MANAGING NON-PERFORMING LOANS IN NIGERIA: AN APPRAISAL OF THE ASSET MANAGEMENT CORPORATION OF NIGERIA (AMCON)

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Abstract

After the financial crisis of 2008-2009, the high rate of Non- Performing Loans (NPLs) in Nigerian banks led to the liquidation and bail out of some banks by the Central Bank. In 2010 the Asset Management Corporation of Nigeria (AMCON) was established as a special purpose vehicle with the mandate to efficiently resolve and manage the non-performing loan assets of banks thereby stabilizing the sector. However, rather than reduce the number of NPL's, 10 years onwards, AMCON has acquired more liabilities thereby increasing NPLs and has about 3,000 cases in court. The objective of the paper is to appraise AMCON, to determine why the corporation is unable to fully carry out its mandate. What are the legal and regulatory problems facing the corporation in executing its mandate? How can AMCON effectively manage NPLs? What alternatives are being explored to handle the legal disputes? The paper finds that the major challenge facing the corporation from inception is lack of adequate laws to enhance their performance together with incessant legal disputes. The paper also examines jurisdiction like Malaysia to draw lessons for an effective management of NPLs. It was recommended among others, that loan restructuring, alternative dispute resolution mechanisms be used to ensuring successful management and speedy disposal of NPLs by AMCON. The article relies on vast doctrinal research and comparative analysis.

Keywords: *Bank lending, Non-Performing Loans, Corporate Governance, AMCON*

Introduction

Bank loan is a major source of financing business in Nigeria. Businesses can approach one or more financial institution for lending which may be for a start-up or for business expansion, thereby making loans and advances the largest item on the assets structure of Nigerian commercial banks.[1] Usually, when a company or a person requests for credit facility (loan) from a bank or financial institution, the bank often demands collaterals[2]in perfecting the transaction so that in the event of default from the borrower, the bank would file a lien on the collaterised property[3]. It is observed that some financial institutions give loans without adequate security,

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[1] AO Chigozie and OM Ikechukwu, 'Lending Rate, Bad Debt and Credit Management in Nigeria Commercial Banks: A VAR Analysis' [2015] *American Journal of Economics, Finance and Management*, (1) (3) 165

[2] Means movable property, whether tangible or intangible, that is subject to a security interest; Collateral Registry Regulations 2014.

[3] *Rite Foods Ltd &Anor V. Adedeji &Ors* (2019) LPELR-47698(CA) 'a lien broadly speaking, is a right to retain that which is in one's possession belonging to another until certain demands of the person in possession are satisfied.' See also *Oguntimehin Vs. Unity Bank* (2017) LPELR (43244) 1 at 36-37 'A legal lien in its primary or legal sense means a right at common law in one man to retain that which is rightly and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied:'

leading to collapse of some banks. This contravenes the provisions of the *Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act.*[4]

The Banking industry happens to be one of the most regulated sectors in Nigeria,[5] reason being that, it is the financial backbone of the economy.[6] Despite efforts by regulators through laws, rules, codes of governance, policies and guidelines, malpractices still permeate the sector. In 2009, Nigerian commercial banks witnessed the sacking of the management of five banks[7]over alleged fraudulent practices which tremendously heightened public anxiety about the health position of those banks and to some extent created doubts about the audit function being performed in these banks by the concerned audit firms.[8]

In the course of bank lending, there are situations where the interest and principal on loans remain unpaid for about a period of 90 days, leading to *Non-performing Loans (NPLs)*[9] which is identified as a major cause of bank failure and in extreme cases lead to liquidation.[10]Considering the spate of NPLs in Nigeria and to forestall its effect on Nigerian banks after the 2008-2009 global financial crisis, in 2010, it became expedient to establish a *Special Purpose Vehicle (SPV)* to revive, stabilise banks and forestall any systemic breakdown of the Nigerian financial system. This led to the enactment of the *Asset Management Corporation of Nigeria (AMCON) Act 2010*, [11]which established the AMCON, known as the corporation under section 1(1) of the *Act*[12], with the core mandate to efficiently resolve the non-performing loan assets of banks in Nigeria[13]by acquiring *Eligible Bank Assets (EBA)* from *Eligible Financial Institutions* [14](EFI).

Since inception, *AMCON* has strived in bringing stability into the financial system as Nigerian banks would have lost about 2 trillion Naira but for *AMCON*'s intervention after the global

[4] CAP F2 LFN 2004 s 15(1) (a) (i) This provision makes a manager, officer or employee of a bank who grants a loan without security liable for the offence under this section. See also section 19(1) (a-c)

[5]Section 1 Banking and Other Financial Institution Act (BOFIA) CAP B3 LFN 2004 The banking industry in Nigeria comprises commercial banks, merchant banks, development banks and micro finance banks which are largely regulated by the Central Bank of Nigeria (CBN)

[6] Regulators include, the Banks and Other Financial Institutions Act (BOFIA), Companies and Allied Matters Act (CAMA), Dishonoured Cheques (Offences) Act 1977, Bills Of Exchange Act Cap B8 LFN 2004, Evidence Act, Economic and Financials Crime Commission Act 2014, Investment & Securities Act 2014, Money Laundering Prohibition Act, Money Laundering Regulation, Nigeria Deposit Insurance Corporation Act, Terrorism Act, Foreign Exchange Monitoring & Miscellaneous Offence Act and the AMCON Act and the Basel committee on banking(Basel 1, II and III accords)

[7] Intercontinental, Oceanic, Union, Afri, and First Inland banks

[8]Adeniyi A Alao, 'Analysis of Fraud in Banks: Evidence from Nigeria' [2016] *International Journal of Innovative Finance and Economics Research'*4(2)April-June 16

[9] B A Garner, '*Black's Law Dictionary'* (9th Edition) 1020 'Non-performing Loan (NPL) refers to 'an outstanding loan that is not being repaid'

[10] O Akinlo and M Emmanuel, 'Determinants of non-performing loans in Nigeria'[2014]*Accounting & Taxation* (6) (2) 1

[11] Now AMCON Act 2019 as amended

[12] Asset Management Corporation of Nigeria (AMCON) was established on the 19th July 2010, when the President of the Federal Republic of Nigeria signed the AMCON Act into Law. AMCON was created to be a key stabilizing and re-vitalizing tool established to revive the financial system by efficiently resolving the non-performing loan assets of the banks in the Nigerian economy. <http://www.amcon.com.ng/About_Us/CorporateOverview.aspx> accessed 24 January 2020

[13] AMCON Act 2015(As amended)

[14] AMCON Act Section 5 provides for the functions of the Corporation

financial crisis.[15] However, criticisms have followed *AMCON*'s role in carrying out its duties, owing mainly to legislative and regulatory incompetence. To find out how other developing countries were able to tackle *NPL*, the paper takes a look at *Malaysian Danaharta* established in 1998 with the mandate to manage and dispose *NPL* in Malaysia.

