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Reflections on Legal Controls of Financial Distress in Nigerian Banks*

Introduction

The object of this paper is to examine the adverse consequences of financial distress in Nigerian banks in the light of the relevant statutory controls of financial distress in Nigeria and to offer some suggestions on how this problem can be adequately addressed by the Nigerian Monetary Authorities.

The banking industry is one of the pillars on which the economy of any nation has been built. Whatever happens in the banking sector is bound to have some impact on banking investors, including the shareholders, the depositors and the users of banking services. Also, whatever happens in the banking sector is bound to have some ripple effect on the entire economy of any nation both internally and at the international level. The significant position of the banking industry has influenced the decision of the Nigerian government in making concerted efforts to ensure that licensed banks are adequately supervised and monitored through statutory enactments and various ancillary regulations.

"Financial distress" in banks has not yet been statutorily defined. However, a distressed bank can be described as a bank which its liabilities have exceeded the market value of its assets. Although *"distress in banks"*

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and *"bank failure"* are common calamities to bankers, they are however, two different successive concepts. A bank first experiences financial distress before its business activities eventually fails. A failed bank has been statutorily defined as a bank which its licence has been revoked or which its management has been taken over by the Central Bank of Nigeria, (*"CBN"*) or the Nigeria Deposit Insurance Corporation (*"NDIC"*) or one which has been described by the appropriate Monetary Authorities as having failed.[1]

There are a number of factors that can lead to financial distress in banks. One of these factors is weak and poor management of some of these banks especially the new ones. Most of the managers are ill-equipped for their posts. The early nineties in Nigeria witnessed a proliferation of banks without adequate manpower to properly manage them. Some of these new banks then compromised standards by employing young and inexperienced staff who had not enough educational background in banking and finance to handle high official responsibilities. Consequently, these banks dissipated much of their time and resources re-orientating these inexperienced staff instead of concentrating on how to expand and flourish.

One other factor that has led to financial distress in banks has been fraud and forgeries by the staff of these banks. In *Federal Republic of Nigeria v. Baba-Bangoji and Another*,[2] the 1st accused person was an Assistant Branch Manager of the Nigeria Universal Bank while the 2nd accused was an Officer of the Federal Ministry of Education, Kaduna. Certain unauthorized credit facilities were alleged to have been extended to the clients of the bank and at the time the facilities were granted by the 1st accused bperson, there was a circular forbidding such grant by CBN. The 2nd accused person was alleged to be the conduit-pipe through which

1. See, *section 29, Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree*, No. 18, 1994 (as amended), now Cap. F.2, Laws of the Federation of Nigeria, 2004.
2. (1999) F.B.R.T.L.R. 178; see also, *Federal Republic of Nigeria* v. *Odogwu* (1997) 1 F.B.T.L.R.179.
3. *Supra*.

some of the money was siphoned as he was the one who approached two clients of the bank, asking them to sign blank cheques which he and the 1st accused person used to take money out of the bank through their accounts. The accused persons were charged with an offence contrary to *section 19 of Failed Bank (Recovery of Debts) and Financial Malpractices in Bank Act, 2004*.[3] The Failed Bank Tribunal convicted the accused persons and held that the 1st accused person was guilty of the offence charged because he knowingly granted credit facility without authority and in contravention of the circulars against lending and the rules and procedure of the bank. The 2nd accused person was also convicted on the ground that not being an officer of a bank he could not grant any facilities to a customer of the bank but by his overt act as has been shown in the case he could conspire with an officer of the bank to grant facilities by doing an act which is not illegal if done by an officer of the bank in accordance with the rules and procedures of the bank.

