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# Nigeria Business Law Journal

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of Business Law in Africa: An Examination of OHADA  
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# Nigeria Business Law Journal

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## CALL FOR PAPERS - JUNE 2017 EDITION

Despite recent economic setbacks, Nigeria's economy continues to show great promise and remains an attractive hub for double-digit returns on investment. However, the country continues to suffer from an acute deficit of adequate infrastructure in all sectors.

President Muhammadu Buhari's administration has consistently reiterated its commitment to diversify the economy and recently released its National Economic Recovery and Growth Plan (2017 - 2020). This proposed economic agenda raises interesting questions about how to finance the infrastructure needed to meet Nigeria's deficit and accelerate the country's industrialisation.

The next edition of the journal intends to focus on ideas and analysis of how to tackle Nigeria's infrastructure deficit, as well as how to increase the country's export potential and stimulate its economic performance. Thus, Convex Publishers wishes to invite papers for the next edition of the Nigerian Business Law Journal on the theme of: Infrastructure, Trade and Economic Performance.

Illustrative themes can include:

- i. Bilateral investment treaties, multilateral trade negotiations, and their impact on local trade capacity and direction
- ii. Quality of infrastructure as an important determinant of trade performance

- iii. The efficiency of Nigerian ports and their immense impact on trade
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Submissions should not be more than 20,000 words, and should use both URL hyperlinks and footnotes for references, where possible. Interested writers should send abstracts (not more than 300 words) and a short profile by 7th June, 2017 to:

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Selected papers will be contacted using the email address provided at the start of the selection process. Final submissions must be sent as attachments in Microsoft Word (or any Word-compatible format) by 30th June, 2017.

If you would like to consult about a potential topic, please use the same email addresses as above.

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# Nigeria Business Law Journal

# Note from the Editor

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Welcome to the inaugural issue of the Nigerian Business Law Journal (NBLJ), what we hope will be the premier source for contemporary and cutting-edge education on pivotal issues of Nigerian and African legal jurisprudence. Issues will be published every quarter.

Given the widely-acknowledged lack of resources in the Nigerian education system, there is a gap in accessing adequate business legal education in Nigeria – among both students and practitioners. With a rigorous editorial process driven by seasoned academics and professionals, this journal aims to address that gap and raise the standard of business legal scholarship in Nigeria by becoming a world-class reference point for articles, reviews, and analyses.

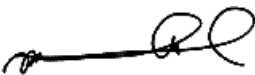
This journal is published by Convex Publishing, a Nigerian publishing company committed to spreading and improving the knowledge of law through books and journals, in partnership with the Abuja Branch of the Nigerian Bar Association (NBA).

Submissions of high quality manuscripts on the full range of issues in business law in Nigeria, Africa, and beyond are welcome. Further details about submissions may be found on the inside back cover of this issue. Suggestions on suitable topics within this jurisdiction are also welcome.

I want to thank the distinguished members of our Editorial Advisory Board for agreeing to serve in that capacity.

We look forward to an exciting journey ahead.

**Dr. George Nwangwu**



*Editor-in-Chief*  
*Nigerian Business Law Journal*

# Legal Innovation, Harmonisation and Regionalization of Business Law in Africa: An Examination of OHADA Business Law and its Implication for Nigerian Businesses

Folake Kehinde Olaoye\*

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## Abstract

In the last few decades, popular rhetoric has described Sub-Saharan Africa (SSA) as a rising region with strong emerging economies. However, more recent realities of economic and institutional challenges show that the continent is not growing as predicted.<sup>1</sup> South Africa and Nigeria are usually identified as the fastest growing economies in the world.<sup>2</sup> In the last year, growth on the continent 'has weakened markedly'.<sup>3</sup> In its 2016 Regional Economic Outlook report on Africa, the International Monetary Fund (IMF) notes that economic activity in Sub-Saharan Africa and particularly Nigeria has fallen to its lowest level in decades.<sup>4</sup> This fall in economic activity is however not spread all over the continent. Notably, a few non-resource dependent states like Senegal and Cote d'Ivoire are experiencing robust growth.<sup>5</sup> The key role played by law and legal institutions in fostering economic growth cannot be overemphasized. However, laws do not operate in isolation and thus economic growth must be multi-sector driven with a focus on strong economic policies.

In 1993, Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), or Organisation for the Harmonisation of Business Law in Africa, was established by 14 West African states to create a new centre of

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1 Steven Radelet, 'Africa's Rise Interrupted?' (*Finance & Development*, June 2016) <<http://www.imf.org/external/pubs/ft/fandd/2016/06/radelet.htm>> Accessed: 20 November 2016

2 Jean Delvin, 'Africa's Emerging Market Boom' (*Forbes*, 10 March 2014) <<http://www.forbes.com/sites/riskmap/2014/03/10/africas-emerging-market-boom/>> Accessed: 20 November 2016

3 IMF, *Regional Economic Outlook Sub-Saharan Africa: A Time for Policy Reset* (IMF, April 2016) Available online at: <<https://www.imf.org/external/pubs/ft/reo/2016/afr/eng/pdf/sreo0416.pdf>>

4 IMF, *Regional Economic Outlook Sub-Saharan Africa: Multispeed Growth* (IMF October 2016) Available online at: <<https://www.imf.org/external/pubs/ft/reo/2016/afr/eng/pdf/sreo1016.pdf>>

5 The Oil Effect: African Economies are Growing at Very Different Speeds' (*The Economist*, 29 October 2016) <<http://www.economist.com/news/middle-east-and-africa/21709218-new-numbers-imf-tell-tale-two-africas-african-economies-are-growing>> Accessed: 20 November 2016

development in Africa. The rationale being that economic integration creates simple, modern and adaptable business laws and guarantees the legal stability needed to encourage investment.<sup>6</sup>

OHADA assumes increased importance as Africa aims to consolidate African trade and investment and harmonize regional norm-making. The changing dynamics of business and economy in Nigeria call for an examination of OHADA business law. Globalization has led to the marketisation of economy, the emergence of new financial capitals, and the creation of transnational legal orders like OHADA.<sup>7</sup> This article examines OHADA as an innovative legal framework for regional integration, compares this with business law reform in Nigeria, and makes a case for engagement with this system by Nigerian business lawyers.

## Introduction

Africa is home to 54 states with different legal origins, traditions, colonial and political histories which share a common goal of economic prosperity,<sup>8</sup> given the continent's dire need for sustainable development and inclusive growth. While popular rhetoric has described Sub-Saharan Africa (SSA) as a rising region with strong and emerging economies,<sup>9</sup> in the last few years, data provided by the World Bank shows that some countries are not experiencing the monumental growth predicted years ago.<sup>10</sup> In the last year, growth on the continent 'has weakened markedly' due to a sharp decline in commodity prices, tight financial conditions, and domestic policy uncertainties.<sup>11</sup> In its April 2016 Regional Economic Outlook report on Africa, the International Monetary Fund (IMF) noted that economic activity in Sub-Saharan Africa and particularly Nigeria had fallen to its lowest level in decades.<sup>12</sup> The IMF projected that economic activity in Nigeria would contract by 1.7% in 2016 as a result of disruptions in oil production, foreign currency shortages, lower oil receipts, lower power generation and weak investor confidence.<sup>13</sup> This fall in economic activity is however not evenly spread across the continent and the IMF describes this unevenness as 'multispeed growth'.<sup>14</sup> Notably, a few non-resource dependent economies like Senegal and Cote d' Ivoire are experiencing robust growth.<sup>15</sup> With the rebasing of Nigeria's Gross Domestic Product (GDP) in 2014, Nigeria displaced South Africa and took over its position as the largest economy in Africa.<sup>16</sup> Nigeria continues to retain this position, with a current GDP of USD\$481.066 billion but in the light of emerging economic trends it is important to reassess Nigerian business law especially in the context of Nigeria's competitiveness as a favourable climate for doing investment in the West African region.

6 Claire Moore Dickerson, 'The OHADA Common Court of Justice and Arbitration: Exogenous Forces Contributing to Its Influence' [2016] 79 *Law & Contemp. Probs.* 63.

7 Terrence Halliday, *Transnational Legal Orders* (Cambridge University Press 2015) 132

8 See Gbenja Bamodu, 'Transnational law, Unification and Harmonization of International Commercial Law in Africa' (1994) 38 *JAL* 125

9 Africa Rising: The Hopeful Continent' (*The Economist*, 3 December 2011) <http://www.economist.com/node/21541015> Accessed: 20 November 2016. Steven Radelet, 'Africa's Rise Interrupted?' (*Finance & Development*, June 2016) <<http://www.imf.org/external/pubs/ft/fandd/2016/06/radelet.htm>> Accessed: 20 November 2016. For example, in 2011, the Economist declared that by 2016, the average African economy will outpace its Asian counterparts. See 'Africa's Impressive Growth' (*The Economist*, 6 Jan 2011) <[http://www.economist.com/blogs/dailychart/2011/01/daily\\_chart](http://www.economist.com/blogs/dailychart/2011/01/daily_chart)> Accessed: 20 November 2016

10 See Jefferey Gentleman, 'Africa Rising? Africa Reeling May Be More Fitting Now' (*The New York Times*, 17 October 2016) <[http://www.nytimes.com/2016/10/18/world/africa/africa-rising-africa-reeling-may-be-more-fitting-now.html?\\_r=0](http://www.nytimes.com/2016/10/18/world/africa/africa-rising-africa-reeling-may-be-more-fitting-now.html?_r=0)> Accessed: 20 November 2016

11 IMF, *Regional Economic Outlook Sub-Saharan Africa: A Time for Policy Reset* (IMF April 2016) available online at <<https://www.imf.org/external/pubs/ft/reo/2016/afr/eng/pdf/sreo0416.pdf>>

12 IMF, *Regional Economic Outlook Sub-Saharan Africa: Multispeed Growth* (IMF October 2016) available online at <<https://www.imf.org/external/pubs/ft/reo/2016/afr/eng/pdf/sreo1016.pdf>>

13 IMF, *World Economic Outlook October 2016: Subdued Demand Symptoms and Remedies* (IMF 2016) 23

14 The October Regional Report is titled 'Multispeed Growth'

15 Steven Radelet, 'Africa's Rise Interrupted?' (*Finance & Development*, June 2016) <<http://www.imf.org/external/pubs/ft/fandd/2016/06/radelet.htm>> Accessed: 20 November 2016. For example, in 2011, The Economist declared that by 2016, the average African economy will outpace its Asian counterpart. See 'Africa's Impressive Growth' (*The Economist*, 6 Jan 2011) <[http://www.economist.com/blogs/dailychart/2011/01/daily\\_chart](http://www.economist.com/blogs/dailychart/2011/01/daily_chart)> Accessed: 20 November 2016

16 Figures are based on data provided by the World Bank at <<http://www.data.worldbank.org/country/Nigeria>> Accessed: 20 November 2016  
13Jean Delvin, 'Africa's Emerging Market Boom' (*Forbes*, 10 March 2014) <<http://www.forbes.com/sites/riskmap/2014/03/10/africas-emerging-market-boom/>> Accessed: 20 November 2016

The key role played by law and legal institutions in fostering sustainable economic growth cannot be overemphasized.<sup>17</sup> Business law including corporate, securities, commercial law, tax law and contract law helps shape the institutions that determine economic decision-making.<sup>18</sup> Integration of law has been identified as crucial for attaining economic development in Africa.<sup>19</sup> Highlighting the legal aspects of Africa's economic integration, Prof. Oppong argues that effective economic integration 'is the product of properly structuring and managing within well-defined legal frameworks, vertical-horizontal, and vertical-horizontal relations among states, legal systems, laws, and institutions.'<sup>20</sup> The emergence of economic regions is thus a transitional legal phenomenon aptly summarized in the following quotation:

The piercing of national borders by transnational norms finds its *strongest expression in the formation of regional communities* of states which seek to develop a common fund of legal rules, concepts and principles among their members.<sup>21</sup> (Emphasis mine)

Economic integration is recognized as a key means to attain sustainable economic development in Africa.<sup>22</sup> Against this background, it is pertinent to note that the African Union and the eight Regional Economic Communities (RECs) have consistently recognised that integration of policy and intra-African trade are key gateways to unlocking the continent's full economic potential.<sup>23</sup> Guided by the African Union's Constitutive Act, in Agenda 2063 of the African Union's 50-year Road Map, African states committed to attaining a prosperous and united Africa.<sup>24</sup> Article 4(1) of the African Economic Community (AEC) treaty provides that one of the key objectives of the community shall be the conclusion of agreements aimed at harmonizing and coordinating policies among existing and future sub-regional and regional economic communities.<sup>25</sup> Article 6 of the treaty envisions the creation of the community in stages, cumulating in the establishment of a common market, and continent-wide economic community and parliament by 2028. Integration in Africa is however fraught with challenges as there are overlapping economic communities with no clear political will to create a single one. Legal jurist, Prof. Richard Oppong, has described the present landscape of regional integration in Africa as 'overlapping memberships, and no clear principles of co-ordination'.<sup>26</sup> The Protocol on Relations between the AU and Regional Economic Communities guided by the Abuja Treaty the AU Constitutive Act aims at minimizing this lack of coordination.<sup>27</sup> The long term objective of the AEC is the eventual transition of all regional economic communities into one community by 2034. However, there is no clear evidence that the existing communities will commit to full integration.<sup>28</sup>

Regionalisation under the African union is built on the objectives of attaining political and socio-economic growth but there is no express mention of 'uniform laws' or business laws in the constitutive acts. Importantly, Article 4 (2) of the AEC treaty only provides for harmonisation of 'polices' including common trade policies, establishment of a common market and makes no express or implied provisions for harmonized business laws. However, the Protocol to the Constitutive Act of the African Union for the establishment of an African Parliament confers the parliament with legislative powers on any subject area in the form of 'model laws' for

17 Frank Cross, 'Law and Economic Growth' [2001] 80 *Tex. L. Rev.* 1737

18 David Kennedy, 'Law and the Political Economy of the World' [2013] 26 *Leiden Journal of International Law* 7

19 Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 2

20 *ibid*

21 Ulrich Scheuner, foreword to C.J. Mann, *The Function of Judicial Decision in Economic Integration* (1971) referenced in Oppong (n13)

22 Henry Kyambalesa and Mathurin Houngnikpo, *Economic Integration and Development in Africa* (Routledge 2016) 17

23 The AU recognizes the Arab Maghreb Union (UMA); Common Market for Eastern and Southern Africa (COMESA); Community of Sahel-Saharan States (CEN-SAD); East African Community (EAC); Economic Community of Central African States (ECCAS); Economic Community of West African States (ECOWAS); Intergovernmental Authority on Development (IGAD) and the Southern African Development Community (SADC).

24 AU, Agenda 2063: The Africa We Want <<http://www.un.org/en/africa/osaa/pdf/au/agenda2063.pdf>> Accessed: 20 November 2016

25 Article 3(1) of the Constitutive Act of the African Union (signed 1999, entered into force in 2002) provides that the objectives of the AU shall be the coordination and harmonization of the policies between the Regional Economic Communities.

26 Richard Frimpong Oppong, 'The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web' [2010] 18 *Afr. J. Int'l & Comp. L.* 92

27 Treaty Establishing the African Economic Community (Signed 1991, entered into force 1994)

28 Richard Frimpong Oppong 'The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web' *Afr. J. Int'l & Comp. L.* 18 (2010) 92.

attaining the goal of the AU.<sup>29</sup> We thus turn attention to a regulatory innovation on the continent, the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA). OHADA was established by 14 West African states in 1993 to create a new Centre of development in Africa.<sup>30</sup> The rationale being that economic integration and harmonisation creates simple, modern and adaptable business laws and guarantees the legal stability needed to encourage investment.<sup>31</sup> OHADA assumes increased importance as Africa aims to consolidate African trade and investment and harmonize regional norm making. OHADA has been described as the 'most ambitious harmonisation outside the European Union' in the world.<sup>32</sup> The changing dynamics of business, a contracting economy and falling oil prices in Nigeria has increased the importance of OHADA in both the West African region and the African Union. Globalization has led to the marketisation of economies, the emergence of new financial capitals, and the creation of transnational legal orders like OHADA.<sup>33</sup> It has been suggested that through harmonisation and regionalisation emerging economies can attract investment, eliminate barriers to cross-border trade and provide a platform for competing more effectively on the world's stage.<sup>34</sup> Firstly, this article examines OHADA as an innovative legal framework for regional integration. Secondly, this article examines business law reforms in Nigeria within the context of OHADA business law reforms and its implications for business activities within the region. Finally, this article then makes an argument for engagement with OHADA law and argues that OHADA emphasizes the importance of modern, easily accessible, transparent, adaptable and innovative business law in a global economy.