In the light of the above, the paper seeks to discuss bank lending, malpractices leading to *NPLs* in the banking sector and the management of *NPLs* by *AMCON* in Nigeria. It assesses the role of *AMCON* to determine if it has carried out the mandate to efficiently resolve and manage the non-performing loan assets of banks. Considering that the *Danaharta* was able to reduce *NPL* in the Asian country and fulfilled its mandate after 7 years of operation, the paper aims to draw a lesson from the *Malaysian Model*.

The paper agrees that considering the challenges faced by *AMCON* in the implementation of its mandate, the corporation has not lived up to its expectation and makes recommendation for a better management of *NPLs* to enable it fulfill its mandate.

2. Bank Lending in Nigeria

The business of banking is provided for under Section 2 of the *Banking and Other Financial Institutions Act* [16]*(BOFIA*) which provides that 'No person shall carry on any banking business in Nigeria except it is a company duly incorporated in Nigeria and holds a valid banking licence issued under this Act.' In line with the Nigerian law on company registration, such company must also be registered under section 21 of the *Companies and Allied Matters Act* [17]*(CAMA*) as a public company with a minimum share capital of 25 billion naira.[18]

The *BOFIA* in section 16 sets out the duty of banks as maintenance of reserve funds, while restricting certain banking activities[19]and specifically prohibits unsecured loans and advances or credit facilities unless authorised in accordance with the banks rules or, as the case may require, deposited with the bank.[20]However, some banks engage in unsecured loan transaction which is observed as one of the major causes of bank failure. Furthermore, *Article 3* of *Central Bank of Nigeria (CBN)* regulation 2010[21]provides for permitted activities by commercial banks which include power to take deposits, maintain current and savings account, provide finance and

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[15] C Amaechi, 'Exploring the Requirement of Capital Adequacy and Bank Stability in Nigeria' [2016] *The Gravitas Review of Business and Property Law* (2) (7) 32

[16]BOFIA CAP B3 LFN 2004(hereinafter referred to as BOFIA)

[17]Companies and Allied Matters Act CAP C20 LFN 2004 (Hereinafter referred to as CAMA) Section 21

[18] See also Article 6 of the CBN Scope, Conditions & Minimum Standards for Commercial Banks Regulations no. 01, 2010 on Minimum Standards for Commercial Banks with national authorisation.

[19]BOFIA s 20(1) (a) which provides that 'A bank shall not, without the prior approval in writing of the Bank, grant (a) to any person any advance, loan or credit facility or give any financial guarantee or incur any other liability on behalf of any person so that the total value of the advance, loan, credit facility, financial guarantee or any other liability in respect of the person is at any time more than twenty per cent of the shareholders fund unimpaired by losses or in the case of a merchant bank not more than fifty per cent of its shareholders fund unimpaired by loses; and for the purpose of this paragraph all advances, loans or credit facilities extended to any person shall be aggregated and shall include all advances, loans or credit facilities extended to any subsidiaries or associates of a body corporate'

[20]Section 20(1) (b)

[21]CBN Scope, Conditions & Minimum Standards for Commercial Banks Regulations no. 01, 2010 https://www.cbn.gov.ng/OUT/2010/CIRCULARS/BSD/COMMERCIAL%20BANKING%20LICENSING%20REGULATIONS%20-%20FINAL%20RELEASED.PDF accessed 17 May 2020

credit facilities. This gives banks in Nigeria power to carry out lending services, thereby giving businesses access to finance through loan facilities. The banking industry in Nigeria comprise of commercial banks, merchant banks, development banks and micro finance banks and are largely regulated by the *Central Bank of Nigeria (CBN)*.[22]The focus of the paper is on *NPLs* by commercial banks.

Bank lending is a form of debt financing which plays a pivotal role for companies and business entities as it enables companies' access finance to support or fund their business through borrowing by way of loan usually obtainable from banks.[23] It is pertinent to know that companies can as well fund their businesses through equity financing by initial public offerings, (IPO) or rights issued on a stock exchange. However, smaller businesses categorised as *Small and Medium scale Enterprises (SMEs),* private companies[24]and partnerships cannot issue shares/equities[25], therefore they rely solely on loans from banks or personal funds to finance their business.[26]According to *Uremadu and Nwaokocha*,[27] most successful small businesses that have grown to medium and large enterprises, were made what they are today through bank loans. However, it is advisable for businesses to have a balance of equity and debt ratio, this is, to ensure a good spread in liability that may arise in the future. Such liabilities include *NPLs* which can lead to liquidation.