Moreover, *"boardroom politics"* and undue interference that go on in these banks are better imagined than experienced. A recent example is that of *Savannah Bank (Nigeria) Plc.*,[4] in which at one time, the Board of Directors of the bank was asked to resign *en masse* by a purported foreign investor of the bank, the International Resource Associate (U.K.) (*"I.R.A."*). A new board was inaugurated but shortly afterwards, there was crisis again, rendering the Board of Directors inept and ineffective in the discharge of their responsibilities. The crisis and high *"turnover"* of the bank's Chief Executive Officers were, largely, traced to alleged undue interference of the wife of one major shareholder of the bank. The reported interference was also said to have given rise to indiscriminate recruitment of a new management team which, according to C.B.N's findings, had no document in their files to show they were interviewed for the job. Also, *I.R.A.* was purported to have acquired controlling interest of 59.9 per cent in the bank through the Nigerian Stock Exchange for a sum

4. See, *Tell Magazine (Nigeria)*, March 4, 2002, 38 to 42. The case of *Savannah Bank (Nigeria) Plc. v. NDIC and CBN* is still *sub judice* on this matter.

of $7 Million. CBN, however, noticed that *I.R.A.* did not remit the $7 Million. Savannah Bank also claimed that $6.8Milion out of the money had been spent on its computerization processes. However, the value of the Information Technology equipment on ground did not justify the amount said to have been spent. As at March 31, 2000, a negative shareholders' funds balance of ₦2.9 bilion had been posted and the bank recorded ₦694.9milion and ₦2.8billion losses for the period. A joint examination of the bank by CBN and NDIC which was conducted on March 31, 2001 revealed a lot of fraudulent activities that went on in the bank. For instance, it was discovered that 74 per cent of the bank's total credit exposure of ₦10.06 billion was non-performing, the unaudited profit of ₦50.8million was found to be mere paper profit, the bank's current account with C.B.N. was overstated with non-existing assets of ₦1.68billion. The bank's recapitalisation requirement was found to have deteriorated from March 2000 figures of ₦3.4billion to ₦5.43billion. Also, the management of the bank was found to have spent ₦97.5million for a 30-year leasehold which the owner had offered to the bank for ₦40million as a freehold.

Based on these scandalous findings, CBN directed the management of Savannah Bank (Nigeria) Plc. to rectify the identified irregularities. In January, 2002, another combined team of examiners from CBN and NDIC was sent to the bank to verify the Savannah Bank's claim that it had rectified all the identified irregularities. The special examination further revealed that liquidity ratio of the 44.6 per cent claimed by the bank was false, the liabilities for treasury bills of ₦2.1billion were financed with borrowings from banks and discount houses and these were held for only three days; the bank's current account with C.B.N. was overstated by ₦975million and the figure recorded as cash at hand of ₦2.2billion could not be confirmed. In view of the state of affairs of Savannah Bank (Nigeria) Plc., C.B.N., in order to protect the depositors, had to revoke its banking licence on the grounds aforementioned.

Furthermore, it has been alleged that most banks, with the active connivance of their External Auditors, sometimes present doctored

balance sheets to their Annual General Meetings and also make false declaration of profits in order to lure more unsuspecting customers.[5]

Financial distress in any bank and the resultant failure of such bank may spell the doom of many customers of such bank and if then there are widespread bank failures, the effect on the economy and the society as a whole has often been adverse in the light of the experience of bank failures in Nigeria in the early nineties. We may now examine the impact of financial distress in banks on the society and the economy.

Financial Distress As Socio-Economic Menace

In view of the global socio-economic importance of the banking industry, financial distress in banks is a major threat to the financial security of the average citizen in particular and of the nation in general. One of the consequences of financial distress is the erosion of public confidence and trust in the banking system. The banking industry requires public confidence and trust to thrive. Indeed, it is the confidence which the public repose in banks that has led them to entrust their valuable liquid and other assets to the bank.

Financial distress in banks also brings untold hardship to the shareholders as well as the individual depositors in these banks who may have to lose some or all of their life savings or deposits with these banks. The Nigerian government has however taken precautionary measures through the NDIC to save the government from embarrassment by imposing an obligation on every licensed bank to insure its deposit liabilities with the corporation under *section 15* of the *Nigerian Deposit Insurance Corporation Act* (*"NDIC Act"*)[6] which provides that *"all licensed and such other financial institutions in Nigeria engaged in the business of receiving deposits shall be required to insure their deposit liabilities with the corporation"*. Thus, where an insured bank fails on account of inability of meeting the demands of its depositors, payment of the insured deposit in such bank shall be made by the Corporation to each

5. See, *The Monitor, (Nigeria)*,Monday, 11th March, 2002,1.
6. *Cap.N.102 Laws of the Federation of Nigeria, 2004.*

depositor under *section 27* of *the NDIC Act*. However, each depositor, whatever the amount he or she may have in such banks, is only entitled to a maximum of ₦50,000 (Fifty Thousand Naira) assessable deposit of an insured bank under *section 26* of *the NDIC Act*.