## An Introduction to OHADA

Figure 1: Organisation pour l'Harmonisation en Afrique du Droit des Affaires



29 Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (signed 2001, entered into force 2003)

30 OHADA Treaty (adopted 1993, amended 2003)

31 Claire Moore Dickerson, 'The OHADA Common Court of Justice and Arbitration: Exogenous Forces Contributing to its Influence' [2016] 79 *Law & Contemp. Probs.* 63.

32 John Dewar, *International Project Finance: Law and Practice* (Oxford University Press 2011) 12

33 Terrence Halliday, *Transnational Legal Orders* (Cambridge University Press 2015) 132

34 Dewar (n) 12

OHADA is **not one** of the eight regional economic communities recognized by the African Union (AU).<sup>35</sup> OHADA was established in 1993 for the following reasons:

- to create a new centre of development in Africa
- to promote economic integration
- to create a simple and adaptable business law
- to guarantee the legal stability needed to encourage investment

In the preamble to the OHADA treaty, member states reaffirm their commitment to the establishment of an AEC. In line with this objective, Article 52 extends membership to members of the Organisation for African Unity (AU). An interpretation of these articles thus means that the drafters sought to establish a system of laws which could be adopted by the AEC. However, OHADA has not attracted continent-wide membership and OHADA functions as a regional community with its own institutional bodies. While fourteen francophone countries signed the OHADA Treaty in 1993, OHADA has since attracted membership outside francophone Africa and is currently made up of 17 states.<sup>36</sup>

Interestingly and beneficial to her economic objectives, Nigeria is strategically surrounded by member states of OHADA (See Figure 1 above). The ability of OHADA to attract membership from Nigeria or other African states is highly unlikely because of its absolute supranationality and its uniform laws which infringe on internal sovereignty. Unlike the constitutive treaties of the Economic Community of African States (ECOWAS) and the African Union, Article 1 of the OHADA treaty provides for: '... harmonisation of business laws in the Contracting States by the elaboration and adoption of simple modern common rules adapted to their economies...'<sup>37</sup> An interpretation of this article presupposes an organisation formed primarily for harmonisation to suit individual economies rather than uniform binding regulation. However, Article 6 of the OHADA treaty provides for Uniform Acts to be prepared by the office of the permanent secretary. Hence, the constitutive documents of OHADA pay closer attention to uniformity in economic integration, positioning OHADA as fertile ground from which Nigeria can learn several lessons.

## Institutional Framework of OHADA

The key organs of OHADA, as established by the OHADA Treaty, are a Council of Ministers, a Common Court of Justice and Arbitration, and the Permanent Secretariat.<sup>38</sup> I argue that the functioning of these institutions establishes OHADA as a *de facto* regional economic community. The institutional framework of OHADA is as follows:

### 1. The Conference of Heads of State and Government:

This is the political arm of OHADA which makes general guidelines needed for the harmonization of business law in Africa.

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35 The communities recognized are: The Arab Maghreb Union (UMA); Common Market for Eastern and Southern Africa (COMESA); Community of Sahel-Saharan States (CEN-SAD); East African Community (EAC); Economic Community of Central African States (ECCAS); Economic Community of West African States (ECOWAS); Intergovernmental Authority on Development (IGAD); and Southern African Development Community (SADC). The Eastern Africa Standby Force Coordination Mechanism (EASFOM) and North African Regional Capability (NARC) both have liaison offices at the AU. Other: See African Union Regional Economic Communities (RECs). See <<http://www.au.int/en/organs/recs>> Accessed 20: November 2016

36 Member states of OHADA are: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Ivory Coast, Mali, Niger, Senegal, Togo and Democratic Republic of Congo (DRC). The DRC is the latest member and joined OHADA in 2012.

37 The English translation of the OHADA Treaty is available online at <<http://www.ohadalegis.com/anglais/legislohadaligne.htm>> Last accessed: 20 November 2016

38 Article 3 OHADA Treaty

## 2. The Council of Ministers

The Council of Ministers meets at least once a year and is made up of Ministers of Justice and Finance from the member states.<sup>39</sup> Uniform Acts are debated upon and adopted by the Council of Ministers on consultation with the Common Court of Justice and Arbitration. This law-making procedure raises issues of transparency and legitimacy because making the uniform acts is left to an unelected group of high-level experts.

## 3. Permanent Secretariat

The headquarters of the permanent secretariat is located in Yaoundé (Cameroon).<sup>40</sup> The Secretariat coordinates the functioning of OHADA institutions and the harmonization process. The Secretariat prepares draft uniform acts, regulations and decisions, coordinates and organizes the sessions of Council of Ministers, and assists the president.

## 4. The Common Court of Justice and Arbitration Court (Commune de Justice et d'Arbitrage, or CCJA)

The CCJA, composed of 13 judges, is the supranational judicial organ of OHADA and has its headquarters in Abidjan (Côte d'Ivoire).<sup>41</sup> The CCJA functions as both a centre of arbitration with its own set of rules that administers arbitration proceedings and a judicial court with jurisdiction for the challenge of final decisions. It acts as a final court as it has the jurisdiction to review, in last resort, all decisions rendered by courts within member states on matters relating to OHADA law. The CCJA also interprets existing uniform acts by giving advisory opinions. In CCJA decision 001/2001/EP, 30 April 2001, at the request of Côte d'Ivoire, the CCJA decided that OHADA uniform acts abrogate identical, as well as conflicting, national laws and regulations.

## 5. The Regional Training Centre for Legal Officers (Ecole Régionale Supérieure de la Magistrature, or ERSUMA)

ERSUMA is based in Porto Novo, Benin, and is a centre for training, capacity-building, research and documentation on OHADA business law.<sup>42</sup>

## 6. OHADA National Committees

They are the focal points of OHADA in each member state. They take part in the preparation of uniform acts at the national level and monitor their implementation

# OHADA Uniform Acts and Lessons for Reform of Business Law in Nigeria

The legislative use of Uniform Acts is the major characteristic that distinguishes OHADA from any other regional organisation in Africa. Article 2 of the OHADA Treaty provides for the enactment of uniform law relating to company law, trade, credit and recovery of debts, means of enforcement, bankruptcy, receiverships, arbitration, employment law, accounting law, transportation and sales laws. At its meeting in Bangui in March 2001, the Council of Ministers decided that harmonisation would include competition law, banking law, intellectual property law, commercial law and evidence law.<sup>43</sup> In practical terms, an investor seeking to establish companies in more than one OHADA states is assured of familiarity with the law and lower costs of setting up a business. John Deware thus argues that emerging countries through OHADA can attract investment and eliminate barriers to cross border trade through harmonisation.<sup>44</sup>

39 Article 27-30 OHADA Treaty

40 Article 40 OHADA Treaty

41 Article 31-39 OHADA Treaty

42 Article 41 OHADA Treaty

43 Alhousseini Mouloul, *Understanding the Organization for the Harmonization of Business Laws in Africa (OHADA)*. (OHADA 2009) 36

44 Dewar (n) 12

Article 10 of the OHADA Treaty provides that that: 'Uniform Acts are directly applicable and binding in the member states, notwithstanding any conflicting provision of previously or subsequently enacted domestic law.' This section examines OHADA business law and similar business law reform projects in Nigeria. This section will show that the weak implementation and coherence of business laws remains a challenge in Nigeria, despite several business law reform projects. As of September 2016, there were 9 OHADA Uniform Acts related to insolvency, debt recovery, commercial transactions, contracts for the transportation of goods, arbitration, accountancy, securities, and company law. Ongoing discussions are taking place on the need to revise some additional uniform acts in OHADA with the strategic support of the World Bank.<sup>45</sup>

### 1. Insolvency

A strong insolvency regulatory regime prevents premature liquidation of sustainable businesses, discourages lenders from issuing high-risk loans, managers and shareholders from taking imprudent loans, and making other reckless financial decisions. Insolvency is important for the economy because it prevents businesses from folding up too quickly, thereby protecting the interests of creditors and other stakeholders.<sup>46</sup>

In December 2015, A Uniform Act Organizing Collective Proceedings for Wiping off Debts introduced new provisions on cross-border insolvency in OHADA.<sup>47</sup> This new law replaces the 1998 law which was considered to be lacking key features of a modern insolvency regime, particularly in regards to reorganization proceedings and the treatment of creditors.<sup>48</sup> The World Bank has stated that this act will ensure access to credit for businesses in OHADA and can be expected to play a crucial role in mitigating investor and creditor risk, reducing the instability that could be caused by high levels of non-performing loans.<sup>49</sup> Key features of the new Uniform Act Organizing Collective Proceedings for Wiping off Debts include:

- A conciliation procedure to encourage saving viable companies
- Simplified regulations for small enterprises
- A new cross-border insolvency regime based on the UNCITRAL Model Law
- Clarified order of priority of creditors
- Incentives for creditors who provide fresh money to troubled companies to facilitate their restructuring and recovery
- A common legal framework to oversee the activities of insolvency practitioners as well as trustees<sup>50</sup>

In May 2016, The Nigerian senate passed the Bankruptcy & Insolvency Act (Repeal & Re-enactment) Bill 2016, in a bid to ease the problems associated with accessing credit for business in Nigerian.<sup>51</sup> This legislation, amongst other things, repeals the Bankruptcy Act No. 16 of 1979, makes provisions for corporate and individual insolvency, provides for the rehabilitation of the insolvent debtor and creates the office of the supervisor of insolvency.<sup>52</sup> Prior to the passage of this Act, there was no insolvency legislation in Nigeria and insolvency was largely regulated by the Companies Act.<sup>53</sup>

45 Gilberto De Barros, *Africa - Improved Investment Climate within the Organization for the Harmonization of Business Law in Africa (OHADA): P126663 - Implementation Status Results Report: Sequence 08* (World Bank Group 2016)

46 The World Bank, *Insolvency. Why it Matters?* (World Bank 2016) <<http://www.doingbusiness.org/data/exploretopics/resolving-insolvency/why-matters>> Accessed: 20 November 2016

47 Uniform Act on Organizing Bankruptcy Proceedings for the Discharge of Liabilities (adopted 1999, amended 2015)

48 Marie Zelazko, 'OHADA Uniform Act on Insolvency: New Act Comes into Force' (*Inside Africa Law* 17 December 2015) <<http://www.insideafricalaw.com/publications/ohada-uniform-act-on-insolvency>> Accessed: 20 November 2016. See Claire Moore Dickerson, 'Corporate Social Responsibility: Lessons from the South on Law and Business Norms' In Dana Gold (ed) *Law and Economics: Toward Social Justice: Toward Social Justice* (Emerald Group Publishing 2009) 136

49 New Uniform Insolvency Act Can help African SMEs Improve Access to Finance in 17 Countries, (The World Bank, 16 September 2015) <<http://www.worldbank.org/en/news/feature/2015/09/16/new-unified-insolvency-act-can-help-african-smes-improve-access-to-finance>> Accessed: 20 November 2016

50 Ibid. See also World Bank, *Doing Business 2017 Equal Opportunity for All* (The World Bank Group 2017) 46

51 Senate Passes Bankruptcy and Insolvency Bill (*The Vanguard* 26 May 2016) <<http://www.vanguardngr.com/2016/05/senate-passes-bankruptcy-insolvency-bill/>> Accessed: 20 November 2016

52 A draft of the bill is available online at <<http://www.nass.gov.ng/document/download/7847>> Accessed: 20 November 2016

53 An Insolvency Bill 2014 for An Act to Consolidate the Enactments Relating to Company, Individual and Cross Border Insolvency and to make Provisions for Business Rescue and Other Related Matters appears to have been abandoned in favour of this act.

## 2. Alternative Dispute Resolution

Alternative Dispute Resolution (ADR), and particularly arbitration is increasingly becoming the preferred mode of commercial dispute resolution and is recognised as protecting the rights of investors. This is largely due to the advantages of arbitration over litigation and the weaknesses of judicial enforcement in developing economies.<sup>54</sup>

The Uniform Act on Arbitration and the Arbitration Rules of the CCJA regulate arbitration under OHADA law.<sup>55</sup> The practice of arbitration remains limited within the OHADA region as only 52 arbitration cases have been submitted to the CCJA since it started operating in 1997.<sup>56</sup> The main objective of the Act is to regulate ad hoc arbitration; however it also refers to private institutional arbitration within the OHADA Contracting States. The CCJA operates like an arbitration centre, which means that it does not directly settle disputes. The CCJA Arbitration Rules also contain regulations on annulment and enforcement of arbitral awards, which are rendered under the auspices of the CCJA. It has been argued that national courts in OHADA states are sceptical of arbitration which raises risks and complications.<sup>57</sup> In November 2015, in a highly criticised decision, the CCJA ruled that an arbitration between a French company, Getma International (Getma), and the Guinean State should be set aside on the grounds that the arbitrators had entered into a separate fee agreement with the parties to the arbitration, in breach of the CCJA Rules.<sup>58</sup> This decision has a likelihood of discouraging foreign investors from including arbitration under the CCJA rules in their contracts as there are allegations of state bias.<sup>59</sup> On the 9<sup>th</sup> of June 2016, the United States District Court, where enforcement proceedings were initiated, recognized the CCJA annulment and held that it would not confirm and enforce the Getma award.<sup>60</sup> A Uniform Act on Arbitration and Mediation is at an advanced stage of drafting, and might be submitted to the Council of Ministers in 2016. This Act will establish alternative dispute resolution procedures and practices in line with international good practice.<sup>61</sup>

The Arbitration and Conciliation Act 1998 Cap A19, Laws of the Federation of Nigeria, 2004, which applies to both domestic and international arbitrations, governs arbitration proceedings in Nigeria. Where the venue of the arbitration is in Lagos State and the arbitration agreement does not expressly refer to any other law, the Lagos State Arbitration law of 2009 will govern the proceedings. Both the Lagos State Arbitration Law of and the Arbitration and Conciliation Act are modelled after the UNCITRAL Model Law, but the state law incorporates recent proposed amendments to the model law. Generally, Nigeria is recognized as an arbitration-friendly country where local courts will not interfere with arbitral proceedings.<sup>62</sup> Enforcement of awards is however a lengthy and difficult procedure due to the backlog of cases in Nigerian courts. There have been several calls for amendment of the law, including introduction of arbitration-related bills.<sup>63</sup> On the 10<sup>th</sup> of November 2016, an

54 Philippe Leboulanger and Gaston Kenfack Douajni, 'Arbitration under the Common Court of Justice and Arbitration of the OHADA Contracting States' in Lise Bosman (ed), *Arbitration in Africa: A Practitioner's Guide*, (Kluwer Law International 2013) 317.