In the process of carrying out the business of banking, some malpractices may arise which may increase the chances of bank failure. Malpractice can be referred to 'an instance of negligence or incompetence on the part of a professional'[28] while negligence refers to the 'failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm.[29] Malpractices in the banking industry can be by employees, non-employees and the bank itself.[30] This includes giving loans without securities and/or without following relevant approval, an oversight usually done by chief executives which has led to distresses in many banks. This also affects customer's deposit, and businesses in the country which may lead to liquidation of affected banks and loss of jobs thereby bringing uncertainty to the industry and wider socio-economic problems. Malpractices led to the failure of six banks which put depositors and shareholders' funds in excess of 700 billion naira in jeopardy[31] leading to the

[22]Section 1 Banking and Other Financial Institution Act (BOFIA) CAP B3 LFN 2004
[23]L Gulliffer and J Payne, ' *Corporate Finance Law Principles and Policy'* [Oxford 2011]19
[24] CAMA s 22(1)
[25] CAMA s 22(5) a-b , Ordinarily cannot invite the public to subscribe to its shares unless by order of the court and meeting other conditions as provided under the law.
[26] A Ikobi-Anyali,' The Role of Access to Finance in the Establishment of New Business Ventures'[2015] *Nnamdi Azikiwe University Awka Journal of Commercial and Property Law* (1) (4) 126
[27] S.O Uremadu and EB Nwaokocha and S.C Onyike,' Effects of Mergers and Acquisitions on Commercial Bank Credit to Small Businesses in Nigeria' [2016] *Ideal Journal of Economics and Management Sciences* (2) (2) 17-26
[28]Bryan A. Garner, ' *Black's Law Dictionary'* 1044 (9th Edition)
[29]Ibid 1133
[30]Adeola A Oluwabiyi 'Legal Response to Banking Malpractices in Nigeria'[2015] *Journal of Law, Policy and Globalization* 46
[31]JNN Ugoani, 'Poor Credit Risk Management and Bank Failures in Nigeria' [2012] 3 Accessed July 22 January 2020 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185013

nationalisation of the affected banks by *CBN* through some forms of mergers, acquisition, takeover and change of ownership structure as the banks were eventually liquidated.[32]

Suffice to state that bank failure is not automatic as there are indicators such as inability to meet the banks financial obligation to customers in line with section 35 *BOFIA*. When a bank has indicated that it is failing in terms of section 35 of *BOFIA*, all that the CBN need do after investigation, is to turn over the control of the failing bank to the *Nigerian Deposit Insurance Corporation (NDIC)* [33] to control and manage the affairs of the company and depositors' money until CBN deems it no longer necessary for the *Corporation* to remain in control of the business of the bank.[34] The problem is that some affected banks fail to inform the *CBN* until they become unable to carry out their banking businesses, or when they inform the *CBN*, the *Apex Bank* will try to save the bank until it is very evident the bank is no longer able to meet its obligation. This was the case with Skye bank as they continually depended on *CBN* lending for sustenance until the bank was liquidated as the *CBN* stated that the bank required recapitalisation.[35]Early detection and regulatory palliative may help insulate a financial institution from failing.

3. Corporate Governance (CG) and Non- Performing Loans (NPLs)

Although there is no globally accepted definition of corporate governance (CG) especially as the concept is evolving and dynamic, Ugowe sees *CG* as '…the system by which companies are directed and controlled'[36] while the Organisation for Economic Corporation and Development *(OECD)* sees CG as a set of relationships between a company's management, its shareholders, its board and other stakeholders. Whenever high profile companies suddenly collapse, there is usually the suspicion that the internal control system was ineffective.[37] Disclosure and transparency have been observed as key pillars of the corporate governance framework, because they provide all stakeholders with the information necessary to ascertain if their interests are being served.[38]

Corporate Governance in the banking sector seeks to ensure customer satisfaction, high employee morale and the maintenance of market discipline, which strengthens and stabilises the bank, it ensures that the values of all stakeholders are protected while minimising asymmetric information between bank managers, owners and customers.[39] To ensure an effective transparency, accountability and disclosure regime in the banking sector, the *CBN* in 2003, developed a rule on Corporate Governance and in 2006 the government introduced a new

[32]There was merger , takeover and acquisition of Intercontinental bank, oceanic bank, first inland bank, Platinum Habib bank amongst others. This led to the emergence of the bridge banks such as Keystone bank , Mainstreet bank and Enterprise bank created by the CBN

[33] BOFIA Section 36

[34]Ibid section 38

[35] What happened to Skye Bank? 12 October 2018 <https://guardian.ng/opinion/what-happened-to-skye-bank/>accessed 18 May 2020

[36]AUgowe,' Monitoring Good Corporate Governance In Developing Countries: Evidence from Nigeria' [2016] *NnamdiAzikiwe University Journal of International Law*126

[37]Ibid 124

[38]B Adeyemi, ' Bank Failure in Nigeria: a Consequence of Capital Inadequacy, Lack of Transparency and Non-Performing Loans?' [2011]*Banks and Bank Systems*(6) (1) 103

[39]O I Obeten and S Ocheni and S John, ' The Effects of Corporate Governance on the Performance of Commercial Banks In Nigeria' [2014] *International Journal of Public Administration and Management Research* (2) (2) 219

Corporate Governance Code (CGC) for banks post consolidation.[40] There is now a 2014 revised guide for banks.[41]

Non-performing Loans (NPLs) refer to 'an outstanding loan that is not being repaid.'[42] It also refers to 'loans which do not generate income for relatively long period of time; that is the principal and/or interest on these loans are left unpaid for at least 90 days.'[43]In more specific terms, 'if a borrower has a loan and he has not fulfilled his loan obligations to the bank for more than 90 days then his loan is considered as non-performing.'[44] This could also be referred to as un-serviced loans or loans which may also be unsecured and may not follow the various disclosure regimes relating to bank lending thereby exposing such loans to risk.[45] Failure to follow due procedure contravenes the provisions of the *Failed Banks (Recovery of Debts*) and *Financial Malpractices in Banks Act.*[46]

NPL is a global issue that followed the financial crisis. In Europe, as at 2015, *NPLs* had reached €1 trillion, highlighting the issue that NPL remains a challenge across the European banking sector.[47]The management of *NPL* is not only concerned with handling them when they have been incurred, it also has to do with the development and implementation of policies and strategies concerning credit management before the problems arise.[48] This is where the role of regulatory agencies such as the *CBN* and the *NDIC* is manifest. Huge amount of *NPLs* may negatively affect the level of private investment, private consumption, increase deposit liabilities and constrain the scope of bank credit to the private sector leading to economic contraction.[49] Also, huge *NPLs* may aggravate the already high pressure on government revenues as attempt to resolve it may force government to provide financial assistance to problem banks[50] therefore; it becomes expedient to control it.

