Global Journal of Politics and Law Research
Vol.3, No.2, pp.93-109, April 2015
Published by European Centre for Research Training and Development UK (www.eajournals.org)

GLOBAL COMPANY CRISIS- HOW EFFECTIVE IS THE MERGER SOLUTION IN NIGERIA

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ABSTRACT*:* *In recent times, the economic depression in the world has affected many companies as every modern business has keyed into the global business world plan. Globalization of the market as such has led to the Global Company Crisis. The problem climaxed when many big companies went into the state of distress or technical insolvency, and were liquidated. Liquidation did not arrest the Global company crisis till the device of Merger was introduced to sanitize the company distress syndrome. The aim of this paper is to assess the efficiency of the merger mechanisms in general and Nigeria in particular as to whether it has totally insulated companies from the economic recession. It will also consider the implication and challenges of the merger devices. The paper will adopt the doctrinaire and analytical methods. The paper finds that mergers are a viable economic reform device, but has some limitations from insulting the world economy from global company crisis. The paper will make some recommendations that can assist in making mergers more effective economy remedy for Global company crises and the Nigeria situation*.

KEYWORDS: Global Company Crisis, Merger Solution, Nigeria

INTRODUCTION

All over the world[1], business concerns have been faced with crisis situations and policy obstacles which have resulted in the down surge of companies and businesses alike. Some have collapsed irretrievably in the process; others have become distressed and incapable of sustaining the company as a going concern, yet there are those that have resorted to alternative means to stay afloat in the face of such turbulence. These crisis situations amongst others range from radical change in policy to labour disputes, issues of false financial statements of companies[2] and insider abuses[3]. In a bid to surmount these challenges, companies have resorted to buy outs, outright sale,

1 Including but not limited to Nigeria, Asia, UK, US, Sweden.

2 Typical examples include the *Cadbury Nigeria* financial audit crisis arising from fraudulent, false financial statement issued by the company's auditors *Akintola Williams and Delloitte* to the effect that the company was a going concern when in fact it was apparently impracticable for the company to offset due and outstanding staff salaries and wages as well as *Enron United States of America* which announced over bloated growth was discovered to be mere cosmetics. The result was that, litigations ensued against the officers of the respective companies and the auditors as well as both companies losing fame, investors' confidence in addition to dwindling shareholder funding. For details, see Muraina A., Okpara E. and Ahunanya S., 'Transparency in Corporate Governance: A Comparative Study of Enron, USA and Cadbury PLC, Nigeria', Medwell Journals, The Social Sciences, Vol.5, Issue 6, 2010, 471-476. Retrieved from http://www.medwelljournals.com on 12/9/2014.

3 For instance, the acts of corporate governance abuse by Mrs. Cecilia Ibru of former Oceanic Bank Plc (now Ecobank Plc) and the alleged acts of Mr. Erastus Akingbola of former Intercontinental bank Plc (now Access

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

government grants, mergers and acquisitions, as well as corporate rebranding and strategic restructuring as various measures taken or adopted to manage the different facets of crisis in company administration globally. Some have been successful while others had been unsuccessful[4]. In this paper, the merger solution and its effectiveness in dealing with company crisis globally shall be examined.The paper will also attempt a cursory look at some of such measures adopted overtime with a view to resolving crisis in corporate and business environments. The paper shall highlight some notable causes of company crises and the remedial measures to resolve them. The paper will refer to the situation in some jurisdictions with a view to making recommendations on the way forward.

MEANING OF CRISIS

Crisis has been defined as an unstable or crucial time, or state of affairs in which a decisive change is impending, a paroxysmal attack of pain, distress, or disordered function[5]. It denotes a period of trauma, distress and inevitable change. Crisis in corporate existence is both inevitable and a household phenomenon, just as business and risk are mutually non-exclusive. Crisis is capable of being triggered by certain actions or inactions usually considered lawful and necessary within the sphere of corporate administration but which carry with them very explosive content that have in notable situations brought down companies and businesses to their knees.

Some of such actions have been due to negligence while others may be due to third party acts or even inadvertence. Yet, some have been totally deliberate. For instance, the exercise of executive powers of hire and fire against an invaluable and a key staff; giving special imbalanced treatment to prospective (new) customers to the exclusion of existing (old) customers, by management, are capable of causing and have in fact caused crisis in companies[6].

Natural disasters, technological crises, corporate downsizing, confrontation, malevolence, organizational misdeeds, workplace violence, rumours, terrorist attacks, product recalls, product tempering by outside forces, competition, and death or resignation of key employee or other personnel, have amongst others been identified as some types of company crisis[7]. It is however

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Bank Plc), which led to the removal and reorganization of the top management of both banks by the CBN in Nigeria. Accessed at http://www.cenbank.org on 09/9/2014.

4 Mary DiMaggio,'The Top 10 Best (and Worst) Corporate Mergers of All Time... Or, the Good, the Bad, and the Ugly'', September 15, 2009. Retrieved from http://www.rasmussen.edu on 12/9/2014.

5 Merriam Webster's Dictionary. Retrieved from http://www.merriam-webster.com ; also see, The Chambers Dictionary, 10th ed., (Edinburgh: Chambers Harrap Publishers Ltd 2006) p358.

6 A classical example was the firing of Mark Hurd by HP and the subsequent entanglement with Oracle. See Otto Lerbinger's publication below at note 5.

7 Otto Lerbinger, 'The Crisis Manager: Facing Disasters, Conflicts and Failures'' (Sage Publications, Journal of Business Communication) 1997, 42, 390-419. In that publication, Lerbinger categorized eight types of company crisis.

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

noteworthy that, whereas some of the aforementioned crises are caused by external forces, others are actually self inflicted[8].

MEANING OF CORPORATE CRISIS

Corporate crisis has been defined as an event or the aggregate of events that cause a company inevitable trauma, distress resulting in inevitable change-often for the worse, and always involving the company's reputation, management, brand or market share[9].