55 OHADA Uniform Act on Arbitration (adopted 2009)

56 Philippe Leboulanger and Gaston Kenfack Douajni, 'Arbitration Under the Common Court of Justice and Arbitration of the OHADA Contracting States' in Lise Bosman (ed), *Arbitration in Africa: A Practitioner's Guide*, (Kluwer Law International 2013) 317

57 Baker and McKenzie *Business in West and Central Africa: The Legal Framework, An Introduction to the Laws of the OHADA* (Baker and McKenzie 2015) 38

58 In 2011, French company Getma International commenced arbitration proceedings against the Guinean State for wrongful termination of a port and railway concession contract. The proceedings were held under the arbitral rules of the CCJA with a tribunal comprised of three arbitrators: Professor Ibrahim Fadlallah, Eric Teynier Esq., and Juan Antonio Cremades Esq. In April 2014, the tribunal ruled in favour of Getma, ordering Guinea to pay over €38 million in damages plus interest. Getma commenced proceedings to enforce the award in the US courts. See <[<http://us-arbitration.shearman.com/siteFiles/12854/2016.06.09%20GETMA%20INTERNATIONAL%20v.%20REPUBLIC%20OF%20GUINEA,%202014-cv-01616,%20No.%2038%20\(D.D.C.%20Jun.%209,%202016\)>](http://us-arbitration.shearman.com/siteFiles/12854/2016.06.09%20GETMA%20INTERNATIONAL%20v.%20REPUBLIC%20OF%20GUINEA,%202014-cv-01616,%20No.%2038%20(D.D.C.%20Jun.%209,%202016)) Accessed: 20 November 2016

59 Maguelonne de Brugiere, A Step Back for OHADA (*Kluwer Arbitration Blog*, February 10, 2016) <<http://kluwerarbitrationblog.com/2016/02/10/a-step-back-for-ohada-arbitrations/>> Accessed: 20 November 2016

60 Maguelonne de Brugiere, Getma v Guinea: The Saga Continued (Hebert Smith Freemills Arbitration Notes 16 June 2016) <<http://hsfnotes.com/arbitration/2016/06/16/getma-v-guinea-the-saga-continued/>> Accessed: 20 November 2016

61 Gilberto De Barros, *Africa - Improved Investment Climate within the Organization for the Harmonization of Business Law in Africa (OHADA): P126663 - Implementation Status Results Report: Sequence 08* (World Bank Group 2016)

62 *OECD Investment Policy Reviews: Nigeria 2015* (OECD 2015) 88

63 For example, the Arbitration and Conciliation Act (Amendment) Bill, 2008 seeking to amend some aspects of the Arbitration and Conciliation Act, CAP A18, 2004 to provide for a mandatory provision to prohibit Nigerian entities from using foreign substantive law for settling their arbitration disputes or from hosting their arbitration disputes outside Nigeria if the dispute itself arose from Nigerian territory.

Arbitration and Reconciliation Act 2004 (Amendment) Bill, 2016 was introduced in the Nigerian Senate.<sup>64</sup> It is expected that if passed, the law will modernise the country's arbitration law, in line with UNCITRAL Arbitration Rules by including provisions on multiple parties, consolidation of proceedings, concurrent hearings, emergency arbitrator proceedings, enforcement of interim measures/procedural orders, enable a more effective framework in terms of speed and efficacy of enforcing arbitral awards and avoiding delays in arbitration applications before the court.<sup>65</sup>

### 3. Accountancy

Good financial reporting and accounting standards promote investment, develop capital markets, help businesses access credit and can improve tax compliance. Strong systems of audit, quality assurance, and oversight help ensure financial stability and prevent economic shocks.<sup>66</sup>

The OHADA Uniform Act Relating to Commercial Companies and Economic Interest Groups (revised January 2014) and the OHADA Uniform Act Organizing and Harmonizing Company Accounting Systems 2002 stipulate accounting, auditing, and financial reporting requirements for the OHADA member states. The OHADA Accounting System in 2001 differs from IFRS and comprises a three-tier system that allows companies to prepare full or abridged financial statements based on their size. With assistance from the World Bank, revisions to the OHADA legislation governing accounting standards are underway to align their requirements with international best practices. As of 2016, a new uniform Act on accounting standards and the Uniform Act on Regulation on Code of Ethics and Auditing Standards have been drafted and agreed upon. This Act is also currently being finalized and will be submitted to the Council of Ministers for review. The new Act is expected to introduce IFRS for public interest entities as well as a revised OHADA Accounting System for Small and Medium Enterprises.<sup>67</sup>

The main legislation that establishes corporate financial reporting requirements in Nigeria is the Companies and Allied Matters Act of 1990, CAP C20 LFN 2004, (CAMA). The CAMA outlines the requirements for corporate accounting, auditing, and financial reporting. All companies are required to prepare annual financial statements. The Financial Reporting Council of Nigeria Act of 2011 (FRC Act) established the Financial Reporting Council (FRC), which is responsible for setting both private and public sector accounting standards and ensuring compliance with financial reporting requirements, among other functions. Under the FRC Act, accounting standards adopted by the FRC must be in line with the requirements of International Financial Reporting Standards (IFRSs). Regulatory bodies, such as the Central Bank of Nigeria, the Securities and Exchange Commission, the Nigerian Stock Exchange, and the National Insurance Commission stipulate additional financial reporting requirements for the entities that fall within their purview.

### 4. Contracts

Contract law is pertinent to business as it helps to uphold commercial agreements and supports the expectations of business people.<sup>68</sup> Efficient contract enforcement is essential to economic development and sustained growth and is one of the key indicators used by the World Bank in calculating doing business scores.<sup>69</sup>

The OHADA Uniform Act relating to the transportation of goods by road entered into force in 2004 and is applicable to all transportation contracts of goods by road, when the origin and destination as specified are within the OHADA jurisdiction.<sup>70</sup> The uniform act deals with the carrier liability and the disputes, provides for

64 Progress of the bill can be tracked online at <<http://placbilltrack.org/view.php?getid=2400>> Accessed: 20 November 2016

65 Kelvin Ebiri, 'CIARB Advocates Reform of Arbitration Laws, NICARB holds Investiture' (*The Guardian*, 15 November 2016) <<http://guardian.ng/features/ciarb-advocates-reform-of-arbitration-laws-nicarb-holds-investiture/>> Accessed: 20 November 2016

66 New World Bank Report Points to Major Developments in Georgia's Accounting and Auditing Environment (30 September 2015, *World Bank*) <<http://www.worldbank.org/en/news/press-release/2015/09/30/new-world-bank-report-points-to-major-developments-in-georgias-accounting-and-auditing-environment>> Accessed: 20 November 2016

67 International Federation of Accountants, Ivory Coast <<https://www.ifac.org/about-ifac/membership/country/ivory-coast>> Accessed: 20 November 2016. De Barros,(n)

68 Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Bloomsbury Publishing 2013) 3

69 World Bank Doing Business, Enforcing Contracts, Why it Matters? <<http://www.doingbusiness.org/data/exploretopics/enforcing-contracts/why-matters/>> Accessed: 20 November 2016

70 Art. 1, Uniform Act Relating to Contracts for the Carriage of Goods by Road.

solutions regarding the conflict of jurisdictions in the case of litigations not submitted to an arbitration panel<sup>71</sup>, and limits the period of commercial sales to two years. In March 2001, the OHADA Council of Ministers decided to take steps towards the harmonization of their contract law. In 2004, a draft OHADA uniform act on contract law aiming to modernize contract law, and based on the Institute for the Unification of Private Law's (UNIDROIT) Principles of International Commercial Contracts, was submitted but has yet to be ratified.<sup>72</sup>

The law of contract in Nigeria is comprised of received English common law, the doctrines of equity, applied English statutes, Nigerian legislation and court decisions.

The relative lack of deliberate efforts aimed at harmonizing contract law in OHADA and contract law reform is a reflection of the commercial reality that '... common law of contract, encumbered with an attachment to doctrines such as privity and consideration, could not easily afford recognition of measures designed to facilitate business dealing...'<sup>73</sup> This is why importance is placed on other areas of business law like tort and, more particularly, on enforcement of contract and property rights.<sup>74</sup>

## 5. Cooperative Law

An important aspect of supportive legal frameworks involves ensuring that co-operative legislation underpins and protects the co-operative identity. The co-operative model of doing business is recognised as offering opportunities for small scale and large scale businesses which take account of a wide range of business needs. Co-operative institutions not only create long-term security; they are also long-lasting, sustainable and successful.<sup>75</sup> The OHADA Uniform Act relating to cooperative societies entered into force in 2011. It outlines the rules of the constitution and the operation of cooperative societies within the OHADA zone. The law on Cooperative Societies is regarded as important, as cooperatives are a key business form in OHADA states.<sup>76</sup>

In Nigeria, cooperative societies are regulated and registered under the Nigerian Co-operative Societies Act, and under cooperative laws in states.<sup>77</sup> The act regulates the registration of cooperative societies, and makes provisions or duties and privileges of registered societies. It also makes provisions for dispute resolution, auditing and dissolution of cooperative societies.<sup>78</sup>

## 6. Commercial Law

Commercial law is generally a body of rules which regulate commercial transactions, and includes banking law, corporate law, sale of goods and consumer protection. However, the scope of commercial legislation is usually regarded as the sale of goods, the law of agency and hire purchase law.<sup>79</sup> The Uniform Act Relating to General Commercial Law was adopted in 1997 and revised in 2010. This Act provides for the standardization of rules applicable to traders and business activities in the OHADA common zone. It regulates the status of traders, registration in the Trade Register and Property Credit, as well as registration renewals and radiation of property security, lease for professional use, commercial funds, commercial intermediaries, and trade sale.<sup>80</sup> This Act was recently revised to take into account the status of entrepreneurs and the computerized operation of the trade and property credit register. In Nigeria, commercial transactions are generally regulated by the Sale of Goods

71 Art. 27, *ibid*

72 Salvatore Mancuso, 'Trends on the Harmonization of contract law in Africa' [2007] 13 *Ann. Surv. Int'l & Comp. L.* 157

73 Mitchell (n) 2013, 5-7.

74 David W. Kennedy, 'Some Caution about Property Rights as a Recipe for Economic Development' (September 4, 2009). Brown University - Law, Social Thought, & Global Governance Research Paper No. 1; Harvard Public Law Working Paper No. 09-59. Available at SSRN: <<https://ssrn.com/abstract=1468549>>

75 Blueprint for a Co-operative Decade (International Cooperative Alliance 2013)

76 Monkam Cyrille, 'The Advent of OHADA Cooperatives companies - An Insight into Management Control' *Revue de l'ERSUMA* [2013] 3 *Droit des affaires - Pratique Professionnelle*

77 Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Nigeria 2016 *Phase 2: Implementation of the Standard in Practice* (OECD 2016) 64

78 Charles Mwalimu, *Nigerian Legal System*, (Peter Lang, 2009) 434

79 Alan Paul Dobson and Robert Stokes, *Commercial Law* (Sweet and Maxwell 2012) 3

80 Brief Presentation on OHADA (*Interlegal Newsletter* 14 April 2016) <<http://www.interlegal.net/fr/news/interlegal-newsletter-april-2016>> Accessed: 20 November 2016

Act 1893, the common law of agency, and the Hire Purchase Act 1965. In 2014, there were talks of reforming the 1893 Sale of Goods Act but this is yet to start.<sup>81</sup>

## 7. Securities Law

The OHADA Uniform Act Organizing Securities was enacted in 1997 and revised in 2011. It has been argued that the revised Act creates a favourable and innovative legal framework for security interests in the OHADA member states by making secured lending more 'creditor friendly'.<sup>82</sup>

The main features of the reform include:

- A reform of the commercial registry (RCCM)
- New security registration rules and the creation of a security agent
- New regime for pledges
- A clear and simple distinction between pledges over tangible movable assets and pledges over intangible assets.<sup>83</sup>

The Securities and Exchange Commission (SEC) created by the Investment and Securities Act (ISA Act) of 2007 regulates the securities market in Nigeria. The adoption of the ISA Act has strengthened the regulatory framework for securities in Nigeria, extended the market, offered more market products, addressed the need to improve the quality and timeliness of disclosures, and managed the risks inherent in the management of client assets in collective investment schemes.<sup>84</sup>

However, in a 2013 assessment report, the IMF noted that inadequate regulatory requirements for broker-dealers, and a weak regulatory framework organizational structure has the potential of introducing systemic risks to the Nigerian financial system. A 2015 collaborative report by the Nigerian Capital Markets Solicitors Association, and the Law Society of England & Wales recommends that in order to boost the integrity of the Nigerian capital markets, there is a need to enhance the framework of rules and develop initiatives so as to (i.) improve information disclosure and dissemination, (ii.) deter manipulation of the market through insider dealing or conflict of interest and (iii.) promote an industry-led culture of transparency and good governance.<sup>85</sup>

## 8. Company law

A revised OHADA Companies Uniform Act came into force in 2014 replacing the 1998 Companies Act. The main innovations under the revised act include the following:<sup>86</sup>

- **Introduction of a Simplified Form of Joint-Stock Company**

The main goal of SAS (*Société Par Actions Simplifiée*) is to offer investors a flexible structure in which contractual freedom prevails.

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81 FG to reform 121-year-old Sale of Goods Law (*Daily News and Analysis of Nigeria* 3 September 2014) <<http://www.dna-nigeria.com/fg-reform-121-year-old-sale-goods-law/>> Accessed: 20 November 2016

82 Enhancing structured lending into Francophone African countries: OHADA adopts a major reform of its uniform act organizing security law Mayer Brown Legal Update April 2011 <<https://www.mayerbrown.com/files/Publication/a1e8d808-ecb2-4a7c-9b316b21edc5e0e/Presentation/PublicationAttachment/f449f57d-5cd9-491e-8c63-179a59f48f85/10768.PDF>> Accessed: 20 November 2016. Alex Bebe Epale, 'The Revised OHADA Uniform Act on Security Law' (*Hogan Lovells Africa Newsletter* December 2012) <[http://www.hoganlovellsafrica.com/uploads/Publications/Africa\\_Newsletter\\_Dec\\_2012\\_-\\_The\\_revised\\_OHADA\\_Uniform\\_Act\\_on\\_security\\_law.pdf](http://www.hoganlovellsafrica.com/uploads/Publications/Africa_Newsletter_Dec_2012_-_The_revised_OHADA_Uniform_Act_on_security_law.pdf)> Accessed: 20 November 2016

83 *ibid*

84 Nigeria: Publication of Financial Sector Assessment Program Documentation- Detailed Assessment of Implementation of IOSCO Objectives and Principles of Securities Regulation (IMF 2013)

85 Samalie Kiyingi and Elizabeth Uwaiwo, *Nigerian Capital Markets: Legal and Regulatory Review and Recommendations* (UBBO 2015)

86 EY Global Tax Alert Library 'OHADA revises Uniform Act on Commercial Companies and GIE' (14 March 2014) <[http://www.ey.com/Publication/vwLUAssets/OHADA\\_revises\\_Uniform\\_Act\\_on\\_Commercial\\_Companies\\_and\\_GIE/\\$FILE/2014G\\_CM4261\\_OHAD\\_A%20revises%20Uniform%20Act%20on%20Commercial%20Companies%20and%20GIE.pdf](http://www.ey.com/Publication/vwLUAssets/OHADA_revises_Uniform_Act_on_Commercial_Companies_and_GIE/$FILE/2014G_CM4261_OHAD_A%20revises%20Uniform%20Act%20on%20Commercial%20Companies%20and%20GIE.pdf)> Accessed: 20 November 2016

- **Increased Legal Certainty**

The Companies Act gives validity to shareholder agreements which are in compliance with the act and article of association. The act also recognises share transfer restrictions made pursuant to the enforcement of a share pledge.

- **Improved Corporate Governance**

The Revised Corporate Act reinforces corporate governance regulation by prohibiting directors from participating in any vote on their own remuneration, specifying the types of contracts that require the prior approval of an SA or SAS's board of directors, introducing the notion of abuse of equality, and introducing new offences relating to the management of companies, such as the failure by directors to submit companies' financial statements within a month of their approval by the shareholders. In addition, the act introduces innovation by enabling participation in meetings and voting by video conference.