[40]Other laws and regulations in place to ensure banks meet up with the issue of corporate governance are NDIC Act 1988, CAMA 2004, BOFIA Act 1991, CBN Circular and Guidelines, e Prudential Guidelines, the Statement of Accounting Standard (SAS 10), Corporate Affairs Commission, Securities and Exchange Commission, Nigerian Stock Exchange.

[41] Code of Corporate Governance for banks and discount Houses in Nigeria 2014, https://www.cbn.gov.ng/out/2014/fprd/circular%20on%20code%20of%20circular%20on%20corporate%20governance%20and%20whistle%20blowing-may%202014%20(3).pdf accessed 16 May 2020

[42] B A Garner, '*Black's Law Dictionary'* 1020 (9th Edition)

[43]A M Adeolu, 'Impact of Asset Management Corporation of Nigeria (AMCON) On the Securitisation in the Nigerian Banking Sector' [2015] *Global Journal of Contemporary Research in Accounting, Auditing and Business Ethics* (2) (1) 283

[44]Anastasiou Dimitrios , 'Management and Resolution methods of Non-performing loans: A Review of the Literature' Athens University of Economics and Business [2016] MPRA Paper No. 77581, Online at <https://mpra.ub.uni-muenchen.de/77581/> accessed 18 May 2020

[45]AM Adeolu(n38)

[46] CAP F2 LFN 2004 Section 15(1) (a)(i) This provision makes a manager, officer or employee of a bank who grants a loan without security liable for the offence under this section.

[47] Alvarez and Marsal, Best Practices for Effectively Managing Non-Performing Loans https://www.alvarezandmarsal.com/sites/default/files/sidebar-callouts/am_nplpublication_f_pages.pdf'accessed 18 May 2020

[48]AnastasiouDimitrios(n39) 2

[49] IBID

[50]OlayinkaAkinola and Mofoluwaso Emmanuel , 'Determinants of Non-Performing Loans In Nigeria'[2014] *Accounting and Taxation*

3.1 Causes of Nonperforming Loans

(a) Unsafe Loan Practices

The major cause of NPL can be attributed to reckless granting of credit facilities to borrower companies without security, in some cases such loans exceed the banks' statutory lending limits in violation of the provisions of the law.[51] It has been observed that many owners and directors of banks abused or misused their privileged positions or breached their fiduciary duties by engaging in self-serving activities[52] which may be connected to making private gains. In the case of *Intercontinental Bank Plc* for example, it was alleged that the managing director, Erastus Akingbola gave out credit facilities to five firms without adequate security.[53]

To give a historical outlook, the classified loans and advances of the whole banking industry in 1990 amounted to N11.9 billion, representing 44.1 % of the total loans and advances.[54] Some of these loans were granted with no regard to the basic tenets of lending, such as due diligence,[55] borrowing power and credit rating of the borrower nor did they comply with any rational lending criteria. This made it extremely difficult or impossible to recover substantial part of the loans.[56] This sort of impunity becomes possible as a result of weak and poor corporate governance in the banking sector.[57] In 2016 alone, the total amount of *NPL* spread across banks in Nigeria totalled over 2 trillion Naira.[58] In the third quarter of 2018, *NPLs* increased by 400 billion naira or 21 % to 2.3 trillion naira from 1.9 trillion in 2ndquarter, this shows a 4 % decline when compared to 2.4 trillion recorded in 2017.[59] This decline can be said to be insignificant considering the effect of *NPL* on the economy.

Banks in Nigeria have been carrying loads of toxic assets that rose progressively from year to year without being reported through good credit risk management. Between '1994 and 2000 a total of 33 banks were liquidated in Nigeria due to huge non-performing loans which were well in excess of 200 billion naira'[60]as a result of attractive interest rates on deposits and loans. In the 1990s, credit facilities were given out indiscriminately without proper credit risk appraisal and management and many cases upfront payment and interest which are sometimes at par or even in

[51] BOFIA section 20(6) (2) 21-28 21

[52]BAdeyemi, ' Bank Failure in Nigeria: a Consequence of Capital Inadequacy, Lack of Transparency and Non-Performing Loans?' [2011] *Banks and Bank Systems*(6) (1) 103

[53] According to the punch newspaper, the firms, which were each granted a loan of N8bn without adequate security under Akingbola's watch, were Soo-Kok Holding Limited; Tofa General Enterprises; Cinca Nigeria Limited; Harmony Trust and Investment Limited; and Stanzus Investment Limited. EFCC re-arraigns Erastus Akingbola for alleged N179bn fraud. <https://punchng.com/efcc-re-arraigns-erastus-akingbola-for-alleged-n179bn-fraud/>accessed January 12 2020

[54]Op. cit.

[55] The purpose of due diligence is for risk management by the bank, as this will enable the bank make an informed decision as to whether to enter into the proposed transaction

[56] Op.cit.

[57]Ibid From the closing reports of banks liquidated between 1994 and 2002, there were evidences that clearly established that poor corporate governance led to their failures.

[58]BabajideKomolafe 'N2trn bad loans: CBN unveils framework for AMCON' 2 June 21 2017. <https://www.vanguardngr.com/2017/06/n2trn-bad-loans-cbn-unveils-framework-amcon-2/>accessed 17 September 2019

[59] Banking Sector Update: Bad loan rises further, hits N2.3trn, December 4 2018. <https://www.vanguardngr.com/2018/12/banking-sector-update-bad-loan-rises-further-hits-n2-3trn/> accessed 24 November 2019

[60]JNN Ugoani, 'Poor Credit Risk Management and Bank Failures in Nigeria' <http://ssrn.com/abstract=2185013> 1 accessed 30 November 2019

excess of the principal. The resultant effects were that much of such credits became bad and irrecoverable.[61] From the above, it can be seen that *NPL* occasioned by lack of due diligence by credit officers of banks is the bane of the banking industry which should be nipped in the bud.