The events that trigger corporate crisis cannot be stated with absolute certainty, but they also have impact on customers, employees, communities, government and the shareholders/investment community. According to **Ogilvy PR**[10], whereas the events that trigger crisis are not predictable with absolute certainty, there are a number of characteristics that are common to virtually all company crises. They include surprise, insufficient information, escalating flow of events, loss of control, intense scrutiny from outsiders/insiders, the beginning of the siege mentality, panic and allowing the issue to be solved by public arena.

In the submissions of Michael Nayor[11], company crisis can be anything that can negatively affect a company's reputation or bottom-line. Such events or actions may at first blush not appear to be serious but have capacity to turn very dirty thus constituting a serious manageable issue in the long run, and with ability to even cause the demise of a company. They are however manageable if handled with honesty and the realization that it may be necessary to absorb losses over the short haul in order to achieve a long and healthy business life[12].

Causes of Company Crisis

8 For example, special treatment for new and or prospective customers/investors, weathering the storm for personal reasons aimed at overreaching other members of staff within staff and management relations are potentially capable of generating crises.

9 Al Tortorella, 'What is a Corporate Crisis?' An Ogilvy Public Relations Worldwide Publication dated 10/20/2004. Retrieved from http://www.ogilvypr.com on 08/9/2014.

10 Ibid

11 Michael Nayor is an expert in crisis management and has authored various materials on corporate crisis and crisis management. He is also the founder and CEO, Crisis Consulting Firm, 'The Rhodell Group' which investigates 'What Really Constitutes a Business Crisis?'

12 Michael Nayor, What Really Constitutes a Business Crisis?, in the article ''All About Crisis Management'', a Free Management Library Publication. Retrieved from http://managementhelp.org on 08/9/2014. FM Library is an Online Integrated Library for Personal, Professional and Organizational Development.

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As earlier noted in this work, crisis presents itself in diverse forms and at various times in the course of the operations and or administration of a company. However, company crisis is shown to be associated with, but not necessarily limited to, the following causes and factors[13];

a. National Disasters including such environmental phenomena as earthquakes, volcanic eruptions, tornadoes and hurricanes, floods, landslides, tsunamis, storms, and droughts that threaten the life, property and environment of a company[14].

b. Technological Crises otherwise occasioned by loss of data, system (software) failures, industrial accidents, oil spills. E.g, Chernobyl Disaster, Exxon Valdez Oil Spill, Heartbleed Security bug, etc.

c. Malevolence of opponents or miscreant individuals with the aim of destroying or destabilizing a company[15].

d. Deception in the form of deliberate concealment or misrepresentation of vital information about a company and its product(s) in its dealing with consumers and the general public[16].

e. Rumours peddled about an organization (company) or its product(s) in order to hurt its reputation. For instance, linking a company to a radical (fundamentalist) group or spreading fake stories that their products are contaminated[17].

f. Radical change of regulatory policies could also result in company crisis. For example, the Central Bank of Nigeria (CBN) ₦25 billion commercial banks recapitalization policy in the Nigerian banking sector[18].

g. Labour disputes, product recalls, product tampering by outside forces, workplace violence, terrorist attacks, confrontations, imbalance treatment of customers, death, resignation or sack of key employee or officer, etc. have also been identified as veritable causes of company crises.

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13 Otto Lerbinger op.cit

14 The 2004 Indian Ocean Upsurge (Tsunami) is but one example.

15 See for example, the 1982 Chicago Tylenol Murders involving Johnson & Johnson (J&J).

16 Enron United States and Cadbury Nigeria scandals; Dow Corning's silicone-gel breast implant are classical examples.

17 See the case of Procter & Gamble's logo controversy relative to its major acquisition of The Gillette Company Inc, in order to extend its reach in the consumer product industry.

18 CBN: Press Conference by Professor Charles C. Soludo on ''The Outcome of the Banking Sector Recapitalization and the Way Forward for the Undercapitalized Banks'', 16 January 2006. Retrieved from http://www.cenbank.org on 15/9/2014. The Central Bank of Nigeria, had on July 6, 2004 announced a reform programme for the nation's banking industry, the main thrust of which required the 89 deposit money banks then in the system to raise their capital base to a minimum of N25 billion each through injection of fresh capital and/or mergers and acquisitions. Twenty-five banks emerged from 75 banks, out of a total of 89 banks that existed as at June 2004. The successful banks account for about 93.5% of the deposit liabilities of the banking system. In the process of complying with the minimum capital requirement, N406.4 billion was raised by banks from the capital market out of which N360 billion was verified and accepted by the CBN; and also the process led to the inflow of foreign direct investment (FDI) of US$652 million and 162,000 pounds sterling.

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

h. False and fraudulent misstatements of company financial statements and audit report are a fundamental cause of company crisis[19].

i. Insider dealing and corporate governance abuse have also resulted in company crises and with far reaching consequences[20].

REMEDIES FOR COMPANY CRISIS

Over the years, there has been a plethora of crises that have affected and brought companies and economies to their knees. In all of these, various measures have also been taken or initiated to tackle and surmount the prevailing situations. Among the various options are the followings;

a. Tamper-proof packaging of products as in the case of Johnson & Johnson's reactionary measure to curb further tampering of its Tylenol products,
b. Product Recall,
c. Effective Communication,
d. Sale,
e. Government Intervention by way of cash injection, undertaking debt/loan refinancing,[21]
f. Raising Long Term Funds,
g. Reduction of Interest Rates or Increase of Interest Rates as the case may be,[22]

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19 The financial misrepresentation of Cadbury Nigeria and Enron United States of America and the crises that followed afterwards are very instructive. Cadbury Nigeria was discovered in 2006 to have overstated its accounts to the tune of 13 billion naira (85 million dollars). This resulted in the sacking of the Managing Director and the Finance Director of the company. The auditors of the company Akintola Williams Delloitte was also fined to the tune of 130,000$. Enron's case was that its purported growth from 10 billion dollars in the early 1990s to 101 billion dollars in 2002 was discovered to be mere cosmetics. Financial statements were tampered with to create a false or deceptive impression leading to its collapse and litigations against the key officers. See further, Muraina A., (op.cit) 471-476. Retrieved from http://www.medwelljournals.com on 12/9/2014.