Another consequence of financial distress in banks is that many enterprises face imminent collapse. Many large, medium and small scale enterprises which have substantial funds in such banks may be unable to retrieve such funds. Some of these hapless enterprises that escape collapse may retrench their workers. Consequently, many people will be out of jobs and this will have a cyclic effect on the economy and the nation and the crime rate in the country may increase thereby. Financial distress in banks is hostile to the growth of banking habit and may force many people to keep their money at home with the attendant risks of attacks from armed robbers and needless loss of lives.

Moreover, as banks play an essential role in international trade and in payment for goods and services, financial distress in banks may financially cripple their customers who engage in international trade. Moreover, if many of these banks are financially distressed, Nigerian bankers will be exposed to distrust by the international banking community and this will reduce the inflow of foreign investments to the country.

Policy-makers in Nigeria have, over the years since the enactment of *the Banking Act, 1952*,[7] taken diverse measures to control financial distress in Nigerian banks and the eventual failure of banks in Nigeria. We should now examine the measures in order to appreciate their impact on the Nigerian banking system.

Relevant Statutory Controls

There have been attempts made by successive governments in Nigeria to regulate banking practice in order to instill discipline and control financial distress. The principal legislation regulating banking business in

7. No. 15, 1952.

Nigeria include *Banks and other Financial Institutions Act, 1991 ("BOFIA")*,[8] *Central Bank of Nigeria Act, 1991*,[9] and *NDIC Act.*[10] There is also the annual or bi-annual *CBN Monetary and Credit Policy Guidelines*, usually, issued to all licensed banks at the beginning of the year to regulate their activities and operations. The current *CBN Monetary Policy Circular* is *"Monetary, Credit, Foreign Trade and Exchange Policy Guidelines For Fiscal Year 2005/2006, No.38"*. All these statutory enactments contain several provisions aimed at controlling financial distress in Nigerian banks.

The body charged with the responsibility of exercising supervisory functions and control over licensed banks in Nigeria is CBN. By virtue of *section 1(1) and (2)* of *BOFIA* which provides that CBN shall have all the functions, and powers conferred and duties imposed by *BOFIA* and *CBN Act.*[11] The Court of Appeal has also held in *Savannah Bank of Nig. Plc. v. Opanubi*[12] that the functions of CBN over all licensed banks and financial institutions in Nigeria is supervisory. Also, the origin of CBN's powers are statutory being derived from both *CBN Act* and *BOFIA*.

The good faith of the Federal Government as well as of the policy makers in controlling financial distress in banks can be seen in the several provisions of *BOFIA* and in *the Monetary Policy Circular No.38*. The first of such provisions is *section 9 of BOFIA*, as amended by *section 7 of Decree No. 38, 1998*,[13] which empowers CBN to determine from time to time, the minimum paid-up share capital of licensed banks, in view of the need to strengthen capacity of deposited money in banks, the need to

8. No. 25, 1991 (as amended by *Banks and Other Financial Institutions Amendment) Decree No.4, 1997, Decree No. 38, 1998, Decree No. 40, 1999 and Act No. 10, 2002*, now *Cap. B3, Laws of the Federation of Nigeria, 2004*.
9. No. 24, 1991 (as amended by *Central Bank of Nigeria (Amendment) Decree No. 3, 1997, Decree No. 3, 1997, Decree No. 37, 1998 and Decree No. 41, 1999, now Cap. C4, Laws of the Federation of Nigeria, 2004*.
10. *Supra*.
11. *Supra*.
12. (1999) 13 N.W.L.R. (Pt. 634), 203.
13. *Supra*.