(b) Weak Corporate Governance

Another cause of *NPLs* is the weak *Corporate Governance* (CG) regime in Nigeria. *Corporate Governance* abuse stems from forms of insider abuses and weak supervisory structures. Insider abuse may take the form of the owners and directors misusing their privileged positions to obtain unsecured loans which in some cases are in excess of their bank's statutory lending limits[62] in violation of the provisions of the *BOFIA*.[63] Also, some of these owners and directors grant interest waivers on non -performing insider-credits without obtaining the *CBNs* prior approval as required by *BOFIA*.[64] Their conversion of bank resources to service their other business interest such as allocation of foreign exchange without naira cover to insiders later crystallise as hard core debts. They also indulge in compelling their banks to directly finance trading activities either through the banks or other proxy companies, the benefits of which did not accrue to the banks.[65]All such acts of misconduct contravene the *Failed Bank (Recovery of Debts) and Financial Malpractices in Banks Act*[66] and are the result of poor *CG* as was evidenced in the notorious case of six blacklisted bank chief executives who were found to be guilty of financial abuses. Amongst them was the high profile trial and conviction on October 9, 2010 of Mrs *Cecilia Ibru,* the former managing director of *Oceanic Bank PLC.*[67]

4. Asset Management Corporation Of Nigeria (AMCON) And Management of NPLs

Following the global financial crisis that hit the Nigerian banking industry, in 2010, *AMCON* was established as an intervention corporation with the main purpose of resolving the threats in the banking industry and restoring the economic activity of the industry. The *Corporation* was established to be a key stabilising and re-vitalising tool established to reviving the financial system by efficiently resolving the non-performing loan assets of the banks in the Nigerian economy.[68]

The object and functions of the corporation are provided for under section 4 and 5 of the *AMCON Act* to efficiently dispose of eligible bank assets and to acquire eligible bank assets

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[61] Ibid Ugoani 'Despite various prudential measures employed to wage the tide, the rising profile of non-performing loans (NPLs) continued unabated into the 2000s. For example, Ajekigbe (2008), reported that the non-performing loans, advances and discounts (LAD) portfolio of First Bank of Nigeria Plc, kept from N2.021 billion in 2007 to N6.015 billion in 2008.This was just a single example from one of the best rated banks in Nigeria and when such bad loans from many
of the distressed banks were added, the banking system only waited patiently until the bubble was burst again in 2009 when the banking licences of 10 out of 24 banks in Nigeria were revoked by the Central Bank of Nigeria (CBN), accusing their executive management teams of high display of poor credit risk management, poor sense of judgment as well as inexperience.'

[62] G COkpara, 'A Synthesis of the Critical Factors Affecting Performance of the Nigerian Banking System' [2009] *European Journal of Economics, Finance and AdministrativeSciences* (17*)* 37

[63]ss 18 and 20

[64]Section 18

[65]Okpara, (n63) 37

[66] Cap F2 Laws of the Federation of Nigeria, 2004 and punishable under Section 16(1) (a) of the same Act

[67]Ibid

[68]AMCON Act 2010

including the acquisition of 'tainted assets.'[69] The rationale behind the establishment of *AMCON* is for the corporation to purchase the toxic assets from the banks to enable the banks have 'clean' balance sheet.[70] The implication therefore is that *AMCON* buys the bad debt that is, *NPL* of companies or persons indebted to the bank and converts same into debt securities such as government bonds or investing in equity shares which are tradable in the secondary market of the *Nigerian Stock Exchange (NSE).* Trading such debts makes them liquid and funds realised from trading on the debt securities may be applied to repaying the loans through the *AMCON*. Setting up an *SPV* for the management of *NPL* enhances credit discipline and division of labour while the separation of *NPL* from a distressed bank enables the bank managers to concentrate on banking restructuring and new lending.[71]

In line with its mandate, the corporation acquired Eligible Bank Assets (EBAs)[72] or NPLs of various Eligible Financial Institutions (EFIs). For a loan to be purchasable by AMCON, the EBA must emanate from an eligible financial institution. The top 5 EFIs which include the oil and gas sector, general commerce, capital market, banking, insurance and manufacturing sectors represent 58.18% of all purchased EBAs.[73] Furthermore, the corporation has so far acquired non-performing risk assets of some banks worth about N2.8 trillion, which has boosted liquidity, profitability, capital adequacy as well as enhanced the safety and soundness of banks[74]while removing the liability from the banks. In 2016, *AMCON* also purchased nearly N100 billion debt of *Capital Oil and Gas* from several commercial banks.[75] In total, at the time of this research, '*AMCON* had taken over *NPLs* granted by financial institutions to 14,000 companies and individuals and has a liability of about 5.4 trillion Naira, 80% of which was being owed by about 350 Nigerians'.[76]

AMCON not only buys off the toxic loans but goes further to manage the loans by issuing seven-year government bonds to these banks[77] which may be traded as debt securities or equities backed by shares of listed companies on the exchange thereby making the debt liquid.[78] To facilitate this process *AMCON* is empowered to issue bonds or other forms of debt instruments as consideration for the acquisition of toxic assets of banks and other financial institutions. Loans

[69]This includeloans, credits or other financial accommodation obtained by insiders, or persons related to or otherwise connected with, the eligible financial institution which granted the loan. See section 37 AMCON

[70]AM Adeolu, 'Impact of Asset Management Corporation of Nigeria (AMCON) On the Securitisation in the Nigerian Banking Sector' [2015] *Global Journal of Contemporary Research in Accounting, Auditing and Business Ethics* (1) (2) 284

[71]AnastasiouDimitrios(n39) 9

[72] Section 25(1) AMCON Act 2010

[73]The Percentage of AMCON portfolio was very high for the 6 banks that were nationalised, the highest being intercontinental bank with 14.62% followed by oceanic bank with about 11.58% while the lowest was Stanbic IBTC with about 0.13%. <https://www.amcon.com.ng/achievements.php> accessed 22 July 2019