- **New financing opportunities and new types of securities**

The act contains new provisions on securities, making possible the issuance of hybrid securities, preferred shares, or free shares, and also making it possible for non-listed public limited-liability companies (*sociétés anonymes*) and simplified limited-liability companies to provide for variable share capital.<sup>87,88</sup>

The act was received positively by business lawyers and the World Bank and is described as a significant breakthrough upgrading OHADA's corporations law to meet the requirements of private equity and other foreign investors, meeting international guidelines for “effective, clear and flexible corporate securities laws” and sets the stage for further development of local capital markets in the OHADA region.<sup>89</sup>

Nigeria corporate law is regulated by the Corporate and Allied Matters Act (CAMA) 1990 and different corporate governance codes. In October 2016, the Financial Reporting Council of Nigeria (FRCN) issued new Codes of Corporate Governance in an attempt to harmonise the overlapping corporate governance codes.<sup>90</sup>

- i. The Code of Corporate Governance for the Private Sector (mandatory)
- ii. The Code of Governance for Non-profit Organisations based on a principle of “Comply or Justify Non-compliance”
- iii. The Code of Governance for the Public Sector was suspended awaiting an executive directive from the Federal Government of Nigeria.

However, in controversial circumstances, two weeks later, the codes were suspended by Nigerian Minister for Industry, Trade and Investment.<sup>91</sup> The codes have faced heavy criticism from stakeholders for the clear conflict between the provisions of the code and CAMA, and for introducing mandatory provisions. Attempts to harmonise corporate governance remain on hold for now.

On November 24, a Corporate Affairs Commission Amendment Bill 2016 was presented before the Nigerian senate and has been designated as one of the key legislative reforms necessary for improving Nigeria's

87 Albert Atangana, “, (Tax News Service 5 March 2014)

88 White and Case, ‘The New OHADA Uniform Act in a Nutshell’ (*Insight: Energy, Infrastructure and Project Finance* February 2014) <<http://www.whitecase.com/sites/whitecase/files/files/download/publications/white-case-the-new-ohada-uniform-act-insight.pdf>> Accessed: 20 November 2016

89 Domoraud Operi and Anthony Riley, ‘Reforms to OHADA Commercial Law: Towards a More Attractive Legal Framework for Private Equity’ (*EMPEA* 27 April 2014) <<http://empea.org/research/legal-regulatory-issues/reforms-to-ohada-commercial-law-towards-a-more-attractive-legal-framework-f/>> Accessed: 20 November 2016

90 <<http://www.financialreportingcouncil.gov.ng/>> Accessed: 20 November 2016

91 PricewaterhouseCoopers, ‘Government Suspends the New Codes of Corporate Governance Issued by the Financial Reporting Council of Nigeria’ (*PWC* November 2016) <[http://pwc-nigeria.typepad.com/files/pwc-regulatory-alert\\_fg-suspends-frcn-code.pdf](http://pwc-nigeria.typepad.com/files/pwc-regulatory-alert_fg-suspends-frcn-code.pdf)> Accessed: 20 November 2016

investment climate. The bill proposes to provide a framework for business rescue recovery process, provide for companies with a single shareholder and director, as well as repeal the statutory declaration by a legal practitioners in company formation. In addition, the bill seeks to clarify rules of doing business in Nigeria, introduce the denomination of share capital in currencies other than the Naira, review and abolish the rules on non-voting/non-weighted shares; review/abolishment of the rules on financial assistance by a company for the purchase of the company's own shares; and create a framework for valuation of equity.<sup>92</sup>

Nigeria appears to making strong attempts to modernise and reform corporate law. The introduction of online registration by the Nigerian Corporate Affairs Commission (CAC) allowing companies to reserve their names electronically is recognized by the 2017 Doing Business Report on as a substantial business driven reform initiative.<sup>93</sup>

### 9. Debt Recovery

The OHADA uniform act relating to debt collection procedures and measures of execution adopted in 1998 outlines two judicial procedures to be implemented by a creditor to oblige the debtor to fulfil its commitments: injunction to pay a sum of money and to issue an injunction or return a specified personal property. It also outlines enforcement measures intended to compel a defaulting debtor to perform his obligations in case of judicial sentence.

In Nigeria debt recovery is generally regulated by the court rules for summary judgment, provisions of CAMA on winding up and liquidation, and the Asset Management Corporation of Nigeria (AMCON) Act.

## An Assessment of OHADA

Having examined business law reform under OHADA and in Nigeria, we now assess OHADA based on its objectives and compare doing business indicators. Several arguments can be made in favour of supranational and uniform laws. Notably, harmonized laws can help to facilitate international trade, fill gaps in domestic law, reduce instances of conflicts of law, serve as an impetus for domestic law reform and, as it is usually translated into several languages, make laws more accessible.<sup>94</sup> OHADA has several challenges but has succeeded in theory in achieving its goals of uniform laws.<sup>95</sup> There is a strong belief that uniform laws act as economies of scale by pulling together expertise and encouraging foreign investment. In most African states, legal reform to meet up with economic changes is a challenge and OHADA has succeeded in reforming outdated colonial laws.<sup>96</sup> Also OHADA has succeeded in establishing a system of laws and has the potential to transform business relations in the West African Region.<sup>97</sup>

It has been argued that uniform laws make OHADA countries competitive economically, thereby attracting foreign investment.<sup>98</sup> Currently OHADA member states have the lowest Foreign Direct Investment (FDI) inflows and Gross Domestic Product (GDP) on the continent (See Table 1 below).<sup>99</sup> This is not necessarily a function of laws and development but due to other factors like lower landmass, smaller populations and natural

92 Favour Nnabuwu, 'How Amendment of CAMA will Improve Investment Climate' (*The vanguard*, 8 August 2016 <<http://www.Thevanguard2016/08/amendment-cama-will-improve-investment-climate>> Accessed: 20 November 2016

93 Doing Business 2017, 39

94 Eric Baskind, Greg Osborne, and Lee Roach, *Commercial Law* (2013 OUP) 11

95 Renaud Beauchard and Mahutodji Jimmy Vital Kodo, 'Can OHADA Increase Legal Certainty in Africa' *World Bank Justice and Development Working Paper Series* 17/2011, 7

96 Renaud Beauchard, 'OHADA Nears the Twenty-Year Mark: An Assessment' *The World Bank Legal Review* (World Bank 2012) 327. <[http://elibrary.worldbank.org/doi/abs/10.1596/9780821395066\\_CH18](http://elibrary.worldbank.org/doi/abs/10.1596/9780821395066_CH18)>

97 Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014) 198

98 See for instance, Weidong Zhu, 'OHADA as a Base for Further Chinese Investment in Africa' (*Penant* December 28, 2009) No.869, 2009. Available at SSRN: <https://ssrn.com/abstract=2194287> which emphasises the importance of OHADA for Chinese investment

resources, and conflicts. For instance the Central African Republic which has the lowest Doing Business index and GDP in the OHADA region has been steeped in civil war since 2012.<sup>100</sup> Nigeria's GDP figures are largely consistent with Nigeria's position as the largest economy and exporter of oil in Africa (Table 1).

Although controversial for promoting structural adjustment-like projects in developing countries,<sup>101</sup> the World Bank's Doing Business report provides a context for evaluating OHADA's business reform project. In the 2017 Doing Business report, Nigeria is ranked 169 in the world and falls behind 11 of the 17 OHADA states. In the 2017 Doing Business reports, the World Bank notes that more than half of the past year's reforms in SSA were implemented by members of the OHADA (See Table 1).<sup>102</sup> These rankings indicate that Nigeria's business law, despite reform initiatives, does not meet international standards. Foreign investors, the World Bank and foreign law firms recognise OHADA as creating a more transparent, predictable climate for foreign investment. OHADA is believed to have led to increased foreign investment and international trade relations.<sup>103</sup> However these gains are relative. For example, based on quantitative analysis, Thiemann reports an overall negative relationship between OHADA regulation and economic performance within the region.<sup>104</sup> Thus the Doing Business indicators are not a sole determinant of economic growth.

**Table 1: Ease of Doing Business in 11 OHADA States**

Country	Ease of Doing Business 2017 Ranking	GDP Per capita (US \$)	FDI 2015
Benin	155	779.1	229,253,141
Burkina Faso	146	613.0	167,397,329
Cameroon	166	1,250.8	620,119,000
Cent. African Republic	185	306.8	3,000,000
Chad	180	775.7	600,219,799
Comoros	153	-	5,146,840
Cote d'Ivoire	142	1,398.7	430,157,849
DRC Congo	184	456.1	-507,780,090
Equatorial Guinea	178	11,120.9	316,172,119
Gabon	162	8,311.5	623,890,439
Guinea	163	531.3	85,000,000
Guinea Bissau	172	573.0	18,344,357
Mali	143	744.3	152,941,331
Niger	150	359.0	524,979,288
Nigeria	169	2640.32	3,064,170,000
Senegal	147	910.8	345,211,486
The Republic of Congo	177	1851.2	1,486,178,037
Togo	154	548.0	52,653,935

A major criticism of OHADA is its limitation to Francophone West Africa. Although Article 42 of the OHADA treaty has been amended to include English, Spanish and Portuguese as official languages, the working language of the organization effectively remains French, as official translations of OHADA uniform acts are not available in English. In October 2016, Anglophone lawyers in bilingual Cameroon embarked on an indefinite strike protesting marginalization and demanding for translation of OHADA uniform acts to English.<sup>105</sup>

While OHADA has achieved its goals of uniform business legislation across its member states the practical advantages of harmonisation are diminished as most business activity in OHADA states fall into the informal sector. Thus, there has been limited application and reception of the uniform acts in member states. With the exceptions of Cameroon, Cote d'Ivoire, Equatorial Guinea, and Guinea Bissau, 12 OHADA states were classified as low-income economies for the 2017 fiscal year.<sup>106</sup> This classification is not the best means for assessing the strength of unified laws in attracting investment and economic growth; however, this gives an indication of the relative success of OHADA.

As OHADA is the only community in the world with uniform commercial laws, this raises practical implications. The “direct applicability and the repealing and mandatory characters distinguish the uniform acts from the European directives whose implementation depends on the willingness of states, which must transpose them into domestic law.”<sup>107</sup>

## OHADA, Nigeria and Pan-African Business

Nigeria has strong economic linkages with neighbouring countries which are members of ECOWAS and OHADA. In a 2015 Organization for Economic Cooperation and Development (OECD) report, it is estimated that the key areas of these regional interconnections are energy, informal trade of goods and services, and the financial sector. The reports also note that the Nigerian financial sector is a major area of cross-border regional activity, with Nigerian banks having 75 subsidiaries across Sub-Saharan Africa (SSA) countries. In spite of this intra-regional trade, Nigeria's exports to African countries are approximately 12%, with ECOWAS accounting for 3%. These figures highlight the unexplored avenues and huge potential for increased regional cross-border economic activities (See Table 2 showing Nigeria's exports and imports with OHADA states).<sup>108</sup>

99 Comprehensive data is available online at <<http://www.worldbank.org/en/region/af>>

100 'Driverless CAR: No One is in Charge of the Central African Republic' (*The Economist*, 8 January 2016) <<http://www.economist.com/news/middle-east-and-africa/21685713-peaceful-election-holds-out-hope-no-one-charge-central-african>> Accessed: 20 November 2016

101 Amanda Perry-Kessaris, 'Prepare Your Indicators: Economics Imperialism on the Shores of Law and Development' [2011] 7 *International Journal of Law in Context* 401

102 World Bank, African Economies Adopt Record Number of Reforms, says Latest Doing Business Report 25 October 2016 <<http://www.worldbank.org/en/news/press-release/2016/10/25/african-economies-adopt-record-number-of-reforms-says-latest-doing-business-report>> Accessed: 20 November 2016

103 Menon Sundaresh, 'Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence' [2013] *Sing. J. Legal Stud.* 231, 245

104 Alexa Tiemann, 'OHADA Membership and Business Reforms: A Driver for Growth?' 2012 <[http://dial2013.dauphine.fr/fileadmin/mediatheque/dial2013/documents/Papers/146\\_US\\_Tiemann.pdf](http://dial2013.dauphine.fr/fileadmin/mediatheque/dial2013/documents/Papers/146_US_Tiemann.pdf)> Accessed: 20 November 2016

105 Prince Nfor Hanson, 'Common Law Lawyers Strike Action, Understanding The Silence of Paul Biya' (*Cameroon Concord* 8 November 2016) <<http://cameroon-concord.com/editorial/item/7255-common-law-lawyers-strike-action-understanding-the-silence-of-paul-biya>> Accessed: 20 November 2016

106 Classification of economies can be found online at: <<https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>> Accessed: 20 November 2016

107 Alhousseini Mouloul, *Understanding the Organization for the Harmonization of Business Laws in Africa (OHADA)*, (OHADA 2009) 30

108 OECD, *Nigeria Investment Policy Reviews* (OECD 2015) 25

**Table2: Nigeria's Exports and Imports with OHADA states**

Country	Export partner share percentageEase of Doing Business 2017 Ranking	Import partner share percentage
Benin	0.13	0.00
Burkina Faso	0.01	0.00
Cameroon	1.30	0.00
Ken. African Republic	0.01	0.00
Chad	0.02	0.01
Comoros		0.00-
Cote d'Ivoire	2.27	0.35
DRC Congo	0.00	0.00
Equatorial Guinea	0.08	0.00
Gabon	0.01	0.00
Guinea	0.03	0.00
Guinea Bissau	0.00	0.00
Mali	0.01	0.00
Niger	0.99	0.00
Senegal	0.65	0.01
The Republic of Congo	0.17	0.01
Togo	0.04	0.02

The banking and manufacturing sectors of the Nigerian economy illustrate a growth in intra-regional trade and the importance of OHADA business law. To illustrate how intra-regional trade can be utilized to expand Nigeria's sectoral economies, the expansion of Nigerian banking groups<sup>109</sup> and Dangote Cement to OHADA states will be examined.

Nigeria is the only economy in West Africa to have a company listed on the Top 2,000 Public Companies in the World report released by Forbes in 2016. Dangote Cement stands at number 1,220 with a market cap of \$13.8 billion<sup>110</sup> and is focused on becoming a pan-African manufacturer. In 2014, Dangote cement opened plants in Senegal and opened a plant in Cameroon in 2015. It projects that new facilities will be opened in Republic of

109 See Charles Enoch, Paul Henri Mathieu, Mauro Mecagni, and Jorge Iván Canales Kriljenko, *Pan-African Banks: Opportunities and Challenges for Cross-Border Oversight* (International Monetary Fund 2015)

110 Stephen Schaefer, 'The World's Largest Companies' (*Forbes*, 25 May 2016) Other economies are Zenith Bank, FBN Holdings and Guaranty Trust Bank <<http://www.forbes.com/global2000/#/country:Nigeria>>

Congo, and Cote D'Ivoire by 2018. The plants in these OHADA economies will collectively represent 12.3% of Dangote's total output.<sup>111</sup> Despite several economic challenges, Nigeria remains Sub-Saharan Africa's largest economy with a GDP representing 32% of the regional GDP. It is expected that in the coming years, sub-regional trade will receive a boost. Five Nigerian banks namely, UBA, Guaranty Trust Bank, Zenith Bank, Access Bank, First Bank and Diamond Bank currently have foreign subsidiaries in OHADA states. UBA has subsidiaries in Burkina Faso, Senegal, Cote D'Ivoire, Democratic Republic of Congo, Cameroon and Republic of Congo, and has announced plans to open more branches in OHADA states. Guarantee Trust Bank has one subsidiary in Cote D'Ivoire and Access Bank has a subsidiary in Democratic Republic of Congo. First Bank of Nigeria has subsidiaries in Democratic Republic of Congo and Senegal.

In view of the above stated potential of increased sectoral growth occasioned by intra-regional trade as well as the prospects of increased activities of Nigerian entities in OHADA states, it is important to examine some immediate implications of interactions between Nigerian businesses and OHADA law. First, do OHADA laws apply to Nigerian companies? Under OHADA law, a branch is defined as a commercial, industrial or service-providing establishment which belongs to a company or a natural person and which has been granted a certain degree of autonomy. It does not have a legal personality distinct from the parent company, can be registered locally by a foreign company and it is governed by the law of the OHADA member state in which it is registered. Article 120 of the 1998 Uniform Companies Act, provides that a branch registered by a foreign company registered outside in an OHADA member state had to be converted into a subsidiary within two years (as from its registration date). However, a waiver could be granted by order of the minister in charge of trade in the OHADA member state, and it was common practice for companies to apply for the waiver without conversion. The Revised 2014 Companies Act now provides that a waiver shall be granted for a non-renewable term of two years and makes provision for removal of a foreign company which fails to comply.<sup>112</sup> Effectively, Nigerian companies operating in OHADA states are subject to OHADA uniform acts.