20 The issues of insider and corporate abuse that rocked some banks in the Nigerian banking industry provide a formidable illustration of the crises that followed. The Central Bank of Nigeria had occasion to, in the interest of and for the preservation of the confidence of depositors and the investing public, effect an immediate change in the top management of the affected banks which included amongst others, Mrs. Cecilia Ibru of Oceanic Bank Plc and Mr. Erastus Akingbola of Intercontinental Bank Plc. These banks had all become distressed and undergone corporate restructuring through mergers with other banks. Specifically, Oceanic Bank Plc was merged into Ecobank Plc retaining the name ''Ecobank Plc'' while Intercontinental Bank Plc was merged into and retains the name Access Bank Plc. It is noteworthy that these banks were prior to the discovery of the colossal fraud, insider and corporate abuse perpetrated by their CEOs, financially buoyant and were among the 25 banks that scaled through the 25billion naira minimum recapitalization as directed by the CBN.

21 This was the case in the Barings' Crash of 1890. Specifically, the U.S Federal Reserve in the wake of the LTCM collapse of 1998, gathered together and secured (by way of persuasion) the commitment of leading U.S banks, many of whom had invested in LTCM, to put in 3.65 billion dollars to rescue LTCM. In Nigeria, the CBN injected as much as 620billion naira among other sums at different times to resuscitate distressed banks shortly before the 2004 Banks ₦25billion Minimum Recapitalization Policy. Accessed at http://www.cenbank.org on 10/9/2014.

22 During the Wall Street Crash of 1929, the US Federal Reserve raised interest rates to protect the value of the dollar and to preserve the gold standard while the US government raised tariffs and ran a budget surplus

h. Mergers and Takeover.

It is pertinent at this point to note that, the above remedies have in appropriate situations provided positive results. However, in drawing this discourse to a close, specific attention is now directed at the last option on the list above and its effectiveness as solution to company crisis; that being the focal point of this paper.

Mergers as Solution to Global Company Crises

Mergers (and Acquisition) have long been recognized as one of the options for addressing business problems (crisis) including the need for expansion and to enhance efficiency, effectiveness and profitability of business organizations. Accordingly, merger has become very relevant in both national and international contemporary business environments, which have been characterized by failure, distress and slow corporate growth. The current economic realities worldwide resulting from economy crashes and financial meltdown have further compelled companies to embrace merger (and acquisition) as a veritable survival strategy[23].

The terms ‘‘merger’’ and ‘‘acquisition’’ are often used interchangeably to mean the same thing, and in a more common sense used in the twin form of ‘‘mergers and acquisitions’’. Acquisition describes the act of gaining effective control over the assets or management and ownership (of shares in the capital) of another company without any combination of companies. Whereas in the case of acquisitions, the companies remain separate legal entities; but with some change in control of companies, the acquisition is seen as a takeover of the target. In this regard, the term ‘‘acquisition’’ can be interchanged with ‘‘takeover’’[24].

Mergers worldwide happen as a result of economic and technological factors. The same was also accountable for the wave of mergers and consolidations in the retail banking sector of the US economy in the 1990s[25].

amongst other measures to alleviate some of the worst problems of the depression. See Steven Schifferes, Analysis on Financial Crises: Lessons From History, 2007. Retrieved from http://www.articlesng.com on 12/9/2014. Steven Scifferes is a BBC Economics Correspondent and in that editorial, took a look in retrospect at the trend of financial crises in the corporate world.

23 Ogbuanya, C.S.N., ‘Essentials of Corporate Law Practice in Nigeria (Lagos: Novena Publishers Limited, 2010) at p587.

24 Ajogwu, Fabian SAN, ‘Mergers & Acquisitions: Identifying the Opportunities & Avoiding the Pitfalls’, 24 August, 2011, p6. A paper for presentation to the Corporate Counsel Forum, at the Nigerian Bar Association 2011 Annual Conference, Port Harcourt on August 24, 2011, as basis for discussion at the forum of Lawyers. Retrieved from http://kennapartners.com on 10/9/2014.

25 For instance, see the US Savings and Loan Scandal of 1985 and its resultant effects on the wave of mergers in the retail banking sector. See Steven Schifferes, Analysis on Financial Crises: Lessons From History, 2007. Retrieved from http://www.articlesng.com on 12/9/2014.

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

MEANING OF MERGER

The term Merger has been severall defined. For instance, Black's Law Dictionary defines merger as the absorption of one organization (especially a corporation) that ceases to exist into another that retains its own name and identity and acquires the assets and liabilities of the former[26]; a business combination which involves the fusion of two or more corporate entities into one, largely on equal terms, is often referred to as merger[27].

Merriam Webster's Dictionary[28] defines merger as the combination of two or more independent business corporations into a single enterprise, usually involving the absorption of one or more firms by a dominant firm. The dominant firm may purchase the other firm's assets with cash or securities, purchase the other firm's stock, or issue its own stock to the other firm's stockholders in exchange for their shares in the acquired firm (thus acquiring the other company's assets and liabilities).

Judicially, merger has also been stated to be the absorption of one company by another, the latter retaining its own name and identity and acquiring the assets, liabilities, franchise, and powers of the former, and the absorbed company ceasing to exist as separate entity[29].

Statutorily however, a merger means any amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies' corporate[30].