[74]Adeolu(n24) 285

[75]Elombah Daniel 'IfeanyiUbah, Capital Oil, NNPC and the Wretched of the Earth'August 5 2017 <https://www.agendang.com/ifeanyi-ubah-capital-oil-nnpc-and-the-wretched-of-the-earth-by-elombah-daniel/>accessed 23 July 2019

[76]Ahmed Kuru 'Only 350 Nigerians responsible for 80% of N5.4 trillion debt'– AMCON June 28 2018 Agency report June 28 2018 https://www.premiumtimesng.com/business/business-news/274261-only-350-nigerians-responsible-for-80-of-n5-4-trillion-debt-amcon.html accessed 23 July 2019

[77] Section 26(1) AMCON

[78] C Amaechi,' Exploring the Requirement of Capital Adequacy and Bank Stability in Nigeria'[2016] The *Gravitas Review of Business and Property Law*(7) (2) 30-31,

that are eligible for purchase must be loans whose security rights and transfer are legally executable, as long as those loans are classified as substandard.[79]*AMCON* is assigned priority to the purchase of any *NPLs* if the removal of the *NPL* was considered to be critical to the rehabilitation of the institution concerned.[80]

After acquisition of the debt, the *EBAs* automatically become vested in *AMCON*, which is empowered to exercise all the rights and obligations previously enjoyed by the banks in relation to those *EBAs.* Thus, *AMCON* can: institute court actions to protect, perfect or enforce any existing security rights or obligations; realise any security interests that the financial institution could exercise on the debtor, call up any guarantee; and, exercise all powers conferred by any document that forms part of the bank asset.[81] As a corporation capable of suing and being sued in its corporate name, AMCON has over 3,000 court cases at the instance of debtors who are trying to restrain the corporation from foreclosing their assets.[82]This is worrisome and a great hindrance to the realisation of its mandate under the AMCON Act. However, section 34(6) *AMCON Amendment Act 2019* now prohibits the granting of injunctions against the corporation, still the corporation will have to deal with the 3,000 cases at hand.

It could be said that *AMCON* has partly met the expectation for its establishment as it brought about stability in the banking industry by buying off toxic assets from banks and converting same into tradable debt securities on the stock exchange between 2010 and 2011. Between 2010 and 2011 the corporation performed well as it successfully removed NPLs from the balance sheets of Nigerian Banks. At its highest level on June 30, 2010, the NPL ratio for Nigerian banking sector was 37.1%. The ratio reduced to 10.4% a year later after AMCON issued bonds in exchange for NPLs, before then the CBN revealed that the NPL ratio prior to AMCON's establishment was as high as 50%. [83] The effect of this is that it brought about sector liquidity thereby saving the financial institutions from the crises.

However, there are inconsistencies with the acquisition of these toxic loans that casts doubts on the role of *AMCON* in the discharge of its duties. The corporation buys toxic assets without crediting the bank accounts thereby denying the banks of the funds needed to engage in their intermediate functions.[84] Again, after *AMCON* acquired these *NPLs*, many of them turned out to have issues or intrinsic defects which *AMCON* did not realise or anticipate it would be contending with after conducting due diligence on the loans. Section 43 provides for the limitation of liability of the corporation by excluding *AMCON* from taking up any liability on loans that were subject of intrinsic defects from an eligible financial institution.

[79] O Ajowole, 'Investigating Nigeria's Asset Management Corporation: Case Study of a Bad Bank Solution to Banking Crisis' University of Cape Town, Master Thesis, [2014] 56-57 http://hdl.handle.net/11427/15509 accessed 22 August 2019

[80] Ibid

[81]Ajowole (n 83) 56-57

[82]TundeAjaja , 'Forfeited assets: AMCON battles 3,000 court cases' October 29 2017 <https://punchng.com/forfeited-assets-amcon-battles-3000-court-cases/> accessed 29 January 2020

[83]YoriEhimony 'A Critical Assessment of Asset Management Corporation of Nigeria(AMCON) as an SPV'https://www.academia.edu/15218615/A_Critical_Assessment_of_Asset_Management_Corporation_of_Nigeria_AMCON_as_an_SPV accessed 18 May 2020

[84]Amaechi(79) 33

By 2012, AMCON started performing poorly. The corporation began to experience losses leading to the corporation declaring a 351 billion naira loss for the 2016 financial year[85] and about 5.4 trillion naira in liability from about 2.8 trillion loans acquired so far. In line with the non-performance of *AMCON* and the loss experienced, the *CBN* and *NDIC* in a recent policy have considered the establishment of a private sector funding.[86]

5. The Malaysian Model of Asset Management - Lessons For Nigeria

In mid-1997, the country of Malaysia was hit by the Asian Financial Crisis, the worst financial crisis Malaysia has experienced since independence. As a result, the country was put on the edge of recession, and the whole of the Malaysian economy registered a negative growth rate of 7.5% in 1998.[87] As a result of this decline in its economy, it began to develop a model of economy recovery to tackle *NPLs*, and is now seen as one of the foremost countries to adopt the model of creating institutions run by public authorities to be responsible for coping with *NPLs*.[88] In Malaysia, this institution is known as the '*Pengurusan Danaharta Nasional Berhad* (or *Danaharta*)' an asset management company established in 1998 with the aim to acquire *NPLs* in the banking sector.[89] The *Danaharta* had a limited life span and had since ceased operation after fulfilling its mandate. These objectives were to be achieved through the acquisition, management, financing, and disposition of assets and liabilities by *Danaharta*.[90]

The *Danaharta* was required under its enabling law to acquire assets with certainty of title which was lacking in the *AMCON* as some of the loans acquired by *AMCON* had no title and thus became difficult to manage. Again, of the provisions of the *Danaharta* establishing law is the power to prohibit an injunction against it by the court,[91] this helped ease the bulk of legal disputes, a provision which was originally lacking in the *Nigerian Model* and seen as a delay tactic until the 2019 amendment to the *Act* which now prohibits the court from granting injunction against *AMCON* under section 34(6) *2019 Amendment.*