ensure a strong financial base for banks and enhance public confidence in the banking industry and the necessity of minimizing the risk of distress of banks. The minimum paid-up capital requirement for *new* banks was raised from ₦1.0 billion (One Billion Naira) to ₦2.0 billion (Two billion Naira) in 2001 fiscal year while the *existing* banks are required to raise their capital base to ₦ 1.0 billion (One billion Naira) by end 2002 in order to strengthen their operations.[14] The current minimum paid-up capital of licensed banks in Nigeria is ₦25 billion (Twenty-five billion Naira). The quest to meet the ₦25 billion minimum capital base stipulated by CBN for banks in Nigeria compelled some of the latter to quickly acquire or merge with other banks in order to meet the requirement before the stipulated deadline of 31st December, 2005. At the end of the exercise, CBN, in a statement, confirmed that only 25 banks emerged, out of a total of 89 banks that were in existence in the country as at June 2004.[15]

Section 13 of BOFIA also prescribes the *"minimum capital ratio"* for every licensed bank and non-compliance with this requirement might lead to a revocation of the licence of the bank in *section 14 thereof.* By *section 15 of BOFIA*, every bank is required to maintain a minimum holding of cash reserves, specified liquid assets, special deposits and stabilization securities in order to satisfy the liquidity minimum which CBN may, periodically, prescribe and by *section 16 of BOFIA*, every bank is required to maintain a reserve fund into which a certain percentage of the profits of a bank for any financial year is expected to be transferred for the purpose of ensuring that the amount of the reserve fund is sufficient for the purpose of the business of the bank and also adequate in relation to its liabilities.

Section 17 of BOFIA also enjoins licensed banks not to declare dividends without fulfilling certain conditions such as making sure that all the liabilities and expenses of the banks have been completely written off so as to preserve the integrity of the banks capital. In *sections 24 to 29 of BOFIA*, there are elaborate provisions for the keeping and disclosure of

14. See, *section 3.2.11 (d) (i), Monetary Policy Circular No. 36, 2003/2004.*
15. See, *The Guardian (Nigeria)*, Sunday, 4th June, 2006, 24.

books of accounting and other operations of a licensed bank in order to ensure that there is probity and accountability in Nigerian banks. Thus, in *section 24 thereof*, it is provided that every licensed bank shall cause to be kept proper books of account with respect to all transactions of the bank and which must reflect a true and fair view of such transactions. In *section 25 thereof*, it is required of every licensed bank to submit to CBN, a monthly statement of its assets and liabilities and a monthly analysis of advances and other assets of its Head Office and branches throughout the country.

By *section 27 of BOFIA*, every bank is required to publicize its Balance Sheet and Profit and Loss Account in every financial year and in *section 28 thereof*, it is provided that every Balance Sheet and Profit and Loss Account of a bank shall give a true and fair view of the state of affairs of the bank as at the end of the reporting period. Also, in *section 29 of BOFIA*, it is provided that every licensed bank has a statutory duty to appoint an Approved Auditor whose duty it is to scrutinize the Annual Balance Sheet and Profit and Loss Account of the bank and also give a report thereon to the shareholders. The Approved Auditor is also under a statutory duty to report on frauds and forgeries committed during the accounting year.[16] This provision is aimed at promoting financial rectitude of every licensed bank.

One other area of statutory controls of licensed banks concerns the calibre of staff qualified to work in these banks and this can be found principally in *sections 18, 19 and 44 of BOFIA*. It is provided in *sections 19 and 44* for example, that, it shall not be lawful to employ any person either, as a director or officer, who has been adjudged a bankrupt or has suspended payment to or has compounded with his creditors or has been convicted by a Court for an offence involving fraud or dishonesty or professional misconduct. The combined effect of *these two sections* is to ensure that only people of high integrity who are physically and mentally capable would serve in the employment of these banks.

16. *Monetary, Credit, Foreign Trade and Exchange Policy Guidelines for Fiscal 2004/2005.*

In *Section 18 of BOFIA,* it is provided that any director who is interested in any loan, advance or credit facility, or proposed loan, advance or credit facility from the bank is to declare the nature and extent of his interest to the board of directors of the bank unless such interest is considered to be immaterial. In *Federal Republic of Nigeria v. Anyaegbunam,*[17] the accused person was charged with the offence of failing to disclose his interest as a director of Group Merchant Bank Limited in a ₦2,000,000.00 (Two Million Naira) and a ₦9,313,447.10 (Nine Million, Three Hundred and Thirteen Thousand, Four Hundred and Forty-Seven Naira, Ten Kobo) credit facilities granted to a trading company in which he had substantial interest, contrary to *section 18 of BOFIA* and punishable under *section 18 (9)* of the same *Decree.*

The Failed Bank Tribunal held that where an accused person is charged with an offence under *section 18 of BOFIA*, the prosecution must prove that the accused is a director of the bank in question at the material time, that the accused is a person interested in a loan, advance or credit facility to be granted or proposed loan, advance or credit facility and that such interest must be personal and that the accused failed to declare such interest. The Failed Bank Tribunal also held that the prosecution had proved its case against the accused by establishing the fact that his interest in the facilities was personal and that he failed to declare his interest.