It entails the transfer of properties and liabilities of one or more companies to another. The transfer is however limited to those rights that can be transferred, and excludes personal contracts such as employment contracts, which have to be specifically provided for. Aluko puts it succinctly thus –

… one or more companies may merge with an existing company (through absorption) or they may merge to form a new company (through consolidation). Nonetheless, a fundamental characteristic of merger (either through absorption or consolidation) is that the acquiring company (existing or new) takes over the ownership of other companies and combines their operations with its own operations[31].

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26 Garner, B. A. (ed.), Black's Law Dictionary, 9th ed. (U.S.: West Publishing Co, 2009) p. 1078.

27 Ogbuanya, C.S.N, (op.cit) at p588.

28 Retrieved from http://www.merriam-webster.com on 12/9/2014.

29 In the American case of *Morris v. Investment Life Insurance Co. 27 Ohio St. 2d. 26.* See also, Akintunde Emiola (Prof.), Nigerian Company Law, (Ogbomosho: Emiola Publishers, 2009) 553-4.

30 s. 119 (1), Investments and Securities Act (cap 124) LFN 2010

31 Aluko B, Corporate Business Valuation for Mergers and Acquisitions, *International Journal of Strategic Property Management, 2005, p.3*

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

A merger (or an amalgamation) occurs when two or more companies transfer their businesses and assets to a new company (or to one of themselves) and in consideration, their members receive shares in the transferee company. The single entity so formed could take the identity of the acquirer or that of the target company. In *re Lipton Nigeria Limited*[32], Lipton Nigeria Limited merged with, and into Lever Brothers Nigeria Ltd. *In re John Holt Investment Ltd and John Holt Ltd*, John Holt Investment Ltd merged with and into John Holt Ltd[33]. *In Re Cheesebrough Products Industries Ltd and Lever Brothers Nigeria Ltd*, the merger resulted into a larger Lever Brothers Ltd[34]. The result of a merger could also take on a new identity and name different from the target and acquirer. In the 2002 merger between Unipetrol Plc and Agip Nigeria Plc, the resultant entity became Oando Plc.

Mergers have been categorized broadly into small, intermediate and large depending on the size and volume of capital, assets or undertakings of the merging corporations[35]. Mergers have also been classified as vertical, horizontal and conglomerate, bust-up, de facto, downstream, upstream, triangular, short-form, statutory, stock, product-extension, reverse triangular as well as cash mergers, depending on the nature of the relationship and business undertaken by the mergees[36].

PROCEDURE FOR MERGERS

The procedures required for the consummation of mergers largely dependent on the size of the merger sought[37]. The statutory regulatory regime for Mergers within the Nigerian jurisdiction is

32 Suit No. FHC/L/M21/81 of 5/6/85 (unreported)

33 Suit No. FHC/L/M68/87 of 18/5/87 (unreported)

34 Suit No. FHC/L/M49/88 of 14/11/88 (unreported)

35 Pursuant to s.120 (1) of the ISA (cap24) LFN 2010

36 Garner, B. A. (ed.), Black's Law Dictionary, (9th ed.) p1078-9. In horizontal mergers, both firms produce the same commodity or service for the same market. In vertical mergers, a firm acquires either a supplier or a customer. If the merged business is not related to that of the acquiring firm, the new corporation is called a conglomerate. Retrieved from http://www.merriam-webster.com (op.cit) on 12/9/2014

37 By virtue of s. 120 (1) of the ISA (cap124) LFN 2010, the Securities and Exchange Commission (SEC) is to determine from time to time a lower and upper threshold of combined annual turnover or assets or both in Nigeria in general or in relation to specified industries, for purposes of determining categories of mergers and a method for the calculation of annual turnover or assets to be applied in relation to each of the prescribed thresholds. The prescribed thresholds under the Act are: Small Merger- a value at or below N500,000,000.00; Intermediate Merger- a value between N500,000,000.00 and N5,000,000,000.00; Large Merger- a value at or above N5,000,000,000.00, respectively. Pursuant to s.122 of the Act, in small mergers, the parties are not required to notify the Commission unless it is so specifically required but notification may be done voluntarily at any time. It should be stated here that within 6 months after implementation of a small merger, the Commission may require the parties to the merger to notify it in the prescribed form if the Commission considers that such merger may substantially prevent or lessen competition or cannot be justified on grounds of public interest. Practitioners and learned jurists have argued, and this paper shares the position, that these provisions may present difficulties in practice. For example, it is doubtful how the commission would become aware of the merger before its consummation if it is not notified. It may be suggested that the reasoning behind these provisions was to ensure that small mergers are not totally excluded from, but given easier

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

governed principally[38] by the Investments and Securities Act, ISA, 2010 and the Securities and Exchange Commission (SEC) Rules and Regulations made thereunder[39].

All around the globe, companies and corporate entities have resorted to the option of merger as a veritable solution to their crisis and challenges. Suffice to examine but a few instances.

platform for consummation relative to, the supervision of the Commission. Therefore, as *Adefulu, A.,* in '*Mergers and Acquisitions Under the Investments and Securities Act, p3'* would state, once a party has notified the Commission in the prescribed form and manner as stated by the Act, the party shall not take any further steps until the merger notification has been processed and approved by the Commission. The Commission is entitled to 20 working days in consideration of the proposed merger and may extend such period to not more than 40 working days for the consideration of the merger approval. In which case, the Act requires the Commission to issue a certificate of extension to any party who notified it of the merger. Upon consideration of the terms of the proposed merger by the Commission in line with the provisions of section 121 of the Act, the Commission shall notify the parties of its approval or give a conditional approval or in some cases state a prohibition on implementation of the merger. Where the merger has already been implemented, the Commission shall further make a declaration that the merger be prohibited forthwith. However, by virtue of ss.123, 124, 125 & 126 of the Act, a party to an intermediate or a large merger must notify the Commission of that merger in the *prescribed* manner and form. Furthermore, the *primary acquiring firm* and the *primary target firm* must each provide a copy of the notice contemplated in section 123 (1) to: a) Any *registered trade union* that represents a substantial number of its employees; or b) The employees concerned or representatives of the employees concerned, if there are no such *registered trade unions.* The parties are also prohibited from implementing the merger until same is approved by the Commission, with or without conditions. Also, a majority of members having not less than ¾ shareholdings in both merging companies must hold separate court ordered meetings for the purpose of giving concurrence to the proposed merger. After due investigation and consideration by the Commission in line with s.121 of the Act, the same is enjoined by the Act to within 20 days or such longer period not exceeding 40 days (in which case the Commission must issue a certificate of extension) to reach a decision whether the merger is approved with or without any condition(s) or prohibited.