Moreover, the Danaharta employed the loan restructure method which is divided into viable and non-viable loan methods. For viable loan, it followed a soft approach consisting of plain loan restructuring which includes: rescheduling of loans through the extension of a loan tenure to facilitate the borrower's repayment over time, settlement of loan and voluntary scheme

[85]AMCON slumps to full-year loss, May 26 2017, <https://amcon.com.ng/news-story.php?n=13> accessed 29 December 2019

[86]BabajideKomolafe, 'N2trn bad loans: CBN unveils framework for AMCON 2' June 21 2017 <https://www.vanguardngr.com/2017/06/n2trn-bad-loans-cbn-unveils-framework-amcon-2/> accessed 29 December 2019

[87]RuzitaAzmi and AdilaAbdRazak ,'The Role of Danaharta in managing and rehabilitating Financially Troubled Companies in Malaysia Part -One'[2014] 383https://www.researchgate.net/publication/312091574_The_Role_of_Danaharta_in_Managing_and_Rehabilitating_Financially_Troubled_Companies_in_Malaysia_-_Part_One accessed 19 May 2020 385

[88] Masahiro Inoguchi, 'Nonperforming Loans And Public Asset Management Companies In Malaysia And Thailand' [2012]Asia Pacific Economic Paper NO. 398 2-3

[89]RuzitaAzmi and AdilaAbdRazak(n89) 385

[90] Ibid

[91] Section 72 of the Danaharta Act 1998

formulated by both borrower and creditor.[92] With this approach, ailing companies owing the banks were given opportunity to restructure their NPLs rather than having the bank petition for winding up. The benefit of loan restructure is that some companies can begin performing again and repay their debts. As such, the recovery structure is pushed to the ailing companies to sort out. Such restructures were nonetheless subject to the *Danaharta's* loan restructuring principle. For non-viable loans, the *Danaharta* employed a hard approach which led to foreclosure of the ailing company's assets, sale of property and all other legal remedies applicable.[93]

The *Danaharta* was given enormous powers from inception to protect the national interest of the country even where it entailed breaching the constitution and/or human rights, powers which *AMCON* does not have. Malaysian courts were fearless in interpreting the law despite it being inconsistent with the constitution. The *Danahartan* met expectation through a viable loan restructure policy, legal enforcement and a fearless judiciary[94] and ceased operation after 7 years.

Sadly for Nigeria, it was not until after 10 years of *AMCONs* operation that it began to input the novel provisions of *Danahartan* especially in the area of prohibition of injunctions. This delay affected the performance of *AMCON.* In its recent amendment, under section 50, which provides for the attachment and freezing of a debtor or a debtor company's bank account, this will affect the ailing bank in running its business.

6. Challenges Facing AMCON

In fulfilling its mandate, the corporation is faced with some underlying legal and regulatory challenges. These factors have affected *AMCON*'s performance in managing the *NPLs* from inception and have given rise to underperformance and acquisition of more debts. These challenges includes the inadequacy of the establishment Act, government role in bank failure such as bad economic policies, lack of availability of database to know whether an individual or company is credit worthy,[95] weak supervisory structure which is manifests in corporate governance abuses, weakness of the regulatory agencies such as *CBN* and *NDIC* in carrying out their duties effectively under their enabling *Acts* and some faulty foundations in respect of some of the acquired loans.

One of the major challenges that faced *AMCON* at inception was the lack of a credit reporting agency or bureau by the federal government or by regulators such as *NDIC* and *CBN.* This can be referred to as legislative inadequacy. For over 10 years in operation, there was no database in the country to determine who owes and the extent of debt owed. It is submitted that this is one of the constraints and contributions to the failure of the corporation as the corporation was unable to ascertain the extent of some debts of the acquired companies which may not be registered, filed

[92]RuzitaAzmi and AdilaAbdRazak ,'The Role of Danaharta in managing and rehabilitating Financially Troubled Companies in Malaysia' part –two [2015] https://www.researchgate.net/publication/312091658_The_Role_of_Danaharta_in_Managing_and_Rehabilitating_Financially_Troubled_Companies_in_Malaysia_-_Part_Two/link/5e8b0efd299bf130798052ff/download

[93] ibid

[94]RuzitaAzmi and AdilaAbdRazak(n95) 27 ' it had resolved all the NPLs it had carved out from the banking system during the Asian financial crisis and had met its projected lifetime recovery target of Malaysian Ringgit ('MYR') 30.35 billion – 26.96 billion in the form of cash and RM3.66 billion worth of residual recovery assets'

[95] Although this has been corrected with the enactment of the Credit Reporting Act, however, the non existence of this law earlier led to the problems the corporation faced and is facing today

or available in the register of the *Corporate Affairs Commission*'s reports. Not until 2017 was the *Credit Reporting Act (CRA)* was passed into law.[96] The *CRA* provides for the framework of credit reporting, facilitating and promoting access to credit and enhance risk management among others.[97] Functions of the *CRA* include creating and maintaining a database of credit and credit related information[98] on behalf of the bank (*CBN*).[99] If this law had been passed earlier, it may have enhanced due diligence/ disclosure before acquisition of an *EBA* by *AMCON* from inception.

Although banks and *AMCON* are expected to carry out due diligence (search report) from the *Corporate Affairs Commission(CAC)* which indicates whether the proposed debtor has an existing debt, fixed or floating charge or any form of indebtedness, it is not clear whether all indebtednesses are actually filed with the *CAC*. With the establishment of a credit bureau and a database system, credit reporting becomes easier and this will enable *AMCON* to readily determine and access credit information from the credit reporting management system of the bureau.

Some loans are given by bank executives without any form of collateral. This is one of the faulty foundations identified earlier. Where there is no collateral, it becomes impossible for *AMCON* to rely on any property to offset the debt from the bank. Before now, moveable assets such as machineries, furniture, personal effects such as jewelleries were unpopular in securing of loans as banks preferred the use of landed properties; this may be an impediment in securing collateral. However, seven years after the establishment of *AMCON*, (in 2017), the *Secured Transaction in Moveable Assets Act*[100]was passed into law making for the facilitation of access to credit secured with moveable asset. This implies that a company or an individual can now borrow money from a bank or any financial institution and collaterise the loan with a moveable asset. This law further provides for a collateral registry.[101]From the above, the paper established that inadequate laws/government failures contributed to the failure of *AMCON*.

