addition, group or holding company arrangements appear more appropriate for Section 539 of the Companies and Allied Matters Act rather than the Investments and Securities Act 2007, which appears more applicable where two or more companies without a holding and subsidiary relationship are involved with an arrangement. In the latter situation, SEC prior approval to the arrangement may be necessary. Pending clear direction from the Nigerian courts in this regard, every case that may give rise to the interpretation of Section 539 of the Companies and Allied Matters Act should be treated based on the facts of each case.

However, it would appear that in order for the regulator to play its role properly, it should strive to respond diligently or endorse arrangements rather than to complicate and delay the arrangement process being sought by banks. SEC must be guided by the basic reasons for the restructuring of the banks, which stem from the banking reforms. The order of the day should be cooperation rather than regulatory friction, conflict or assertiveness which may end up damaging the transaction and investors, creating uncertainty in the mind of the regulated banks and increasing the cost of doing business and the systemic risk of total failure of all or some of the Nigerian banking and financial institutions and systems.

*For further information on this topic please contact [Anthony Idigbe](mailto:a.idigbe@punuka.com) or [Okorie Kalu](mailto:o.kalu@punuka.com) at Punuka Attorneys & Solicitors by telephone (+234 1 270 4789), fax (+234 1 270 4790) or email ([a.idigbe@punuka.com](mailto:a.idigbe@punuka.com) or [o.kalu@punuka.com](mailto:o.kalu@punuka.com)).*

## Endnotes

- (1) Mallam Sanusi Lamido is the governor of the CBN. He was recently listed as one of the world's most influential personalities by the *TIME* 100 List, May 2 2011, and named "Global Central Bank Governor of the Year 2011" by *Banker* magazine, a publication of *The Financial Times*.
- (2) In order to sustain the gains of the stabilisation measures taken by the CBN since 2009, the CBN could implement a softer liquidation procedure by managing the bank and thereafter handing it over to another bank; this process was used successfully in the past for the disposition of the failed African International Bank by the Ecobank group.
- (3) This law was repealed in the United States in 1999 by the Gramm-Leach-Bliley Act. The change followed the merger of Citicorp Inc with Travelers Corp Inc to form Citigroup Inc.
- (4) Sections 21(1) and 22(1)(c) of the Banks and Other Financial Institutions Act.
- (5) For example, where, with the approval or permission of the CBN, the related enterprise is incorporated outside Nigeria, jointly established by two or more banks or is a custodian company.
- (6) Headed "Mergers, acquisitions and takeover bids".
- (7) Interested companies seeking to avoid cumbersome formalities, reduce costs and meet the banking regulator's deadline on the one hand, and SEC seeking to protect, assert and exercise its oversight functions over companies, particularly in the context of any form of corporate restructuring, on the other hand.
- (8) The Corporate Affairs Commission, which functions as a registry and regulatory body in matters pertaining to incorporation and administration of company matters under the Companies and Allied Matters Act.
- (9) While the Companies and Allied Matters Act defines 'arrangement' expressly, resort must be had to the received common law jurisprudence to define the contractual and commercial meaning of 'compromise'. In *Sneath v Valley Gold Ltd* [1893] 1 Ch 447 at 494, compromise was described as an agreement which terminates a dispute between parties as to the rights of one or more of them or which modifies the undoubted rights of one or more of them or which modifies the undoubted rights of a party which it has difficulty in enforcing.
- (10) This appears to mean that any 'arrangement' or transaction that is unanimously agreed to by all the members and (secured) creditors of a company does not qualify as an arrangement which leads to change in the rights and liabilities of these stakeholders and will not be subject to the procedural regulation and conditions stated under PART XVI of the Companies and Allied Matters Act.
- (11) The court has attempted to define the words 'creditor' and 'member'. 'Creditor' was defined in *Re Midland Coal Coke and Iron Co Craig Claim* [1895] to include any person who has or may have a pecuniary claim against the company, whether liquidated or

unliquidated and whether contingent or not. An 'arrangement' (defined above), on the other hand, covers a wider range of agreements, which do not necessarily involve any disputes. It may just be that the structure of the company in terms of the rights and liabilities of stakeholders needs to be modified.

(12) Rule 165B.

(13) *Company Law and Practice in Nigeria*, 5th Edition, LexisNexis, at page 336.

(14) This is because SEC is supposed to be better placed than the court to inquire into the fairness of a scheme.

(15) *Supra* at page 333.

(16) *Supra* at page 333.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at [www.iloinfo.com](http://www.iloinfo.com).

---

#### Online Media Partners



© Copyright 1997-2010 Globe Business Publishing Ltd