38 In Nigeria the legislations that have impact, directly or indirectly on mergers and acquisitions in Nigeria are: *1*) The *Investments and Securities Act* (ISA), Cap 124, Laws of the Federation of Nigeria, 2010 and the Rules and Regulations of the Securities and Exchange Commission (SEC) made pursuant to the ISA; *2*) The *Companies and Allied Matters Act* (Cap C20), Laws of the Federation of Nigeria, 2010; *3*) The *Companies Income Tax Act* (Cap C21), Laws of the Federation of Nigeria, 2010. In addition, there are other sector-specific laws that regulate business combinations. The *Banks and other Financial Institutions Act* (BOFIA), Cap B3, Laws of the Federation of Nigeria, 2010 regulates the banking industry; the *Nigerian Telecommunications Act,* Laws of the Federation of Nigeria, 2010 regulates the telecommunications industry; the *Insurance Act,* Laws of the Federation of Nigeria, 2010 regulates the insurance industry; the *Electric Power Sector Reform Act,* Laws of the Federation of Nigeria, 2010 regulates the electric power sector. Transaction agreements relating to business combinations are typically governed by Nigerian law which has its roots in English common law. The parties to such agreements may, however provide for the law of any other jurisdiction to govern the agreement, especially where the transaction has cross border dimensions.

39 The Securities and Exchange Commission (SEC) is the apex regulatory body for mergers in Nigeria. For the role of the SEC and procedure for mergers, see generally, sections 118, 120, 121, 122, 123, 124, 125, 126, 127, Investments and Securities Act (cap 24), LFN, 2010. Also see Akinola, O. B., Understanding Nigerian Corporate Law Practice (Enugu: Chenglo Limited, 2010), 310-319; Bhadmus, Y.H., Bhadmus on Corporate Law Practice (Enugu: Chenglo Ltd, 2009) 437-446;

In 1985, Savings and Loans institutions in the United States of America (USA) were faced with financial crisis and many of them had become bankrupt, causing a run on Savings and Loans institutions in Ohio and Maryland, USA. These institutions were before the crisis allowed under the financial regulations of the 1980s to engage in some complex, and often unwise, financial transactions, competing with the big commercial banks, even though they were but local banks which made home loans and took deposits from retail investors[40].

Arising from the mass bankruptcy and eventual collapse of such institutions, the US government was laden with huge financial liability because it insured many of the individual deposits in the Savings and Loans (S & Ls). The cost of the bail-out eventually totaled 150 billion US dollars. Realizing the obvious incapacity to continue in the business in their individual capacities, the distressed and bankrupt institutions wisely resorted to mergers and consolidations and this laid the ground work for the wave of mergers and consolidations in the retail banking sector in the 1990s[41]. The United States banking sector had recorded plethora of successful mergers[42]. Precisely in 1955, Bank of the Manhattan Co. agreed to a merger deal with Chase National Bank and finally emerged as Chase Manhattan Bank; J. P. Morgan & Co. merged with Guaranty Trust Company of New York to form Morgan Guaranty Trust Company of New York in 1961. And in 1960, American Commercial Bank merged with North Carolina National Bank under the name North Carolina National Bank which was succeeded by Bank of America. Credit Suisse had also merged with the First Boston Corporation under the name CS First Boston (which later became Credit Suisse Boston and now Credit Suisse as its ultimate successor)[43].

In the United Kingdom, following the Electricity Act, 1947, over 600 electric power companies (including private companies), were merged into fourteen Area Boards, in the nationalization process of the electric power industry[44].

In Nigeria, instances of some successful mergers . Suffice to highlight a few of such to include – Nigeria Breweries Plc and Schweppes International and Diamond Breweries Limited;

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40 Retrieved from http://www.investopedia.com on 10/9/2014.

41 Ibid

42 As far back as 1923, Berks County Trust Company merged with Schuylkill Valley Bank with the name Berks County Trust Company. For details, access http://en.wikipedia.org/wiki/List_of_bank_mergers_in_the_United_State. Retrieved on 15/9/2014.

43 Ibid

44 The British Electricity Authority (BEA) was established in 1948 with the nationalisation of the Great Britain's electricity supply industry. It was created by means of the *Electricity Act 1947*. The BEA took over the operations of over 600 small power companies, municipal authority electricity departments and the Central Electricity Board to form the BEA, which comprised a central authority and 14 area boards. The BEA was responsible for the generation, distribution and sale of electricity to users. It did not include control of the North of Scotland Hydro Board, which remained independent of the BEA. For details, see Robert A. Brady, 'Crisis in Britain: Plans and Achievements of the Labour Government', U.S.: University of California Press, 1950. Electronic copy available at http://books.google.com.ng Accessed on 13/9/2014.

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

Total Motors Plc and West Coast fisheries; Lever Brother Limited and Lipton Nigeria Limited; SCOA Nigeria Limited and Nigeria Automobile Company Limited; and, Nigeria Match Company Limited and United Match Company and Star Match Company Limited and Star Splints Limited; Benue Cement Company and Dangote Cement Plc. as well as Agip Nigeria Plc and Unipetrol Plc. These are all non-banking sector consolidations[45].