However, the mere fact that a director in a company merely introduced clients to do business with a bank will not, necessarily, amount to having any interest in any loan, advance or credit facilities to such clients This was the decision of the Court of Appeal in *Co-operative Development Bank Plc. v. Joe Golday Company Limited and Others*[18] in which the 6th Respondent was alleged to have introduced twenty-one companies to do business with the Appellant. It was, however, established in evidence that he had no direct or indirect personal interest in any advance, loan or credit facility or proposed loan or credit facility or proposed advance in any of the twenty-one companies he had introduced to the Appellant-bank and

17. (1997) I F.B.T.L.R. I.
18. (2000) 14 N.W.L.R. (Pt. 688), 506.

that there was no reliable evidence establishing that loans or credit facilities were granted to those companies. He was, therefore, discharged and acquitted of the alleged offence that he failed to declare his interest as required by *section 18(3) of BOFIA*.

Another area of statutory control of licensed banks has been exercised in respect of lending. On a general note, *section 20 of BOFIA* has been designed to regulate bank lending. In this section, there is a legal restriction imposed on types of loans and investments and the total loan to any single customer. By this same *section 20,* the total loan, advance or credit facility to anyone should not be more than twenty per cent of the shareholders' fund unimpaired by losses for commercial banks and fifty per cent in case of merchant banks. A bank is further required under *the section*, without the prior approval in writing of CBN, to prevent any outstanding unsecured loans or unsecured credit facilities in excess of ₦50,000:00 (Fifty Thousand Naira). This amount has however been increased to ₦1,000,000.00 (One Million Naira).[19]

A special definition of *'director'* has been given in this same *section 20* so as to prevent the enthronement of technicality whereby fraud perpetrated by bank directors cannot be traced and neutralized. It is, thus, provided in *section 20 (5) of BOFIA* that the expression: *'director'* includes director's wife, husband, father, mother, brother, sister, son, daughter and their spouses.

In *Federal Republic of Nigeria v. Odogwu and Another*,[20] the first accused person, who was then the Managing Director of the second accused person, was alleged to have committed several offences, namely, that he granted unsecured advances of amounts exceeding the statutory limit specified by *section 20 (2) (a) (ii) of BOFIA*, to three companies in which he had substantial interest; to have managed three companies whilst

19. See, *section 7* of Decree, No. 4, 1997, *supra*. This amount was reduced to ₦100,000:00 by *section 11* of Decree, No. 38, *supra*, but was put back at ₦1,000,000:00 by *section 5* of Decree No. 40, 1999, *supra*.
20. (1997) I F.B.T.L.R. 179.

also managing the second accused which had no holding or subsidiary relationship with the companies in breach of *section 19 (3) (a) of BOFIA,*; failure to maintain proper books of account as required; forgery of documents of loans and advances and Returns submitted to CBN and making false entries in the second accused person's book of account. The first accused person was found guilty on all the charges and convicted as charged.

Also, in *Federal Republic of Nigeria v. Murnai,*[21] the accused person was accused of granting credit facilities to customers of the bank without lawful authority in contravention of the rules and regulations of the bank and of granting credit facilities without taking security or collateral to cover all the facilities granted by him. The Failed Bank Tribunal held that the prosecution had proved beyond reasonable doubt that he granted credit facilities without adequate securities, he was therefore convicted of the offence charged.