Although optimism has been expressed in OHADA's ability to attract membership from other states, notably Nigeria, the possibilities of this reoccurring are very slim.<sup>113</sup> Undoubtedly, economic integration in OHADA is largely based on civil law and is effectively a French transplant. There are arguments that the difference between common law and civil law within the context of African integration are less real than imagined.<sup>114</sup> In practice there are clear differences between business law based on common law and business law based on civil law, and thus maximum harmonization using uniform laws is not likely to be agreed to by Nigeria. Also, states are reluctant to abandon their sovereignty in favour of uniform supranational legislation.

## OHADA and Transnational Legal Lawyering: Practical Implications

This section focuses on the practical implications of OHADA for transnational lawyering and business law in Nigeria. As identified above, a growing number of Nigerian companies are expanding operations in West Africa. Nigerian business lawyers have not sufficiently engaged with OHADA business law and its nine uniform business acts. The OHADA system has, however, caught the attention of the international community. In a 2015 report titled: 'Business in West and Central Africa: The Legal Framework, An Introduction to the Laws of the OHADA' global law firm Baker and McKenzie, notes that uniform laws in 17 countries make it easier for both international and local firms to do business in this part of the world. As OHADA assumes increased global

111 This is based on the Dangote Cement Annual Report available at: <<http://dangote.com/downloads/2014-Dangote-CEMENT-A.R.pdf>> Accessed: 20 November 2016

112 Thomas Rabain and Simon Cuddebec, 'A Closer Look at the Regime Applicable to Branches Under the OHADA Revised Uniform Act' (*Inside Africa Law*, 18 October 2016) <<http://www.insideafricalaw.com/publications/a-closer-look-at-the-provisions-of-the-regime-applicable-to-branches-under-the-ohada-revised-uniform-act>> Accessed: 20 November 2016

113 See Beauchard and Kodo (n) note 48 quoting Akin Akinbote, 'The ECOWAS Treaty as a Legal Tool for the Adoption of OHADA Treaty and Laws by Anglophone Ecowas States' (OHADA 2008) <[http://www.ohada.com/infohada\\_detail.php?article=953](http://www.ohada.com/infohada_detail.php?article=953)> Accessed: 20 November 2016

114 Corinne Boisman, 'Remarks by Corinne Boisman' (2011) 105 *Proceedings of the Annual Meeting (American Society of International Law)* 42

importance, most global law firms have practices dedicated to advising clients on OHADA law.<sup>115</sup> Although bar admission remains nationalized, Nigerian lawyers may find themselves advising clients on cross border issues involving the application of OHADA business law.

In 2007, a group of Nigerians led by Mr. Akin Akinbote established the OHADA Nigeria Club, registered as a company limited by guarantee under the Laws of the Federation of Nigeria.<sup>116</sup> The club's inaugural executive council, made up of prominent Nigerian lawyers,<sup>117</sup> in its announcement noted that club's strategy was to enhance regional integration based on OHADA law in Africa. Noting limited knowledge about OHADA, the club set the sensitization of the official, business, banking, legal, legislative circles about OHADA as its objective. Beyond holding a few seminars and mobilizing interest in OHADA, the organization's activities in recent years remain undocumented and unknown.<sup>118</sup> A leading introductory text to OHADA from a common law perspective also includes contributions from Professor John Yakubu and Hon. Justice Mohammed Baba Idris, a judge of the Federal High Court, Edo State, Nigeria.<sup>119</sup> Crucial engagement with OHADA law in Nigeria appears to have diminished in recent years. A key way of leveraging on changes in the regional market will be to introduce French as a compulsory language in schools, and introduce the teaching of international law, including OHADA law, at undergraduate levels.

## Conclusion

This article has examined key developments under OHADA and its implications for business law in Nigeria and transnational legal lawyering. This article has also examined key innovations in OHADA law and similar reform projects in Nigeria. Harmonisation and integration of business law remains a fundamental challenge on the African continent. The role of law in bringing change and innovation remains paramount, however this must not be blindly applied ignoring the realities of the states in which they are applied. Laws do not operate in isolation and thus economic growth must be multisector-driven with a focus on strong economic policies.

There are allegations that foreign investors who once found Nigeria highly attractive are leaving the country due to harsh economic policies and effects of the recession.<sup>120</sup> The question thus is: in light of legal reform in OHADA, will regulatory reforms make doing business in Nigeria more attractive and investor-friendly, promoting the interests of private investors including small and medium business? Given the issues raised in this article it is fundamental that Nigeria takes crucial steps towards reforming its business laws.

The 'Brexit' vote of 2016 and the 2016 US elections, both elevated on neo-nationalism, have highlighted the limitations of globalization and supranational law. Therefore, the bigger lesson is the need for governments to focus on inclusive growth and development at all levels. Under the umbrella of the African Union, negotiations for a Continental Free Trade Agreement (CFTA) are underway. The CFTA is expected to be launched by an indicative date of 2017.

115 See Chambers and Partners Global Guide, Commercial/Corporate: OHADA Specialists Africa-wide <<http://www.chambersandpartners.com/16083/2651/editorial/2/1>> Accessed: 20 November 2016

116 <<http://www.ohada.com/actualite/216/ohada-nigeria-club.html>> See also 'The New ECOWAS: Implications for the Study of Regional Integration' Okechkuwu C. Iheduru, Andrew J. Grant, Scarlett Cornelissen, and Timothy M. Shaw, *The Ashgate Research Companion to Regionalisms* (Ashgate Publishing, Ltd., 2013)

117 Members of the Executive Council led by Akintola Akinbote are: George Etomi, Mohammed Bello-Adoke (SAN), Abimbola Akeredolu, Alex Muoka, Morenike Obi-Farinde, Olanrewaju Oyetunji, Ikeazor Akaraiwe, Adejumo Ademiluyi, Ade Ipaye, Ayodele Kusamotu Bolaji Owaonsoye and Deji Adekunle.

118 In 2007 the obituary of the club's president was announced in the media. See <<http://lawyersofafrica.org/palu-pays-respect-to-the-late-mr-akintola-anthony-akinbote-esq/>> Accessed: 20 November 2016

119 Claire Moore Dickerson, ed. *Unified Business Laws for Africa: Common Law Perspectives on OHADA* (IEDP 2012)

120 <http://www.bloomberg.com/news/articles/2016-03-30/nigeria-s-promise-turns-to-peril-as-investors-head-for-the-exits>

Objectives of the CFTA are to create a single continental market for goods and services, with free movement of business persons and investments, and pave the way for accelerating the establishment of the Continental Customs Union and the African customs union. Secondly the CFTA aims to expand intra-African trade through better harmonization and coordination of trade liberalization and facilitation regimes and instruments across RECs and across Africa in general. Thirdly, it aims to resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes. The outcome of these negotiations may have an impact on the future dynamics of regional business law in Africa and may elevate the visibility of OHADA business law. OHADA was established as a response to economic recession, legal and judicial insecurity in Francophone West Africa and was thus aimed at restoring investor confidence and attracting foreign investment.<sup>121</sup> As Nigeria makes efforts to grapple with the challenges of a contracting economy, regulatory reforms within OHADA provide lessons.

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121 Alhousseini Mouloul, *Understanding the Organization for the Harmonization of Business Laws in Africa (OHADA)* (OHADA 2009) 13

# Project Appraisal, Feasibility and Outline Business Case Studies In Public-Private Partnership (PPP) Projects

Chibuzo C. Ekwekwuo\* and Tasmiah Nuhiya Ahmed•

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## Abstract

This article examines the global activities and steps undertaken in a Public-Private Partnership (PPP) project appraisal and feasibility study. It draws out its similarity in purpose and implementation steps with the outline business case deployed by the local regulatory regime for implementation of PPPs in Nigeria.

## Project Appraisal

Appraising a PPP project means checking that it makes sense to develop and implement the project as a PPP.<sup>122</sup>

Project appraisal for a public-private partnership (PPP) project generally refers to the evaluation of project feasibility, i.e. technical, economic and or social viability. Project appraisal enables a definition of the project and its scope. The objectives or desired outcomes of the project are defined and analysis undertaken to determine the degree to which the various options for project design will result in the accomplishment of these outcomes and objectives. It enables the project proponent to decide whether or not to proceed with the PPP option. Appraisal is the analysis of a proposed project to determine its merit and acceptability in accordance with established criteria. This typically involves assessing the project and proposed PPP against four key criteria:

- Project definition and feasibility
- Economic viability
- Commercial viability
- Value for money<sup>123</sup>

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122 <https://pppknowledge.org/ppp-cycle/project-appraisal>

123 Ibid

It checks that the project is feasible against both the situation on the ground and the current government policy, and that its objectives' set remain appropriate and costs are reasonable.<sup>124</sup>

Project appraisal is also the process by which the need for further investment is identified, the objectives of the investment project stated, and various options for meeting this need examined to identify the preferred option. The preferred option should take into account both value for money and likely affordability. The result of this process can be a quantification of the expected costs of the project as well as the expected benefits over the lifetime of the project. The benefits should be monetised—that is to say a monetary value should be attached to them—wherever possible to enable net present value to be calculated. There will, however be some benefits that cannot be monetised in each of the options examined, and these will need to be evaluated in qualitative terms. Various techniques are available to enable this to be done consistently and systematically, and to aid in the comparison of different options.

In a PPP project which is not constrained by a capital budget, there is a risk of over-specifying the requirement and asking for a gold-plated solution when a lower cost alternative would give similar benefits and offer better value for money. Hence, there is a need to look at a range of options for meeting the identified need including a 'Do Minimum' option in order to identify the solution most appropriate to the project objectives which maximizes value for money. The 'Do Minimum' option should represent the best performance outcome that can be achieved through limited expenditure in the absence of significant capital investment. It is the 'base case' against which the costs and benefits of alternative investment projects can be evaluated. The approach is necessary because there is otherwise a danger that significant benefits that can be achieved at modest cost will be attributed erroneously to the investment project.<sup>125</sup>

Furthermore, project financing requires a very thorough appraisal process because of the sole reliance on project cash flows.<sup>126</sup>

The following may be considered as traditional project appraisal criteria:

- *Technical:*  
Will the project work? Has due attention been paid to technical factors affecting the project design? Given the human and material resources identified, can the project activities be undertaken and outputs achieved within the time available, and to the required standards?
- *Financial:*  
Can the project be financed? Will there be sufficient funds to cover the expenditure requirements during the life of the project?
- *Economic:*  
Will the nation and society at large be better off as a result of the project? Will the project benefits be greater than the project costs over the life of the investment when account is taken of time (namely, is the Net Present Value of the project positive at the test discount rate)?
- *Social and gender:*  
What will be the effect of the project on different groups, at the individual, household and community levels? How will the project impact on women and men? How will they participate in various stages of

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124 Definition provided by United Nations Economic Commission for Africa (UNECA or ECA)

125 National Policy on Public-Private Partnership

126 Public Private Partnership Handbook, issued by Asian Development Bank <<http://www.adb.org/sites/default/files/institutional-document/31484/public-private-partnership.pdf>>

the project cycle? Will the social benefits of the project be greater than the social costs over the life of the investment, when account is taken of time?

- *Institutional:*  
Are the supporting institutions in place? Can they operate effectively within the existing legislative and policy environment? Has the project identified opportunities for institutional strengthening and capacity building?
- *Environmental:*  
Will the project have any adverse effects on the environment? Have remedial measures been included in the project design?
- *Political:*  
Will the project be compatible with government policy, at both central and regional levels?
- *Sustainability and risk:*  
Will the project be exposed to any undue risks? Will the project benefits be sustainable beyond the life of the project?<sup>127</sup>

The issues that affect the viability and appropriateness of PPP projects should be included in the expected outcome of appraisal of a PPP project. It is advisable, where the skills exist, to undertake some level of project appraisal in-house before engaging any transaction advisory services. However, it is common in Nigeria that only the detailed appraisal is undertaken, and this is done at Outline Business Case Stage to include:

*Nature of Project:* the PPP project must satisfy a defined need with a clear and definable revenue stream. It is helpful that the project appraisal be based on an identified public need which can only be met by direct government intervention. It should evaluate whether a potential project is politically undesirable, or whether it is impractical to pass on the costs of meeting this need by charging the beneficiaries for the service they receive, or whether it is desirable to provide a subsidy to certain users.

*Risks inherent in the Project:* The risks inherent in the project must be identified and allocated to the party best able to assume and mitigate such risks. Both the public and private sector parties to a PPP contract need to identify and attempt to quantify the project risks during the project appraisal, procurement and contracting phases. The process needs to be systematic and recorded, and will often involve technical advisers.

*Speed of Implementation:* By the time a PPP project comes to market, the project must have clear project objectives and be clear of any policy or political hurdles that might stand in its way.

One factor affecting PPP business case development within the Bureaucracy is shortage of specialist skills. The focus on policy skills in public administration, and the need to rotate individuals between different postings, does not often take account of the special needs of management or the implementation of projects and the development of specialist skills within the public sector. Such transfers can also diminish personal accountability for decisions, particularly if projects pass through several hands that are responsible for the decision-making process at different times. The government is beginning to address these conflicting pressures on its departments by encouraging them to establish dedicated PPP project units and teams and to follow good project management practices, including:

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127 Criteria provided by United Nations Economic Commission for Africa (UNECA or ECA)

- setting out a clear statement of the policy context and the objectives of the project
- the identification of all of the relevant decision-makers at the outset
- timely provision of information, and a clear plan and timetable for the key project decisions
- independent review at key stages by transaction advisers

However it does not appear that recording and application of lessons learnt in previous projects is systematically undertaken as an integral part of the process of development of capacity in the units.

The Infrastructure Concession Regulatory Commission (ICRC) is the authority in Nigeria responsible for monitoring the implementation of PPPs and the policies of the government of Nigeria that deal with PPP Projects. ICRC is also responsible to make recommendations to government on how PPP implementation may be improved. ICRC guides agencies engaged in PPP project procurement and operation on the practical application of the government's policy, undertakes project approval functions, supervises project implementation and has a central role in PPP information disclosure. ICRC is also taking a lead in providing learning programs and might be best positioned to apply the lessons learned from previous PPPs in its future training programs to improve project appraisal and decision-making.

## Project Appraisal and Project Feasibility Studies

Across the world project appraisal is essentially carried out through project feasibility studies. The approval processes are based on the information gathered and conclusions reached by the feasibility study. A feasibility study conducted during the project's appraisal phase verifies whether the proposed project is well-founded and is likely to meet the needs of its intended target groups and/or beneficiaries. A feasibility study is expected to define the operational details of the project, taking account of all policy, technical, economical, financial, institutional, management, environmental, socio-cultural, and gender-related aspects and it also provides the government with sufficient information to justify acceptance, modification, or rejection of the proposed project.<sup>128</sup> In Nigeria the ICRC's rules have defined this stage as an Outline Business Case (OBC), but essentially it is a feasibility study.

### Feasibility Studies

A feasibility study is a key tool that is used by the government to determine whether or not to proceed with a PPP. A feasibility study focuses on a number of issues, which include: affordability of the project, potential to deliver the value for money, forms of PPP which are most likely to maximize value for money, requirement of private finance, and optimum scope of the PPP. Conducting a thorough and rigorous feasibility study is considered as one of the factors that contribute towards the success of a PPP.<sup>129</sup>

The generic PPP project cycle of the National Treasury of South requires feasibility studies to:

- Describe the institutional function to be performed by the private party
- Set out results of a sector needs and options analysis
- Demonstrate affordability
- Show how risk may be transferred to private party
- Give an initial indication of how value for money will be achieved
- Describe institutional arrangements for monitoring the PPP<sup>130</sup>

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128 European Commission revised Project Cycle Management Handbook (March 2002);

129 Introducing Public Private Partnership in South Africa, issued by National Treasury Public- Private Partnership Unit of the Republic of South Africa;

130 Generic PPP Project Cycle, provided by National Treasury, Republic of South Africa <http://www.ppp.gov.za/SiteCollectionDocuments/GenericPPPLife-cycleChart2002.pdf>

## Institutional Arrangement for Project Feasibility

Usually, the procuring institution appoints private sector advisors to do a feasibility study on the most appropriate mechanism for procuring the PPP project. If the feasibility study shows that a PPP is a viable option, the procuring institution invites the market to submit bids for the infrastructure and/or service provision project.<sup>131</sup> In Nigeria this process feasibility study tool has been adapted and is called the Outline Business Case.