As a typical characteristic of a growing economy in virtually all sectors, spurred by the strive for expansion with respect to size, financial base, and service delivery to secure dominance of a customer-filled environment, banks have from time to time taken giant steps to ensure greater efficiency and effectiveness in Nigeria - one way to achieving this has been through merger and acquisition[46]. It is very striking to note that between 2005 and 2011, a total of 89 commercial banks that operated in Nigeria were successfully reduced to 25 financial institutions through various merger and acquisition schemes[47]. For example, Unity Bank Plc today comprises eight initial entities (Intercity Bank Plc, First Interstate Bank Plc, Tropical commercial Bank Plc, Center-Point Bank Plc, Bank of the North, New Africa Bank, Sociate Bankcare, Pacify Bank and New Nigeria Bank) excluding the host entity[48].

REASONS FOR MERGER

Companies would ordinarily maintain and reserve their comfort zones but for compelling business and policy objectives and or demands. However, there are many reasons for companies wanting to merge with or acquire other companies. These reasons include the pursuit of a growth strategy, the defence of hostile action from another would-be acquirer, and financial opportunities[49]. However, the commonest reason is that the merger will result in substantial trade advantage or greater profits than the combined profits of the two companies working separately.

45 The first successful merger was between AG Leventis & Company Limited and Leventis Stores Limited in 1983 where 100 ordinary shares of 50 kobo each of Leventis Stores Limited were exchanged for 83 ordinary shares of 50kobo each of AG Leventis &Company Limited. See Ajogwu, Fabian SAN, 'Mergers & Acquisitions: Identifying the Opportunities & Avoiding the Pitfalls', 24 August, 2011, p3. A Paper for presentation to the Corporate Counsel Forum, at the Nigeria Bar Association 2011 Annual Conference, Port Harcourt on August 24, 2011, as basis for discussion at the forum of Lawyers. Retrieved from http://kennapartners.com on 10/9/2014.

46 Noteworthy that some of such mergers have been spurred by the determination to stay afloat in the face of highly challenging public policy initiated by regulators of the economy such as the Central Bank of Nigeria courtesy of its Banks Recapitalization Policy of 2004.

47 CBN: Press Conference by Professor Charles C. Soludo on''The Outcome of the Banking Sector Recapitalization and the Way Forward for the Undercapitalized Banks'', 16 January 2006. Retrieved from http://www.cenbank.org on 15/9/2014.

48 This Day Newspaper, 'Nigeria: New Shape of the Country's Banking Sector'', 12 October, 2011. Retrieved from www.articlesng.com on 10/9/2014.

49 Coyle B, *Mergers and Acquisitions*, CIB Publishing, 2000, Kent, p.7

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

There is also the element of synergy[50] [51]. For instance, laying out the reason for the merger between United Bank for Africa Plc and Standard Trust Bank Plc, the Chairman of United Bank for Africa Plc stated as follows –

The primary objective of the merger is to create the No. 1 bank in West Africa and one of the largest Banks in sub Saharan Africa with a formidable asset base, offering a full spectrum of banking services from basic products and services for the low income personal market to customized solutions for the commercial and corporate market. The combined entity upon completion of the merger will have total assets of NGN365 Billion, over 360 branches spread across all the states of the country and a market Leadership position within the sub-regional banking industry[52].

The reasons for mergers are various: the acquiring firm may seek to eliminate a competitor, to increase its efficiency, to diversify its products, services, and markets, or to reduce its taxes[53]. Prof. Alexander Roberts[54] have also identified a number of reasons why companies merge to wit:

i. Companies sometimes merge or acquire in order to try and improve long-term competitive advantage in support of strategic goals.
ii. The strategic rationale makes use of the merger or acquisition in achieving a set of strategic objectives.
iii. The strategic rationale may also be fundamentally defensive. If there are several large mergers in a particular sector, non-merged company may be pressured to merge with another non-merged company in order to maintain its competitive position.
iv. Mergers are sometimes forced on companies due to failure(s) of management, error in strategy alignment, and change of market conditions during strategy implementation thereby causing diversion of the company from its original objectives, set target and destination. The result is usually a strategy compromise.

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50 Synergy" according to Weinberg and Blank is "the favourable affect on the overall earnings caused by combining two firms in circumstances which will give rise to savings in costs or increases in revenue – or more simply the 2+2 =5 effect."

51 Rabinowitz, L. (ed.), Weinberg & Blank on Takeovers and Mergers, 5th ed., Vol. 2, (London: Sweet & Maxwell). Electronic copy available at ARCHBOLD 2015, Sweet & Maxwell eBooks. Retrieved from www.sweetandmaxwell.co.uk on 15/9/2014.

52 Letter from the Chairman of United Bank for Africa Plc dated May 18, 2005, in the Scheme of Merger between United Bank for Africa Plc and Standard Trust Bank Plc. Accessed at http://www.ubagroup.com on 15/9/2014

53 Merriam Webster's Dictionary. Retrieved from http://www.merriam-webster.com on 12/9/2014. In the merger scheme consummated between Benue Cement Company (BCC) and Dangote Cement Plc (DCP), it is noteworthy that ''better access to financing'', ''enlarged cement production platform'', ''robust shareholder value proposition'' and ''improved management efficiencies'' were also cited as envisaged benefits of and therefore reasons for the merger. See the Letter from the Chairman of Dangote Cement Plc, Alhaji Aliko Dangote CON, dated August 24, 2010, in the Scheme of Merger between Dangote Cement Plc and Benue Cement Plc. Suit No. FHC/CS/L/1038/10. Retrieved from http://dangote.com on 15/9/2014.

54 Alexander Roberts (Prof), William Wallace (Dr), Peter Moles (Dr), 'Mergers and Acquisitions', Edinburgh Business School, Heriot – Watt University, 2010. Retrieved from http://www.ebsglobal.net on 12/9/2014.