Also, in *the Monetary Policy Circular No. 36,*[21] CBN has stated that banks shall be penalized under *section 60 (1) of BOFIA 1991,* as amended, if the credit status of a customer is not sought from the Credit Bureau, under the Credit Risk Management System (CRMS), before credit is granted or when credit is granted to a delinquent customer or if a delinquent credit is not reported. This CBN rule is aimed at curbing indiscriminate, unauthorized lendings and reckless granting of credit facilities. All licensed banks are yet enjoined to follow prudential guidelines on early recognition of losses and adequate provisioning for bad and doubtful debts.[22]

Other relevant statutory controls against financial distress in Nigerian banks will be found in *section 30* through *Section 38 of BOFIA* wherein CBN has been vested with the power of superintending the banking industry and this function CBN performs, mainly, through the Director of Banking Supervision with the assistance of other officers of the bank

21. (1998) 2 F.B. T.L.R. 196.
21. *Section 3.2.23. (iv).*
22. *Supra*, see, *section 3.2. 14.*

designated as examiners. These bank examiners have the power to examine, periodically, the books and affairs of each and every licensed bank. In the performance of their duties, they are vested with the right of access, at all times, to the books, accounts and vouchers of the bank. They are also entitled to require officers and directors of any bank to furnish any information or explanation they may deem necessary for their examination. The statutory purpose of this bank examination is to enable detection of any financial malpractice that may have occurred and to ensure that banks do not furnish false statements or keep incorrect books of account.

Apart from the regular examination under *section 30 of BOFIA*, *section 32* thereof also provides for the conduct of special examination into the operations of a bank where the Governor of CBN is satisfied that (a) it is in the public interest so to do or (b) the bank has been carrying on its business in a manner detrimental to the interest of its depositors and creditors or (c) the bank has *'insufficient'* assets to cover its liabilities to the bank, or (d) the bank has been contravening the provisions of *the Act* (e) an application is made therefore by (i) a director or shareholder of the bank; (ii) a depositor or creditor of the bank. Provided that in the case of paragraph (e), the Governor of CBN may not order a special examination or investigation of the books and affairs of a bank if he is satisfied that it is not necessary to do so.

Where the findings of a special examination reveal any of the circumstances mentioned above, the Governor of CBN may take a variety of actions or decision ranging from ordering the bank to take certain steps to the outright revocation of its licence. However, the revocation of the licence of a bank can be regarded as *the sanction of the last resort* against an obdurate or a recalcitrant bank. The Governor of CBN, with the approval of the Board of Directors of CBN, revoke any licence granted to a licensed bank under *section 12 of the BOFIA* and he does not seem compellable by action in court to do so.

In *Gadzama v. The Rims Merchant Bank*,[23] the Appellant, as Petitioner, brought a Petition at the Federal High Court, Lagos, against the Respondent to wind-up the Respondent and for revocation of its banking licence. The Respondent, consequently, filed an application seeking an order restraining the Appellant from taking any steps in the Petition or proceeding in the Petition by way of advertising it as well as an order striking out the petition *in limine*. The trial Court granted the application and consequently struck out the Petition. Dissatisfied, the Appellant appealed against the ruling to the Court of Appeal. The Court of Appeal dismissed the appeal, and held that under *section 12 of BOFIA*, it was the Governor of CBN who may, with the approval of the President, revoke any licence granted under *BOFIA*. And that the Governor does not seem compellable by action in court to do so. Consequently, it was a misconception that the Appellant thought he had the standing to do so. However, by virtue of *section 2 of Decree, 40, 1999*,[24] now, the Governor of CBN only requires the approval of the Board of Directors of CBN to revoke the licence of a bank.

However, in the exercise of his power to revoke, the Governor of the CBN is under a statutory duty by virtue of *Section 5 (4) of BOFIA* to give the licensed bank concerned a fair trial before he decides to revoke its licence. Therefore, the Governor's order of revocation would be *ultra-vires*, null and void if he fails to observe this fundamental rule of natural justice. The Court of Appeal in *Co-operative and Commerce Bank (Nigeria) Plc. v. O' Silvawax International Limited*[25] held that the revocation of the licence of a bank is not a terminal event but that revocation could have indicated an ill-disposition, an acute and serious ailment. It does not go beyond that condition to herald and constitute the death of the bank. Until the bank is wound-up, it remains alive and possessess its legal personalty, as sick as it could have been and as indicated by the revocation of its licence.