In the PPP life cycle, preparing an Outline Business Case (OBC) is a very important element as the stronger the relationship between OBC preparation and the procurement stages, the greater is the likelihood of achieving genuine value for money. The Ministry, Department or Agency (MDA) will often require external technical, legal and financial support for the preparation of the OBC. Accordingly, the MDA will procure the services of an external advisor through the competitive bidding process. The OBC also serves as a high level check on the suitability of the project being developed as a PPP.

The first stage of the OBC (pre-feasibility) covers the following aspects:

- A description of the law, policy context and business need
- Cost-benefit analysis including non-quantifiable costs and benefits
- An evaluation of the options for meeting the project objectives
- Identification of the preferred procurement route based on value for money and the feasibility or desirability of using a PPP
- Analysis of the project risks and mitigation measures
- Description of the proposed risk allocation and contract terms
- A value for money (VFM) and affordability analysis, including a cash flow model of estimated costs and returns for a PPP contractor and the consequent annual payments to or by the authority
- Sensitivity analysis on the key input variables

The Federal Executive Council (or other relevant authority) must approve the OBC before the project can proceed to the next stage.

## Step by Step Procedure for Conducting Pre-Feasibility and Feasibility Study

In some jurisdictions a pre-feasibility study may be carried out to establish that the identified project has merit to be taken up by the Ministry Department and Agency for implementation through the PPP route. Conducting the pre-feasibility may comprise of the following broad stages:

### Stage 1: Strategic Needs Assessment

In this step, strategic needs in terms of output and scope of the project, in line with the objectives and the mandate of the MDA, are delineated.

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131 Introducing Public Private Partnership in South Africa, issued by National Treasury Public-Private Partnership Unit of the Republic of South Africa

A brief description of the activities that may be involved in this stage is as given below:

- Step 1: Review of previous Needs Assessment, if any
- Step 2: Determine project's ability to meet the MDA's objectives
- Step 3: Assess the ability of the MDA to deliver project
- Step 4: Detailing desired output
- Step 5: Outlining the scope of the project

In practice currently in Nigeria, there is often no separate pre-feasibility stage, the evaluation anticipated in a pre-feasibility or appraisal stage are all undertaken as part of the Outline Business Case (OBC) carried out by an external transaction adviser. The OBC is the standard regulatory requirement and may, in addition to the activities referred to above, carry out in a pre-feasibility involve the following:

### **Stage 2: Technical Feasibility Study**

This is a technical description of the engineering and non-engineering aspects of the project. This should be based on the service definition and sizing of the project scope. The technical specification should offer a least cost solution to meet the projected demand, service standards, and other objectives.

#### *Social and Environmental Feasibility*

Infrastructure projects often have significant social and environmental impacts arising from their construction and operation, which can be both positive and negative. The impacts may include spill-over effects beyond the immediate project area and beyond the people directly associated with the project.

Social impacts on communities affected by the project include, for example, requirements for any resettlement and the associated impact on quality of life and livelihoods, and impacts related to environmental alteration (for example on health and livelihoods).

Environmental impacts on the project location and in associated areas (for example downstream, ground water or ambient air) include effects on environmental resources due to alterations or pollutants. Carrying out assessments of social and environmental impacts is often a mandatory regulatory requirement of an infrastructure project's development process. The scope of social and environmental studies covers the following:

- Quantifiable social and environmental costs and benefits
- Non-quantifiable social and environmental costs and benefits
- Options for mitigating adverse impacts and the cost of mitigation

The secondary effects are also included in the assessment.

### **Stage 3: Legal Analysis**

A comprehensive legal due diligence must be done to ensure that all the foreseeable legal requirements are met for the development of the project. Common legal issues pertain to land use rights and regulatory matters. However, the public sector agency's legal advisors should conduct a thorough due diligence on all the legal issues which have a bearing on the project, such as relevant legislation, tax laws, land title, regulatory aspects, and related matters.

### **Stage 4: Financial Feasibility**

The next step in the process is to establish the financial viability of the project with respect to the costs involved and the revenue potential. The steps involved in undertaking the financial feasibility of the project are elaborated below:

*Step 1: Determination of project cost*

The key input for the financial feasibility analysis is project cost. Three broad categories of costs need to be considered including capital costs for project development, operation costs, and maintenance costs which arise during the operation and maintenance of the created infrastructure or asset.

- *Capital costs:* Capital costs are the costs incurred for the creation of an asset. In the case of civic infrastructure, this includes costs of development. These are one-time costs incurred in the process of creation of the specific infrastructure.
- *Operating costs:* Operating costs indicate the expenditure to be incurred for the operation and use of the infrastructure created. These would include expenditure on manpower, electricity charges, chemical costs, and other administrative expenses.
- *Maintenance costs:* Maintenance costs include expenses made towards normal civil works, such as repairs made to an asset. In order to ensure that the asset created is made available throughout its intended lifetime, it is critical to ensure that normal wear and tear of the asset is addressed in time. For instance, to avoid corrosion, pipes would need to be painted on a regular basis with a corrosion-resistant lubricant.

*Step 2: Determination of project revenues*

The next important step which needs to be undertaken as part of the financial feasibility analysis is the estimation of project revenues. Project revenues represent the income that is generated from the provision of services to the users. The revenue sources for various sectors could vary from one sector to another. These could be in the form of user charges levied, fare or toll revenue, revenue from ancillary sources like sale of carbon credits, or provision of advertising rights. Project revenues may also include direct payments from the government authority.

*Step 3: Preparation of financial model*

Once the project costs and revenues are identified, the next stage in the financial analysis is to build the financial model for the project. This task involves primarily two activities, identifying all the inputs for the financial model, and preparing the financial model.

*Step 4: Conduct a sensitivity analysis*

A sensitivity analysis is conducted to gauge the financial robustness of the project, i.e., to see how changes in key assumptions impact the financials of the project. The financial model is developed in such a manner as to allow different values for the key model variables.

*Step 5: Assess the viability of the project*

On the basis of the projected cash flows which have been estimated in the preceding step, the next step is to compute the Internal Rate of Return (IRR) of the project. The estimated IRR would then have to be compared against a benchmark to assess whether the project is commercially viable. The possible benchmarks could be returns that are generated from similar projects or returns that are assumed to be reasonable by a private developer in the specific service sector.

*Step 6: Economic feasibility*

The feasibility study also includes an economic analysis of the project. The purpose of economic analysis is to determine whether there is an economic case for the investment decision. An economic evaluation of the project is required for green field projects, capital projects, and projects that warrant an analysis of externalities such as major rail, port, and airport projects. Social infrastructure projects can also be viewed from this holistic perspective. The economic assessment goes beyond the items typically included in a financial analysis.

*Step 7: Assessment of value for money (VFM) and affordability of the project*

The value delivered by a project is measured in relation to the same service being provided by the MDA under conventional procurement methods. The value of the project and, in turn, the choice of

procurement method should be determined by comparing it to the net benefit that would accrue if the MDA delivers the same service through a conventional public procurement benchmark (Public Sector Comparator). A PPP is preferred when conventional procurement offers significantly less value compared to procurement through a PPP.

*Step 8: Preparation of detailed implementation plan*

A project implementation schedule is developed from the technical specifications. This reflects the timing and the interrelationships of all the major components of the project. The stages included for individual projects vary depending on whether the project has a capital expenditure or operating expenditure focus and according to the sector.

*Step 8: Compilation of the OBC*

The outputs of the feasibility analysis are drawn together into an OBC report, which provides the PPP's business case. If the feasibility study is supportive of the investment and of procurement by PPP, then it becomes the basis for seeking and obtaining all required regulatory and executive approvals.

The report will, as a result, include the following:

- Support and justification for the project – providing justification for the investment
- Need for the project – gaps identified in the market analysis that would be filled by the project, policy objectives met by the project, alternatives considered
- Description of the project, including definition of services/outputs it will provide, location, target user group, technologies to be employed, agencies involved and their responsibilities, project timeline, etc.
- Social and environmental assessments and planned impact mitigations
- Technical description of the infrastructure additions required for the project
- Benefits and costs of the project, and their distribution among key stakeholders, including social and environmental impacts
- Summary of the financial viability of the project
- Summary of economic appraisal (benefit/cost analysis)
- Project implementation schedule
- Support for procuring the project as a PPP

In addition to the OBC includes the following:

- Identification of major project risks and their proposed allocation between the public and private partners
- Type of PPP proposed including description of likely finance structure
- Requirement for government assistance to the project (such as Viability Gap Fund)
- Value-for-money (VFM) analysis and result
- Other due diligence assessments (legal, market sounding)
- Capacity of sponsor (MDA) to implement the PPP, plan for implementation and PPP management including capacity-building and use of advisors, plan for meeting project development costs
- A section summarizing the justification for the PPP project.

The steps and contents of an Outline and Final Business Case as they are called in Nigeria are not necessarily cast in stone for every project. There are common features, as can be seen above. However, an Outline or Final Business Case report must take account of specific project features and provide needed information for decision-making in each case to be very useful. The Outline Business Case is the basis for going to the market in the first place to seek a core investor. The Final Business Case is produced after procurement has resulted in selection of a core investor and negotiations have been concluded with specific deal terms agreed. This Final

Business Case, financial model as well as negotiated agreements approved by ICRC through its certificate of compliance will be the basis for seeking final Executive Council Approval of the negotiated deal in Nigeria.

# Unbundling as A Privatisation Strategy: The Electricity Sector Reform in Nigeria

Chudi Nelson Ojukwu\*

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## Abstract

The power sector is critical to the developmental reform of any country and Nigeria is no exception. For many years the electric sector has been plagued by a plethora of problems, from low-capacity generation of power, decaying facilities, corruption, leakages, poor distribution, non collection of tariff, and many other problems. Prior to the reform, the structure within Nigeria's Electricity Act<sup>132</sup> and the National Electric Power Authority Act<sup>133</sup> created one mammoth state-owned corporation called NEPA which carried out all the activities in that sector. This monopoly came with the usual baggage of inefficiency and poor service delivery.

It became imperative that in order to bring about significant improvement in the sector, a holistic reform of the sector had to be undertaken. Hence, Nigeria commenced an electricity sector reform program in 2000 as part of its overall economic reform program. This paper considers the strategy of reform adopted by Nigeria under the Electric Power Sector Reform Act<sup>134</sup> in the context of privatisation and liberalization. While also admitting that privatisation is not a standalone answer to reform in the energy and power sectors, as well as the several factors constantly at play in any reform drive, this paper also examines the road to reform in the Electricity sector in Nigeria.

## Introduction

The power sector is critical to the developmental reform of any country and Nigeria is no exception. For many years the electric sector has been plagued by a plethora of problems from low capacity generation of power, decaying facilities, corruption, leakages, poor distribution, non-collection of tariff and many other problems.

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132 Cap 106

133 Cap 256

134 2005 No. 6 (Hereinafter referred to as the Act)

The power sector is unlike most other sectors in any economy. Prior to reform many countries had large state-owned corporation carrying out all the activities in that sector. These monopolies came with the usual baggage of inefficiency and poor service delivery. In Nigeria, the structure was represented through the years by the Electricity Act<sup>135</sup> and the National Electric Power Authority Act<sup>136</sup> which created the corporation and monopoly known as National Electric Power Authority (NEPA).<sup>137</sup> Several attempts in the past to revamp the NEPA yielded little or no dividends.

Given global trends in the electricity sector it became imperative that, in order to bring about significant improvement in the sector, a more holistic approach must be adopted. To this end, Nigeria commenced an electricity sector reform program in 2000 as part of its overall economic reform program. This paper considers the strategy of reform adopted by Nigeria under the Electric Power Sector Reform Act<sup>138</sup> in the context of privatisation and liberalization.

It is clear that privatisation is not a standalone answer to reform in any sector, and this is even more so in the energy and power sectors. To ensure that inefficient state monopolies do not transform to inefficient private monopolies, with dire consequences to economic and political security of the country in question, several factors will require delicate inter-balancing. Whilst many sectors are easy to liberalize and deregulate, factors such as technology, environment and economic imperatives make oversimplified solutions unworkable in developed economies, and more so in developing economies such as Nigeria. It is in this context that this paper examines the road to reform in the electricity sector in Nigeria.

## Privatisation as a Reform Strategy

Privatisation as a reform strategy first came into being in the 80s. Indeed it is on record that the word first appeared in standard dictionaries only in the early 1980s.<sup>139</sup> Privatisation as a reform strategy has different perspectives depending on the sector that is driving it. From the economist's point of view, the need to privatise arises from the anticipation that it will enhance efficiency<sup>140</sup> in the supply of products and services in that particular sector.

In a paper delivered at a sensitisation seminar for the judiciary, the chairman of the Technical Committee, National Council on Privatisation (Nigeria) had this to say:

*The privatisation programme has commonly (if not mistakenly) been thought of as simply as a programme for the sale of government owned shares in public enterprises. Whilst the sale of government-owned shares is one of the reasons for which*

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135 Cap 106

136 Cap 256

137 Before the creation of NEPA in 1972 there were several government-owned entities or corporations (see for instance, the Electricity Corporation of Nigeria and the Niger Dams Authority) carrying out various aspects of the electricity business from generation to transmission. The creation of NEPA brought all these entities under one monopolistic corporation that was now to be reformed through an initial process of unbundling.

138 2005 No. 6 (Hereinafter referred to as the Act)

139 It appeared in Webster's New Collegiate Dictionary in 1983. See: Ravi Ramamurti and Raymond Vernon, 'Privatisation and Control of State-Owned Enterprises' p.7

140 "Gains and losses of efficiency stemming from privatisation can be the result of changes in technical efficiency, that is, the minimization of costs for a given level of output; or they can stem from changes in allocative efficiency, evidenced by a closer alignment of prices to long run marginal costs. Presumably, both kinds of efficiency will improve with privatisation. However, an improvement in efficiency is more likely to be the result of strengthening the influence of market forces than of a change in ownership as such. Competition can be introduced without privatisation, and in many cases privatisation does not result in increased competition." Ibid p.74

*the National Council on Privatisation was set up, the sale of shares is only one component of the council's work. The privatisation programme entails a wholesale reform of the Nigerian public enterprises sector. Privatisation works best when it is a part of a larger programme of reforms promoting efficiency including the opening up of markets, removal of price and exchange rate distortions, and the encouragement of the development of the private sector through free entry into hitherto restricted sectors such as oil and gas and power generation and distribution.*<sup>141</sup>

This statement clearly shows that privatisation, at least within the Nigerian context, forms part of a larger reform strategy. Given that studies have shown that even where there is a sole motive for privatisation many indirect consequences emerge, thus giving rise to direct or indirect benefits or detriments. It is clear then that to be effective privatisation must form a part and not the sole program in any given context. Privatisation is best executed as an integral part of a reform program that looks beyond sale of government enterprises and introduction of market forces but must include a well-articulated programme of economic growth, competition, rule of law, regulation, and - for an emerging democracy - poverty reduction.