Another challenge is the litigation of *AMCON* cases. Section 49-50 of the *AMCON Act* makes provision for the corporation to apply to the court by motion *exparte* to take possession of the debtor's properties. Currently *AMCON* has over 3,000 court cases at the instance of debtors who are trying to restrain the corporation from foreclosing their assets. The power given to debtors under our justice system to restrain the corporation hindered the performance of the corporation. With the recent amendment of the *Act*, debtors are now precluded from restraining the corporation through injunctions. This is in line with the *Malaysian Model*.

Although the *Act* did not make provision for any form of alternative dispute resolution, the practice direction 2013[102] in its rule 2.2 (e) encourages parties to use *ADR* mechanism when

[96] Credit Reporting Act 2017
[97] Credit Reporting Act 2017 s 1
[98] Ibid s 3
[99] Ibid, s 4(1)
[100]2017
[101] See Section 1, Secured Transaction in Moveable Assets Act 2017
[102] Rule 1.2 of the AMCON Practice Direction 2013 provides the fundamental objective of the practice directions enables the court (Federal High Court) to deal with AMCON claims quickly and efficiently.

appropriate. It is surprising that since inception, *AMCON* has not explored this option to reduce legal disputes.

6. Conclusion & Recommendation

NPL is a global issue but can be managed through effective economic and monetary policies, and laws in place. It is submitted that *AMCON* has underperformed as it has not lived up to its responsibility as it has acquired more NPLs than desired. *AMCON* was formed to bring stability to the Nigerian financial system; therefore, it needs full institutional and legislative support available in the financial industry because the total failure of AMCON will affect the banking system, which will also affect the economic outlook.

Considering the challenges faced in debt recovery and the number of legal disputes facing the corporation, in 2019, the *AMCON Act* was amended[103]to aid debt recovery by empowering the agency to access financial details of debtors among other amendments. The agency can now place bank accounts of debtors under surveillance, obtain access to computers and access to banking details of debtors.[104] Suffice it to state that having stepped into the shoes of the bank for debt collection purposes, a banker customer relationship now exists which outs the previous banker customer relationship between the debtor and the banker, no banker customer relationship could be said to have been breached.

On reducing the number of cases in court, the slowness in litigation as a result of incessant adjournments and lack of diligence of counsel, and the fact that litigation does not instil investor confidence, the paper recommends that *AMCON* should trigger the alternative dispute resolution mechanisms in the practice direction which is faster in settling disputes to recover the huge amount of money owed them. *ADR* can be seen as one of the fastest methods of settlement of commercial dispute unlike litigation. To realise this, judges and *AMCON* tribunal should be trained on the requisite *ADR* mechanism suitable for the dispensation of *AMCON* related cases. There are several *ADR* options such as arbitration, negotiation and mediation, these mechanisms should be explored. These identified debts are commercial disputes which can be resolved through arbitration.

The paper discovered that bank failure arises as a result of malpractices in bank lending and creation of non-performing loans triggered by bank owners and directors who fail to follow the bank's lending policy. Consequently, the paper makes some important recommendations for improved management of *NPLs* by AMCON. The first step to an effective management of NPL is preventive measures achievable through an effective prudential regulation in the financial system. There is need for the enhancement of due diligence. This is very important in bank lending to disclose the borrower's ability to service the loan or not, it also shows if there are encumbrances such as floating or fixed charge or even debenture on the collateral to be used by the borrower. It further shows in case of registered corporations, whether the company has borrowing power. Due diligence exposes any anomaly in a transaction and it is highly recommended for *AMCON* and the banks to ensure this is done, either by their in-house lawyer,

[103] AMCON (Amendment N0 2) Act 2019, An Act to amend the AMCON Act No 4 2010 to give the corporation additional functions and increase the members of the board and for related matters.
[104] AMCON Act 2019, Section 6 as amended

credit officer or a private lawyer hired for that purpose. The credit reporting agency platform can be used to verify a borrower's credit rating.

To also improve on the *CG* in Nigeria, it is pertinent to adhere to some internationally recognised *CGC* such as the *OECD* model and the *Basel Accord Committee on Banking Supervision*.[105] When a bank sees that it cannot meet up with its obligation, it should file notice of bank failure or insolvency early enough, so that *NDIC* can takeover before it escalates. To ensure transparency and disclosure, the regulator should ensure commercial banks comply with the various disclosure regimes which may be on-going, periodic, quarterly or annual. To minimise non -performing loans, companies owing the bank may be advised to sell their portfolios to other investors to get rid of the risky assets or this option may be included in the loan agreement between the borrower and the lending bank.

The lending bank should ensure there is an adequate risk assessment before giving out loans to customers. Bank regulators should improve on their oversight functions to ensure banks and financial institutions comply with the various disclosure, accountability and transparent regimes as provided for under the laws and rules. The government should equally be proactive in economic policies as bad policies may highly affect the role of government agencies.

The *Malaysian Model* is vital as it focused on loan restructuring with guidelines developed by the *Dahanarta*, *AMCON* should focus their guideline on loan restructuring to help failing companies *NPLs* especially if such companies are viable. On Section 50 of the *AMCON Act* that allows freezing of the asset, the paper recommends that the corporation should follow loan restructuring process instead of freezing assets of the company, through this restructuring, it will determine whether the company can be revived and pay off their debts. There is no one- size -fit -all for recovery of debt, it is recommended that *AMCON* should study each company's portfolio to determine the appropriate discovery strategy which may be by extension of the loan period or reschedule payment plan.

The courts also have a vital role to play to ensure *AMCON* is able to meet its mandate; the court should be fearless in interpreting the law in favour of the corporation for national interest of the nation. It is hoped that with the implementation of the recent amendments of 2019 the *AMCON* will be repositioned to fulfil its mandate and drastically reduce *NPL* on its balance sheet.

[105]Obeten and others(n49) , 230