23. (1997) 4 N.W.L.R. (Pt. 498) 234.
24. *Supra*.
25. (1999) 7 N.W.L.R. (Pt. 609) 97.

NDIC Act also contains some provisions aimed at guarding against financial distress in banks. By *section 5 of the Act,* the Corporation is empowered to give assistance to a bank in case of imminent or actual financial difficulties of the bank; and by *section 16* through *section 18,* NDIC has powers similar to those contained in *section 30* through *section 32* of *BOFIA* to appoint examiners to examine the books and affairs of an insured bank. However, where there are inconsistencies in any of the provisions of *BOFIA* and *NDIC Act*, the provisions of *BOFIA* shall prevail by virtue of *section 54 of BOFIA*.

By and large, one can deduce from the foregoing analysis of the various relevant statutory controls of financial distress in Nigerian banks that the efforts made by the policy-makers in Nigeria to guard against financial distress in the Nigerian banking industry have been well focused. In order to ensure the proper implementation of the provisions of the laws, and to ensure that the Nigerian Monetary Authorities and their agents perform their duties without any fear of intimidation or undue anxiety, it is provided in *section 49 of BOFIA* that nothing done or omitted to be done by the Federal Government or its agency shall be subject of litigation in any court of law.

By *section 49 of BOFIA,* neither the Federal Government nor CBN nor any officer of that Government or CBN shall be subject to any action, claim or demand by or liability to any person in respect of anything done or omitted to be done in good faith in pursuance or in execution of, or in connection with the execution or intended execution of any power conferred upon that Government, CBN or such officer, by *BOFIA*. *Section 49 of BOFIA*, in effect, has ousted the jurisdiction of the Court in respect of any act or omission of the Federal Government or the official of CBN done in *good faith* in the exercise of the power conferred on them by *BOFIA*. In *Nigeria Deposit Insurance Corporation v. Central Bank of Nigeria and Republic Bank Limited,*[26] the Plaintiff/Respondent's banking licence was revoked by the first Defendant/Appellant on 29th June, 1995.

26. (2000) 18 W. R.N. 1.

on the ground that the Plaintiff/Respondent was in a grave financial condition, which had culminated in the total erosion of its capital base and the dissipation of its depositors' funds and had resulted in the inability of the bank to meet its obligations to its depositors and creditors. The various actions taken by the Regulatory Authorities to halt further deterioration including calls on the shareholders to recapitalise the bank, had failed. The Plaintiff/Respondent instituted an action at the Federal High Court, claiming, *inter-alia*, a declaration that the revocation of its licence was capricious, illegal, null and void as same was based on a cause not cognizable under *section 12 of BOFIA*.

The Defendant/Appellant responded by a Notice of Preliminary Objection, seeking to strike out the action on the ground that the Court had no jurisdiction to entertain the Plaintiff/Respondent's case and that the Plaintiff/Respondent had no right of action. The trial judge found that the revocation was properly done under conditions envisaged by *section 12 of BOFIA*. The Paintiff/Respondent's appeal to the Court of Appeal was allowed whereupon the Defendant/Appellant appealed to the Supreme Court. The Supreme Court allowed the appeal and held that *section 49 of BOFIA*, provides an ouster clause to prevent litigation in case of such event as revocation of banking licence by CBN and that in order that the Court may have jurisdiction to entertain the type of action in question, the Plaintiff/Respondent had to allege and show bad faith in the way the revocation was done and also indicate the elements that constitute such bad faith. The allegation of bad faith was found to have been made on the Writ of Summons by alleging that the act of revocation was capricious and illegal. The Supreme Court, however, further held that the elements that would constitute bad faith were not proved as the reasons given for the revocation of the Plaintiff/Respondent's licence fell within the provisions of *section 12 of BOFIA*. *Section 49 of BOFIA* was held to be effective to prevent the court from entertaining the matter.

The statutory measures taken thus far by the Government and the Monetary Authorities appear formidable enough to curb the incidence of financial distress in Nigerian banks. However, we should now examine

some lapses in the operations of the Supervisory Authorities and our Law enforcement machinery which need to be addressed so that the problem of financial distress in Nigerian banks could be adequately resolved.