The key objectives of the Nigerian privatisation program have been stated to be:

- i. To re-invigorate the Nigerian economy
- ii. To better the citizens' standards of living through the delivery of enhanced quality services by hitherto public-owned enterprises in a cost-effective manner
- iii. To eliminate government's financial obligations to public enterprises thereby easing their strain on the budget and freeing up finances to be directed towards the provision of much-needed infrastructure development and social services
- iv. To give Nigeria a bigger window into the world economy and to participate more widely in international trade
- v. To create new jobs
- vi. To broaden and deepen the capital markets
- vii. To avoid the concentration of wealth in the hands of the powerful and wealthy
- viii. To attract foreign direct investment, capital, technology, and managerial expertise to the Nigerian economy<sup>142</sup>

Much work has been done from the economic and policy perspective in the area of privatisation design and implementation, but there appears to be a dearth of legal literature on privatisation techniques.

In Nigeria privatisation has been executed through several approaches, namely:

- Outright sale
- Sale of majority stakes to a core investor
- Public offering
- Initial Public Offers
- Management buyouts
- Management contracts
- Concessioning
- Liquidation

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141 Akin Kekere-Ekun, 'Challenges to the Implementation of the Privatisation Programme in Nigeria' A paper presented at the Seminar for Judges on Privatisation October 2001 p.7

142 Ibid at p. 4

- Partial privatisation or commercialisation
- Unbundling and stripping

Privatisation in many instances is a straightforward sale of the entity or company in question. This is usually the case if the entity to be sold off was a limited liability company. At a certain point in the past, what is generally described as the nationalization era, the government acquired shares or took over companies which they considered necessary for the promotion of the national interest. Many of such companies failed to deliver on their promise leading to what is presently known as the privatisation era. During the nationalization era, different types of corporate bodies were also created for the purposes of implementing the nationalization policy and these were known either as public corporations or statutory corporations. Many of Nigeria's public utilities fell into this latter category.

Whilst it is easy to privatise companies that were limited liability companies in the first place, the same cannot be said of public or statutory corporations. In describing the difficulties inherent in privatising public corporations, Prof. Gower<sup>143</sup> had this to say:

*When nationalisation had been achieved by acquisition by the government of the share capital of the former companies, privatisation is a straightforward operation, not necessarily involving any legislative action; the government merely has to dispose of the shares either by a public offering and listing on the stock exchange or by private deals. When the undertaking had been vested in a statutory public corporation the privatising modus operandi is somewhat more complicated; a new limited company has to be registered, the undertaking vested in it, and normally, a public offering made of its share capital. In either event, novel constitutional and legal questions are likely to arise. This is principally because although the government may declare that it wishes to relinquish all political control, leaving the industry to the discipline of the market, this generally proves to be easier said than done, and because when, as in the case of public utilities, the company will have a monopoly, special arrangements need to be made to protect consumers.*

Hence privatisation has led to interesting distortions of, and supplements to, company law.<sup>144</sup>

It is exactly the issues raised above that have precipitated the manner and means of restructuring or reforming the electricity sector in Nigeria.

## Unbundling under the Electricity Power Sector Act 2005

Unbundling is a concept that means different things depending on how it is used. In most cases, the term “unbundling” is used to denote the deregulation of generation by the separation of generation from transmission and distribution. Unbundling is also used to denote “rate unbundling,” that is the unbundling of the cost of electricity services. It would appear that the post-privatisation stage of the reform program in Nigeria merely contemplates the unbundling of services and not necessarily costs. Thus, it must be understood that the deregulation of generation does not necessarily mean that other entities will be allowed to provide distribution services and other electrical retail services to consumers.<sup>145</sup> Indeed unbundling in the power sector is most frequently used to connote either vertical or horizontal unbundling. Vertical unbundling means a separation of

143 Paul Davies, *Gowers' Principles of Modern Company Law* (Sweet & Maxwell 1997) 6

144 *Ibid* at p.70

the utility into three or four arms of the business namely: generation, transmission and distribution (and sometimes supply) whilst horizontal unbundling connotes a separation of the various business segments into independent separate business entities.

The Electric Power Sector Reform Act 2005 is seen as the foundation necessary for effective reform of the electricity sector in Nigeria. In many jurisdictions where reform had been attempted without first putting in place a new legal regime to govern the industry, it resulted in either a distorted reform attempt or an unfocused or failed attempt at reform. Given the history of the electricity sector, legal and regulatory reforms were imperative if any meaningful progress was to be achieved. NEPA was a creation of statute, and thus any reform targeted at it had to take into consideration its special position under the law or else legal imperatives would make any step taken illegal. Indeed unlike many of the other sectors where reform was carried on without any major legislative changes, in sectors such as telecommunications and electricity which had dominant public corporations such as NITEL and NEPA, reform could only be possible after an extensive legislative change.

The Electric Power Sector Reform Act was an extensive piece of legislation that was geared towards providing for transitional, pre-privatisation and post-privatisation reforms. This paper will focus on the efficacy of the provisions relating to transitional issues and privatisation arrangements.

To understand the strategy adopted for the reform, it is necessary to examine some of the key legislative provisions.

Section 1 of the act provided for the formation of an initial holding company limited by shares under the Companies and Allied Matters Act. The National Council on Privatisation<sup>146</sup> was required under this section to take steps necessary for the incorporation of the initial holding company not later than six months after the coming into force of the act.

This step was taken with the incorporation of Power Holding Company of Nigeria PLC on the 13<sup>th</sup> of March 2005 as the initial holding company. The shares in the initial holding company were held by the Bureau of Public Enterprises and Ministry of Finance Incorporated, as stipulated by Section 2 of the act.

The act<sup>147</sup> required that the National Council on Privatisation fix a date after the incorporation of the initial holding company for the transfer of the assets and liabilities of the National Electric Power Authority. The council consequently fixed the 1<sup>st</sup> of July 2005 as the initial transfer date. It was the assets and liabilities of the Authority appearing on its audited balance sheets at the initial transfer date that would be vested in the initial holding company.<sup>148</sup> The vesting of assets on the initial holding company would be provisional until a final order was made by the council. The final order would be made within eight months from the initial transfer date, and on finalisation of the opening balance sheet of the initial holding company. The final order would either confirm the transfer of assets and liabilities or make modifications to the initial transfer order. Once there the transfer of liability or obligation had taken place, the authority was to be released from the liability or obligation.

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145 The reform going at present will in the first place lead to creation a semi-deregulated environment in which the retail side of the electricity sector will remain regulated and whilst the wholesale generation market will be subjected to competition and market forces. Indeed it would appear that for a while successor companies in the area of distribution may acquire exclusive service territories.

146 Hereinafter referred to as the council

147 Section 3 (1) which provides: "The National Council on Privatization shall, by a written notice in a gazette fix the date (in this act known as the "initial transfer date") on which the assets and liabilities of the Authority (as specified in subsection 2 of this section) shall be transferred to the initial holding company."

148 Section 3 (2) *ibid*

Also with effect from the initial transfer date every person employed by the authority immediately before that date would be transferred to the service of either the commission or the initial holding company.<sup>149</sup>

On the initial transfer date, the commission<sup>150</sup> would issue an interim licence to the initial holding company which would be valid for a period not exceeding eighteen months.<sup>151</sup>

Section 8 provided that after the formation of the initial holding company, the National Council on Privatisation would, not later than eight months, take the necessary steps under the Companies and Allied Matters Act to incorporate the number of additional companies limited by shares it would deem appropriate. These companies were to be known as successor companies. The successor companies would take over the assets and liabilities of the initial holding company, in the areas of generation, transmission, trading, distribution and bulk supply and resale of electricity amongst others. All the shares of the successor companies were to be held by the Ministry of Finance Incorporated and the Bureau of Public Enterprises on behalf of the federal government.<sup>152</sup>

The first step in the bundling process was to create business units within the existing power authority (which later became the Power Holding Company of Nigeria Ltd). These business units were transformed on corporatization into separate limited liability companies.

The Bureau of Public Enterprise, acting on behalf of the Council, incorporated 18 such successor companies. The council was also required in section 10 (1) of the act to require the initial holding company to transfer employees, assets, liabilities, rights and obligations of the initial holding company to a successor company not later than one year from the initial transfer date. The transfer order would be binding on the initial holding company, transferee and all other persons<sup>153</sup> and would not be withstanding of any act or rule of law that required the notice or registration of transfers.<sup>154</sup> The effect of the subsection was to negate any legislation that may have had the effect of voiding a transfer of assets and liability if there was non-compliance with the act of registration.<sup>155</sup> In making a transfer order, the council was not required to obtain the consent of the initial holding company or the successor companies, but if the transfer of assets and liabilities was to a company other than the successor companies then the consent of such a transferee would have to first be obtained before the transfer order could be binding.

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149 Section 5 (1)

150 Nigerian Electricity Regulatory Commission See Section 31

151 Section 7

152 These successor companies were accordingly incorporated on 5<sup>th</sup> of November 2005.

153 Section 10 (2)

154 Section 10 (3)

155 Such laws will include regulations made by the Securities and Exchange Commission and provisions of the Companies and Allied Matters Act.

The transfer order<sup>156</sup> to successor companies, as contemplated by the Act, provided for a wide range of issues apart from the mere transfer of assets and liabilities. The order provided that the initial holding company or the transferee company pay for anything transferred and specified to whom such payment may be made.<sup>157</sup> The order also specified, amongst other things, the method of payment (that is whether by cash or otherwise), the amount to be paid, the method of valuation if necessary,<sup>158</sup> provided that any right, liability or obligation that is transferred by the order may be enforced against or by the initial holding company, the transferee, or both of them.<sup>159</sup> The order also imposed conditions on the exercise of powers by the transferee relating to employees, assets, liabilities, rights or obligations, including a condition that the powers be exercised only with the approval of the commission.<sup>160</sup>

On the transfer date specified in the transfer order, the commission was required to issue an appropriate interim licence to each successor company which would be valid for a period not exceeding one year.<sup>161</sup> Within six months of receiving the interim licence each successor company was required to apply for a regular licence in accordance with the provisions of the Act.<sup>162</sup>

It is pertinent to note that whilst not expressly stated in the law, the act unbundled electricity activities into generation, transmission, distribution and trading in section 8. This is also clear from the provisions in the Power Policy on Cross Ownership to the effect:

- (ii) Neither distribution nor generating companies will be allowed to own shares in the transmission;
- (iii) Generating companies will not be allowed to own shares in distribution/sales (marketing) companies and vice-versa;<sup>163</sup>

that there is a policy to unbundle the electricity industry.

The final stage of the unbundling process came with the privatisation of the successor companies that were the holders of generation licences, distribution licences or transmission licences by the National Council on Privatisation.

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156 The National Council on Privatisation by the Electric Power Sector Reform (Transfer of Assets, Employees, Liabilities, Rights and Obligations) Order No.1 2006 transferred assets and liabilities of the Power Holding Company Plc to the following successor companies:

- (i) Kainji Hydro Electric Plc
- (ii) Shiroro Hydro Electric Plc
- (iii) Sapele Power Plc
- (iv) Egbin Power Plc
- (v) Afam Power Plc
- (vi) Ughelli Power Plc
- (vii) Abuja Electricity Distribution Plc
- (viii) Jos Electricity Distribution Plc
- (ix) Ibadan Electricity Distribution Plc
- (x) Benin Electricity Distribution Plc
- (xi) Enugu Electricity Distribution Plc
- (xii) Kaduna Electricity Distribution Plc
- (xiii) Kano Electricity Distribution Plc
- (xiv) Eko Electricity Distribution Plc
- (xv) Ikeja Electricity Distribution Plc
- (xvi) Port Harcourt Electricity Distribution Plc
- (xvii) Yola Electricity Distribution Plc
- (xviii) Transmission Company of Nigeria

157 Section 10 (7)

158 Ibid.

159 Section 10 (7) (I) The effect of this provision is to give a right and impose a continuing liability on the initial holding company in relation to the assets transferred even after the transfer has been effected. In fact, section 13 which provides for release from liability after a transfer has been made is made subject to the provisions of section 10 (I). The purpose of the provision may be to ensure that the initial holding company retain sufficient interest in the subject of the transfer to enable it maintain an action in the event of a breach of the conditions relating to the asset or transfer.

160 Section 10 (7) (m)

161 Section 23 (1)

162 Section 23 (2)

163 4.3.4. National Electric Power Policy 2001

## Privatisation of Successor Companies

The effort to privatise the successor companies created out of the Power Holding Company of Nigeria (PHCN) commenced in 2006<sup>164</sup> with a request for an expression of interest in the eleven distribution and six generation companies.<sup>165</sup>

The privatisation of the PHCN's successor distribution and generation companies was recommenced in 2010. In March 2011 a total of 331 Expressions of Interest (EOIs) were received for the transactions, and 207 bidders were short-listed after evaluation.

At the deadline for purchase of bidding documents, a total of 152 consortia from over 30 countries purchased the bid documents.<sup>166</sup>

The privatization of the generation companies was through a mixture of strategies. One hundred percent of the shares in Sapele Power Plc were sold to CMEC/Eurafric Consortium, whilst Ughelli Power Plc was sold to the Transcorp/Woodrock Consortium. Fifty-one percent equity of Geregu Power Plc was sold to Amperion Consortium. The Hydropower stations were privatized as concessions. Concession of Kainji Hydro Electric Plc was to Mainstream, whilst concession of Shiroro Hydroelectric Plc was to North-South Power.<sup>167</sup>

Two additional successor companies, namely Omotosho Power Plc and Olorunsogo Power Plc, were subsequently privatized to CEMEC-Pacific and SEPCO-Pacific respectively.

The privatization of the distribution companies<sup>168</sup> which was based on the unique ATC&C loss reduction proposals of bidders had the following core investors acquiring 60% of the equity of each of the companies. Abuja Electricity Distribution Plc was acquired by Kann Consortium, Benin Electricity Distribution Plc by Vigeo Power Consortium, Eko Electricity Distribution Plc by West Power & Gas, Enugu Electricity Distribution Plc by Interstate Electrics Ltd, Ibadan Electricity Distribution Plc by Integrated Energy Distribution & Marketing Ltd, Ikeja Electricity Distribution Plc by NEDC/KEPCO Consortium, Jos Electricity Distribution Plc by Aura Energy Ltd, Kano Electricity Distribution Plc by Sahelian Power SPV Ltd, and Port Harcourt Electricity Distribution Plc by 4power Consortium.<sup>169</sup>

The first phase of the reform and restructuring of the electricity sector ended with a limited liberalisation, but not deregulation. Indeed it would appear that not all aspects of the electricity business were intended to be privatised at the end of this phase of the reform. The commission is required each year to deliver a report to the Minister of Mines and Power on the potential for competition in the Nigerian Electricity Supply Industry. The report is required to analyse whether the industry has developed to the point where a more competitive market ought to be established.<sup>170</sup> The criteria for establishing a competitive market are:

164 This process was suspended by the Nigerian government in 2007 and ultimately halted.

165 Nigeria recommenced the privatisation programme for the electric power assets in 2010. The process concluded in November of 2013 with the handover of the distribution and generation companies to the various private sector entities that won the bids.

166 The final bids were received for the generation companies on offer by the Bureau of Public Enterprises (BPE) on the July 17, 2012. Nine bids were found to be technically qualified to purchase the generation companies. Final bids for the distribution companies were received on July 31, 2012. A total of 29 bids were deemed qualified to purchase 60% equity in the distribution companies they bid for.

167 Egbin Power Plc whose privatization was commenced in 2006 was also concluded in 2013 with KERL acquiring 70% of the equity.

168 The privatization of Yola Electricity Distribution Plc to Integrated Distribution & Marketing Ltd failed after about one year due to issues related to security in the region. The company has since reverted to the control of the government. Kaduna Electricity Distribution Plc which did not receive a qualifying bid in the first round of privatization was privatized in 2013 to North West Power in a subsequent privatization round.

169 A total sum of \$2,445,184,864.78 (Two billion, four hundred and forty-five million, one hundred and eighty-four thousand, eight hundred and sixty-four Dollars) was realized from the privatisation, excluding amounts deducted as transaction advisory fees. This was one of the most successful and aggressive power privatization programmes in the world.