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v. Strategy compromises could arise from a number of sources, including changing customer demand and the actions of competitors, thereby creating strategy variance from the initial strategic track. The difficulty associated with trying to correct the detected strategy variance is sometimes almost impossible and the easier correctional remedy is to merge with or acquire another company that will assist in correcting the variance.

vi. Mergers and Acquisitions are sometimes required for reasons of financial necessity[55].

vii. Government and other public sector bodies may sometimes instruct and be instructed to merge as part of long-term government initiative[56].

viii. Other factors which are regarded here as merger drivers also account for and necessitate a great deal of mergers. Typical examples include;

a. a requirement for specific skill or resource;
b. the stock market regulations;
c. globalization (with demands for global competitiveness);
d. geographical consolidation;
e. diversification;
f. sector pressures;
g. capacity reduction;
h. vertical integration;
i. increased management efficiency;
j. a desire to acquire a new market or customer base; and
k. the need to buy into a growth sector or market.

EFFECTIVENESS OF MERGER AS SOLUTION TO COMPANY CRISIS

The effectiveness of the merger solution to resolving global company crisis is not in doubt to some extent. Both public and private corporations have severally adopted the merger option for both administrative convenience and commercial competitiveness in national and global business environments.

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55 A company may misalign its strategy and suddenly find that it is losing value because shareholders have lost confidence. In some cases, the only way to address this problem is to merge with a more successful and financially stable company or even acquire smaller but more successful companies as a remedial. For example, pursuant to the Nigerian banking sector reforms, some distressed banks, including Intercontinental Bank Plc (now Access Bank Plc), merged with or were acquired by other stronger, more viable and financially sound banks.

56 See the merger of over 600 public and private electricity (power) companies and authorities into 14 Area Boards under the Nationalization policy in the United Kingdom pursuant to its Electricity Act of 1947. Retrieved from http://en.wikipedia.org/wiki/List_of_pre-nationalisation_UK_electric_power_companies on 10/9/2014.

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Whereas merger is not the only solution to solving company crisis, it has been widely adopted as a veritable, effective and efficient strategy for escape[57]. Notwithstanding this widely adopted status, however, merger schemes are not without constraints. These constraints are capable of causing failure of mergers. The following are some scenarios for the relative failure of merger arrangements[58].

i. An inability to agree on terms[59];
ii. Overestimation of the true value of the target companies due to over-optimism in assessment;
iii. Failure to realize identified potential synergies due largely to difficulty in generating and exploiting same[60];
iv. Inability to implement change;
v. Shortcomings in the implementation and integration processes usually due to inadequate planning and control, and the lack of an implementation driver thus taking longer time than expected or even losing the opportunity to generate and exploit potential synergies;
vi. Failure to achieve technological fit arising from incompatibility of different technological systems developed by merging companies;
vii. Conflicting cultures of merging corporations due largely to inadequate preparation for adaptation. This is so because individual companies prior to merger are used to their respective corporate cultures;
viii. Weak Central Core in the target; and
ix. The target being too large relative to the acquirer.

But in spite of the above scenarios that relatively determine the failure of mergers, its effectiveness as solution to global company crisis is recorded in some countries. A brief insight to the following instances would suffice for the effectiveness of the merger solution to global company crisis.

57 All across the globe – US, UK, Asia, Europe and Nigeria – corporate organizations (private and public) have adopted the merger solution as last resort when all other steps fail. See the final step at merger of Nordbanken and Gota bank (retaining the name Nordbanken) in the resolution of the Swedish Financial Crisis of the 1990s at http://www.frb.org; http://www.scholar.google.com. Also see the resolution of the East Asian financial crisis at http://www.scholar.google.com.

58 Roberts, Wallace and Moles, Mergers and Acquisitions, (op.cit).

59 For example, the proposed merger between a leading mortgage lender, Abbey National and Bank of Scotland, both in the UK failed to materialize, first, because of failure of senior managers of both organizations to agree on the management and organizational structures of the proposed new organization; secondly, due to the ‘‘gratecrashing’’ threats from Lloyds TSB which was considering selling Cheltenham & Gloucester, the building society it bought in 1995 for £1.8bn, in order to buy Abbey National. Retrieved from http://www.bankofscotland.co.uk; http://www.brandrepublic.com on 11/9/2014.

60 This may be due to external changes in the market. eg, the Dot.com Crash shortly after acquisition,2000.

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THE SWEDISH FINANCIAL CRISIS[61]

In the early 1990s, the economy of Sweden experienced a twin crisis, which marked the first systemic crisis in industrialized countries since the 1930s[62]. It led to the successive collapse of leading finance companies in Sweden e.g. Nyckeln, which folded in September, 1990, Gota Bank, Forsta Sparbanken and Nordbanken's which became distressed in 1992 and 1993 respectively, resulting in massive liquidity problems in the securities market.

As a first step to resolving the crisis, Swedish authorities forced banks to write-down their losses, used capital injections, and separated troubled institutions[63]. The national authorities took a further step by guaranteeing a loan for Forsta Sparbanken and took over Nordbanken and injected huge funds into Nordbanken to absorb further potential losses, and thereafter embarked upon a strategic restructuring by splitting Nordbanken into two entities. However, in less than a year after these resuscitation efforts, a third major institution, Gota Bank was distressed and taken over by the government. This negatively affected the Swedish economy.

Following deliberate governmental efforts[64], the Swedish authorities, as a last resort, approved a merger scheme for the troubled and acquired institutions. Accordingly, Nordbanken and Gota Bank were strategically restructured and merged in 1993 into Nordbanken which became Sweden's fourth largest bank.

The Resolution of the East Asian Crisis (Indonesia)[65]

The corporate and financial crisis of East Asia attracted global attention due to its extraordinary turbulence and effect on the global economy. Among policy makers, international financial institutions and private organizations, it was commonly held that the crisis was as a result of interactions between massive capital inflows and outflows and weak domestic institutions, notably

61 Yorulmazer T, "Lessons from the Resolution of the Swedish Financial Crisis", Federal Reserve Bank of New York, 2009. Retrieved from http://www.frb.org; http://www.scholar.google.com on 10/9/2014.