Identified Problems

The causes of financial distress in Nigerian banks are not always easy to identify or detect. This is attributable to the nature of banking services which often occur in numerous directions and under many open and covert circumstances. Most of the time, the causes become revealed only after the effects have manifested themselves negatively by which time it may be too late to correct them or do anything meaningful concerning them. Some of these causes would, however, include late or incomplete and non-rendition of returns, inadequate training of staff on money-laundering measures and combating financial terrorism, non-disclosure of reportable transaction and intractable bad and doubtful debt portfolio of licensed banks.

A major threat to financial stability in Nigerian banks is the post-consolidation global exposure to international fraudsters. Also, the banking supervision strategy and technique in CBN, despite its enhanced Financial Analysis and Surveillance System (e-FASS) which will enable CBN to monitor the transactions in all the banks without necessarily sending examiners or inspectors there, is neither pervasive nor adequate yet.[27]

Although CBN has rendered creditable service in ensuring that licensed banks are adequately monitored, a lot more still has to be done in the area of effective examination and supervision of these banks, especially those operating in the rural areas. It is doubtful that CBN has enough manpower to cover these rural areas. The poor condition of the rural hinterland (such as lack of electricity, potable water supply and good roads) is not conducive to unhindered and efficient bank examination and supervision.

27. See, *The Guardian (Nigeria)*, Wednesday, 24th May 2006, 27.

One other problem is that the investigation and prosecution of cases of fraud, forgeries and other banking malpractices are often very slow and unco-ordinated even despite the advent of the Economic and Financial Crimes Commission (*"EFCC"*), which was established by *Economic and Financial Crimes Commission (Establishment) Act, 2004*.[28] The Nigeria Police Force, which is the institution charged with this responsibility is as at now, still ill-equipped and unequal to the task of thorough investigation and prosecution of these offences.

Another issue that needs to be addressed is delay in the administration of justice in our Courts before offenders are prosecuted.

We may now examine the possible options for resolving these identified problems.

Conclusion

In the light of the problems highlighted above, the following suggestions are hereby offered for purposes of more effective control of financial distress in Nigerian banks.

CBN needs to increase the numerical strength of its bank examiners so that there can be more effective supervision and examination of banks in the rural areas. It is also proposed that CBN and NDIC examiners ought to be regularly exposed to periodic intensive in-training programmes specially designed to forestall distress in banks.

It is evidently desirable that the Nigeria Police Force be better equipped with modern police equipments such as electronic surveillance instruments to detect banking malpractices. Investigation and prosecution of banking-related offences ought also to be undertaken by a special unit of either CBN or NDIC or of both of them as we have in the Nigerian Drug Law Enforcement Agency which has been charged with the duty to prosecute drug-related offences.

A blueprint to stem systematic distress in Nigeria banks titled: *"The Framework for Contingency Planning for Banking Systematic Crisis Based on the Toronto Leadership Forum Definition of Systematic Crises"*

28. *Cap.E.1., Laws of the Federation of Nigeria, 2004.*

by CBN was unfolded on 1st July, 2002. According to CBN, the structure of the framework would consist of an evaluation of the supervisory policies and processes in determining the financial condition of banks and a robust safety net; intervention incorporating appropriate actions; guideline for developing contingency plans by banks and a defined composition and functions of a crisis management unit. An effective implementation of the new framework would enable regulatory authorities reduce the occurrence of systematic distress by sharpening supervisory processes, inducing self-regulation among banks, lowering the cost of crisis resolution and providing requisite advance consideration and agreement by all stakeholders.[29]

However, it is believed that due compliance by licensed banks with the statutory regulations is highly essential in reducing the incidence of financial distress in Nigeria.

Also, the following anti-bank distress measures ought to be vigorously pursued by all the present twenty-five 'mega' banks in Nigeria: development of strong internal control systems, sharpening of the oversight roles of the Board of Directors, development of robust risk-management structures, and ultra-sensitivity to any tendency towards incurring bad debts.

Moreover, concerted efforts ought to be made to review, from time to time, the prevailing measures for financial distress and failure in the banks and the need, on the part of the Nigerian Monetary Authorities, to continuously pay adequate attention to general development in the Nigerian banking industry.

29. See, *Comet, (Nigerian Newspaper)*, 22nd May, 2002, 20.