62 Yorulmazer T., (op.cit).

63 The troubled finance institutions were separated into "good banks" and "bad banks", asset management companies (AMC$_S$) were set up to restructure and divest the assets of the "bad banks". Owners of such bad banks were invited and given options to either inject the needed additional capital or let the Swedish authorities deal with the situation, which implied financial support and restructuring.

64 In December 1992, Sweden provided guarantee for all bank deposits and creditors of its 114 banks. The Parliament also passed the Bank Support Act, authorizing government to provide flexible support for banks in form of loan guarantees, capital contributions and other appropriate measures. The Bank Supervisory Authority was also set up by Parliament in furtherance of the Act with authority to decide and manage bank support operations.

65 Masahiro Kawai, 'The Resolution of the East Asian Crisis: financial and corporate sector restructuring, Journal of Asian Economics11, World Bank, Washington DC 20433, USA (2000) 133-168.

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

in the financial sector, in emerging market economies[66] like Indonesia, Korea, Malaysia and Thailand.

Economic crisis in Indonesia was triggered by depreciation of the rupiah (the Indonesian local currency) during the second half of 1997. The crisis exposed deep systemic weaknesses in the banking and corporate sectors, which required aggressive, and wide-ranging policy measures as well as institutional reforms; furthermore, it was traceable to government's launch of the 1988 financial sector deregulation which resulted in the sudden expansion of commercial banks without adequate supervision and transparency. Domestic banking sector weaknesses were worsened by the spate of large external borrowings by Indonesian corporations in the few years leading to the crisis.

As a strategy for bank restructuring, the Indonesian government initially focused on closing insolvent commercial banks[67]. Attention was later shifted to stabilization of the banking system by dealing with the remaining nonviable banks, recapitalization and rehabilitation of weak but viable banks and enhancement of supervisory and regulatory capacities[68]. Amongst other measures, the authorities also introduced and implemented the elimination of restrictions on foreign ownership of domestic banks, and a temporary voluntary suspension of corporate external debt repayment. Restructuring operations graduated to take over of some banks including Bank Central Asia (BCA), Indonesia's largest private bank, as well as seven major banks and six non-listed State-owned banks[69].

The end was that, the government of Indonesia resorted to the formal merger of five State-owned banks into a new institution, Bank Mandiri and vested in it 100% shareholding of the component banks. Thus the crisis finally got under control and the economy saw the light of day with the emergence of few but strong, financially viable institutions through strategic, successful mergers.

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66 Ibid

67 The first of such was the closure of 16 insolvent commercial banks in November 1997 (out of a pre-crisis total of 238 in July 1997). See Masahiro Kawai, op.cit

68 In response to the spate of withdrawal of deposits following the closure, the Bank of Indonesia (BI) provided substantial liquidity support, including credits to some large private banks; guarantee for depositors and creditors of locally incorporated banks; creation of the regulatory agency Indonesian Bank Restructuring Agency (IBRA) as well as an Asset Management Unit (AMU) in IBRA.

69 Some banks were frozen while others offered for sale. For detailed accounts on the Swedish and East Asian financial crisis and the resolution thereof, see *Yorulmazer T.*, "Lessons from the Resolution of the Swedish Financial Crisis", Federal Reserve Bank of New York, 2009. Retrieved from http://www.frb.org; http://www.scholar.google.com and *Masahiro Kawai*, 'The Resolution of the East Asian Crisis: financial and corporate sector restructuring, Journal of Asian Economics11, World Bank, Washington DC 20433, USA (2000) 133-168.

ISSN 2053-6321(Print), ISSN 2053-6593(Online)

SOME RESASONS FOR FAILURES OF MERGERS IN NIGERIA

Historically, merger done in Nigeria has not been without some pit falls as a result of the fact that most merged companies often focus too intently on cutting costs and the drive to buy a competition company without seeking business strategy and recognizing other factors like

(a) Proper due diligence and valuation before engaging in merger.

(b) Litigation and disputes which are still pending in some companies before merger.

(c) Nigerian lawyers who are conversant with the extant laws relating to merger procedures are not consulted but are made to be working under the terms and conditions laid out by the financial advisers which is not the case in other jurisdiction. For instance in United Kingdom and United States of America where lawyers play far leading roles in mergers and acquisitions.

(d) Generating the synergy which is needed for such a company.

The lesson to be learnt from the foregoing scenarios is that, in the heat of corporate crisis in an economy, the way out is not just a mere consummation of merger schemes. There is certainly more to do than mere consolidation of interests and assets. Proper regulatory framework and thorough supervision by regulatory bodies are fundamental to avoiding financial crisis in the economy.

RECOMMENDATIONS

Sequel to the pit falls highlighted, this paper hereby recommend the following:

1. Value-driven focus and corporate loyalty must be created from the onset of the merger
2. A process that is co-designed from the beginning will make merger appear seamless and fluid with a high degree of positive engaged energy throughout the organization.
3. Integration must be holistic, fluid and well executed. The factor for post merger success and long term sustainability depend on the involvement and the integration of employee form the start to create a common new identity around a shared vision.

CONCLUSION

From a consideration of the respective crises situations discussed, it is safe to conclude that the mergers have to a large extent assist in the resolution of corporate (and financial) crises across the globe. The Nigerian economic crisis were all not resolved by recourse to the merger option.
It is accordingly submitted that, amongst the array of options available for corporate restructuring and resolution of company crises, merger solution will be a more effective and a fundamental and decisive element with its obvious benefits or advantages which include reduction of intense competition for scarce funding and increased efficiency if a confidential survey employees programme is launch within the shortest time after merger. Giving effect to the recommendations made will bring about the emergence of a sustainable, safe and secure corporate environment with minimal containable crises.

ISSN 2053-6321(Print), ISSN 2053-6593(Online)