170 Section 24 (1)

- The degree of privatisation that has occurred
- The existence of a sufficiently large number of potentially competitive entities, so as to avoid the likelihood of an abusive market power
- The existence of other preconditions, including the necessary metering and information technology infrastructures, required for the operation of a more competitive electricity market

Despite the peculiarity of the electricity sector, unbundling has been a company law restructuring tool over the years. With reference to privatisation and restructuring of utilities owned by the government, the term has assumed a more technical meaning.

In company law, unbundling is used sometimes to denote a process known as Corporate Spin Offs. Spin Offs are most popular in the United States of America as a means of increasing shareholder value. It generally consists of a company divesting some parts of its business to a new subsidiary. Usually, the spun off company has the opportunity to improve its operating performance with a more focused management. Generally, the advantage of a “spin off” of the divesting company includes enhanced value, and an ability to focus on its core business. It is also generally believed that spin offs allow the divesting company the opportunity to separate a leverage capital-intensive business from high growth divisions. Indeed, spin offs can be used to separate business that generate conflict of interest or even remove regulated business from unregulated business.

## International Perspective on Electricity Reform

Electricity Reform or restructuring is one of the most challenging industry reforms worldwide. Although reform has differed from country to country, it is safe to state that electricity reform has generally proceeded based on any of the following combinations:<sup>171</sup>

- Enactment of an electricity reform law
- Corporatization of state-owned utilities
- Unbundling of vertically integrated utilities into generation, transmission, distribution and supply activities
- Horizontal separation of corporatized entities
- Regulatory reform
- Establishment of independent regulator
- Establishment of a competitive wholesale market
- Privatisation of electricity assets
- Allocation of energy subsidies and stranded costs
- Introduction of the retail supply market competition

Not every one of the above is necessary for the reform of the sector in developing countries. As earlier stated the prescriptive activities in any particular country will largely conform to its own peculiar need and circumstances.

One common feature that cuts across most of the current reforms is the unbundling of the utilities. Some countries have implemented only vertical unbundling, whilst many have gone the full hog of implementing both

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171 Jamasb et al, 'Electricity Sector Reform in Developing Countries' World Bank Policy Research Working Paper 3549, March 2005 p. 7

vertical and horizontal.

Reform and unbundling of utilities have largely been very successful in the UK and the South Americas. In the UK however, the trend appears to be that after unbundling and reform, successor privatised entities began to merge or attempt to merge. This however, is not a comment on the importance of the unbundling in the reform process but a product of the practical reality of a new commercial environment created by the reform. Indeed the subsequent mergers were fuelled by economic prosperity and the need to exploit economy of scale.

In Northern Ireland reform followed the creation of three new separate generation companies each entering into power purchase agreements with the transmission and distribution utility. Thus the reform there focused mainly on the generation end of the industry, although subsequent price caps led to some gains to consumers.<sup>172</sup>

In Scotland the electricity industry was made up of two vertically integrated companies. Reform consisted of privatising the utilities without first restructuring.<sup>173</sup>

In Africa, apart from perhaps Uganda and Nigeria which are on the path of implementing a full vertical and horizontal unbundling, most power utilities remain integrated either horizontally or vertically even where there has been a full privatisation of the sector.<sup>174</sup> What has happened in some of those jurisdictions has been described as simply replacing a public monopoly with a private monopoly.

### Issues and Challenges

Unbundling as a reform strategy is not without its difficulties. There is a major challenge of transforming a fully-integrated monopoly into disintegrated business enterprises. Many utilities operated not as businesses but as social services. Implied in the above is the fact that they were in most cases not in a position to recover costs or independently fund their operations.

In many developing countries, especially in Africa, electric systems are usually smaller than 1,000 megawatts. It has been suggested that there should be a threshold below which certain types of reform will likely be ineffective. This is based on the probable assumption that it is improbable that effective competition can be achieved in relatively small systems and the likelihood of increased transaction costs will outweigh any potential benefits that may be associated with unbundling.<sup>175</sup> Though the threshold argument has merit it clearly does not apply to Nigeria as at the time of commencement of the reforms its electricity industry operated well over 3,000 megawatts with a possible suppressed demand in excess of 10,000 megawatts.

In Nigeria the unbundling of the utility faced much the same challenges as in many other countries. Transforming the utility through unbundling had to contend with challenges such as:

- Creating a new market structure from a non-existent market situation
- Creating autonomous business entities
- Unbundling of tariff structures
- Creating financially viable distribution companies
- Operationalizing new market rules
- Treatment of legacy debts
- Treatment of stranded costs

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172 Jamasb et al 'Electricity Sector Reform in Developing Countries-World Bank Policy Research Working Paper 3549, March 2005 p. 37.

173 Ibid.

174 See for example Cameroon–AES, Cote d'Ivoire, and Togo.

175 Jamasb *et al* 'Electricity Sector Reform in Developing Countries' World Bank Policy Research Working Paper 3549, March 2005 p. 43.

- Rightsizing and development of managerial capacities
- Funding of cross subsidies
- Implementation of industry standard codes in a transition environment

The above are merely examples of the many challenges to reform and unbundling of the electric sector.

In Nigeria the market structure is built around the successor companies created out of the existing utility consisting of six generation, 11 distribution companies and one transmission company.<sup>176</sup> The market structure has the generating and distribution companies trading based on vesting contracts during the transition phase with the transmission company responsible for wielding the power, a market operator that administers the market and a system operator in charge of load allocation and dispatch. In addition, the Nigerian Bulk Electricity Trading Company Plc (NBET) was created as a wholesale bulk electricity trading company, with the mandate to purchase bulk power and resell to the distribution companies. Other successor companies created include Omotosho Power Plc and Olorunsogo Power Plc. To ensure that stranded assets and liabilities were properly vested, the Nigeria Electricity Liability Management Company (NELMCO) was created. Also the National Power Training Institute (NAPTIN) was incorporated to take over the training facilities owned by the PHCN.

The new electricity industry and its structures is a departure from the previously existing integrated utility, thus adapting the new entities to the market structure presents quite a challenge.

Another critical challenge in this process is how to fund hitherto existing cross subsidies now that the entities are unbundled and independent. Of course there is also the question of integrating politically motivated distribution expansion programmes that are not financially viable but politically expedient into a new purely commercial oriented environment.

The several other challenges listed above are by no small measure less important than the ones we have discussed. Indeed it would appear that the toughest challenge is the change process itself.

## Conclusion

Despite the main issues that arise from the reform of the electric sector and the unbundling process, it is clear that successful implementation of reform in the sector must necessarily include unbundling and restructuring of existing public sector utilities, especially where they had hitherto operated as a monopoly.

The key to any strategy lies of course not merely in its soundness but in the commitment of key stakeholders to its implementation. Worldwide electric sector reform has become imperative. Successes have been recorded in some countries, with some embarrassing failures in others. What has become clear is that there must be an understanding that none of the steps required in undertaking reform is an end in itself, but rather a means to achieving the ultimate objective of improving power supply.

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<sup>176</sup> The six generation companies are Egbin Power Plc, Sapele Power Plc, Afam Power Plc, Ughelli Power Plc, Kainji Hydro Electric Plc and Shiroro Hydro Electric Plc. The 11 distribution companies are Abuja Electricity Distribution Plc, Benin Electricity Distribution Plc, Enugu Electricity Distribution Plc, Eko Electricity Distribution Plc, Ibadan Electricity Distribution Plc, Ikeja Electricity Distribution Plc, Jos Electricity Distribution Plc, Kaduna Electricity Distribution Plc, Kano Electricity Distribution Plc, Port Harcourt Electricity Distribution Plc and Yola Electricity Distribution Plc, the one transmission company is Transmission Company of Nigeria Plc (TCN).

It is however clear that whilst industry issues may be global certain peculiarities still assail reform in developing countries especially Africa.

In implementing the unbundling concept in privatisation it is important to keep the following in perspective:

*Competition and privatisation are expected to lead to external and internal efficiency. However, unbundling of the system tends to increase transaction costs and loss of economies of co-ordination. The net effect is uncertain in the absence of independent regulatory oversight. The effectiveness of competition and incentive regulation will determine whether the benefits of reform will exceed the higher transaction costs in order to produce net performance improvements.*<sup>177</sup>

There is no doubt the Nigerian reform that included the unbundling of its utilities was based on a sound legal and regulatory framework. Thus, like many other jurisdictions that have embarked on successful reforms, the Nigerian reform program was heralded by a legislative reform in the form of a comprehensive Electric Power Sector Reform Act that laid a clear roadmap for the reform and its implementation.

There is a lot to be said of the threshold principle because research appears to support it; at least to the extent that there is a size below which a wholesale competitive market is not worthwhile since in such a case transaction costs will begin to exceed the benefits of unbundling of the electricity utility.

The unbundling process has proved largely successful, first with the internal vertical unbundling to the horizontal unbundling into 18 successor companies on 1<sup>st</sup> July 2006 and the subsequent privatisation of the successor companies. It is clear that without the unbundling of the sector and the companies themselves reform of the sector would have been impossible. The market structures and regulation were only possible within the context of the legal and regulatory framework based on an unbundled electricity sector. The challenges to this process do continue to exist however the road to reform is certain.

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177 'Electricity Sector Reform in Developing Countries' op cit pp.44-45

# Managing Environmental Risks in Contracts For Sale of Assets

George Nwangwu\*

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## Abstract

This paper discusses the management of environmental risks that arise during the negotiation of Sale and Purchase Agreements of assets in various environmentally-sensitive sectors, particularly in red flag industries like oil and gas, petrochemicals, energy, and transport. It evaluates the effect of existing environmental legislations and the common law on such contracts and suggests strategies that parties can adopt during contractual negotiations to achieve optimal value.

## Introduction

Environmental risk factors are usually significant during the sale and transfer of assets either from the public sector to the private sector or from a private sector organization to another one. The quantum and quality of this risk that is transferred during asset sale affects the actual value of the asset. However, from experience, it appears that this fact is usually lost on parties during contract negotiations. Instead parties to a contract for sale of assets pay more attention on haggling prices based on other economic factors like the physical condition of the asset, the remaining life of the asset, and the price of comparable assets. The environmental risks that are being transferred or retained by the different parties are hardly ever factored in by parties in arriving at price of the asset. The reason for this might be the result of decades of inefficient and therefore ineffective regulation by responsible authorities. The result of this is that the serious penal and contractual consequences of non-compliance have never been obvious to commercial parties. However, this situation is fast changing as environmental regulation in the country seems to be improving and multilateral and development finance institutions continue to make environmental conditions of assets a prerequisite for funding.

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It has become increasingly important therefore for parties negotiating contracts for sale of assets to pay attention to the environmental condition of the asset. In the first instance the buyer should ensure that appropriate audits or due diligence are carried out since environmental degradation might not always be visible to the naked eye, or might only become apparent after several years. As mentioned above, the consequences of environmental liabilities that are inherited in this manner are not only penal but also have serious economic consequences.

The basic principle is that the person responsible for causing the pollution is liable for the consequences of the pollution, which may arise in the form of criminal or civil liability. However, these liabilities may be transferred contractually, as the rule in the contract for the sale of goods is that prima facie risk and title pass together.<sup>178</sup> During contractual negotiations it is usually in the interest of the seller to ensure that this is always the case. The buyer, on the other hand, would like to take the title with as little liability as possible, especially where the cost of clean-up is uncertain. It is against this background that negotiations on the transfer of environmental liability between the seller and buyer are conducted. It is also important for lenders and other financiers to be mindful of the quantum and quality of environmental liability that is being assumed by the buyer/borrower as it may effectively affect the ability of the borrower to repay the loan or whittle down the value of the collateral where the contaminated property is used as security for the loan. There is also the possibility of transferring criminal and civil liabilities contractually. Also some of the extant laws permit the government to revoke title to properties from which such pollution originates.

## Effect of Relevant Laws and Regulations on Environmental Liability

Environmental liability in Nigeria is regulated by different statutes and the law of torts.

### Environmental Statutes

There are several laws that create environmental liability in Nigeria; however, the principal environmental statute is the National Environmental Standards and Regulation Enforcement Agency (NESREA) Act 2007.<sup>179</sup> This law replaced the erstwhile primary environmental legislation, the Federal Environmental Protection Agency (FEPA) Act. The NESREA Act created the National Environmental Standards and Regulations Enforcement Agency (NESREA) which is charged with the responsibility of environmental standards, regulations and other policy guidelines. The agency is however precluded from making regulations for the oil and gas sector.<sup>180</sup>

In relation to the creation of environmental liability, section 24 of the act empowers NESREA to establish effluent limitations on existing and new point sources, for the protection of human, animal, marine and plant life, and any person who violates the provisions of this section commits an offence and shall, on conviction, be liable to a fine not exceeding N200,000 or to imprisonment for a term not exceeding two years, or to both and an additional fine of N5,000 for every day the offence subsists.<sup>181</sup> Where the offence is committed by a body corporate, the organization shall, on conviction, be liable to a fine not exceeding N1,000,000 and an additional fine of N50,000 for every day the offence subsists.<sup>182</sup>

178 See section 20 of the Sale of Goods Act 1893. Note that this is a general rule and there are exceptions. Note importantly section 17 which leaves the parties with the option of determining when risk is to pass. Therefore, parties are at liberty to incorporate their intentions into their contracts.

179 See section 20 of the Sale of Goods Act 1893. Note that this is a general rule and there are exceptions. Note importantly section 17 which leaves the parties with the option of determining when risk is to pass. Therefore, parties are at liberty to incorporate their intentions into their contracts.

180 National Environmental Standards and Regulation Enforcement Agency Act 2007, Act No. 25

181 See section 8 of the National Environmental Standards and Regulation Enforcement Agency Act 2007, Act No. 25

182 See section 24 (4) of the National Environmental Standards and Regulation Enforcement Agency Act 2007, Act No. 25

Section 27 of the NESREA Act deals with the discharge of hazardous substances into the air, the land, and the waters of Nigeria, or on its adjoining shorelines. Any person who violates this provision is liable, upon conviction, to a fine, not exceeding N1,000,000 or to imprisonment for a term not exceeding 5 years.<sup>183</sup> Where an offence under this section is committed by a body corporate, it shall, on conviction, be liable to a fine not exceeding N1,000,000 and an additional fine of N50,000 for every day the offence subsists and every person who at the time the offence was committed was in charge of the body corporate shall be deemed to be guilty of such offence and shall be liable to be proceeded against and punished accordingly.<sup>184</sup> Note however, that a person is not liable for punishment under Section 27 of the act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.<sup>185</sup> It supposes that an innocent purchaser of an asset without notice of the discharge of hazardous substances will not be liable under this provision.

There are other laws and regulations that create criminal liabilities due to environmental pollution. These include the National Effluent Limitation Regulations, the National Environment Protection (Pollution Abatement in Industries and Facilities producing Waste) Regulations (1991), the Federal Solid and Hazardous Waste Management Regulations (1991), the Hydrocarbon Oil Refineries Act 2004, the Oil in Navigable Waters Act 2004, and the Oil Pipelines Act. All these laws create one form of environmental liability or another, with some of them creating strict liability offences.

### **The Law of Torts**

In Nigeria, the liability for environmental degradation is also possible under the law of torts. It follows that a purchaser of a contaminated asset may be liable in tort for the contamination even where the purchaser was unaware of such contamination at the time of purchase. Actions in tort may be maintained under trespass where for instance the contamination migrates into adjoining properties or under negligence where a land owner fails to exercise due care in handling the contamination and the other party suffers damage as a result or in nuisance (whether public or private), where the polluting activity for instance interferes with another's use or enjoyment of the asset. There are also offences of strict liability where the offending party does not need to have been knowingly at fault for the contamination.

## **Contractual Management of Environmental Risks**

A well-drafted agreement involving the sale, lease, concession, or financing of an asset - whether a public enterprise or a privately-owned asset - is not complete unless it undertakes to allocate environmental liabilities. The task of the buyer prior to negotiating the asset sale agreement is to identify any potential environmental liability that is attached to the asset under consideration now or in the future. The best way to achieve this is by ensuring that a proper environmental due diligence or audit is carried out. This study will signpost likely environmental risks and liabilities that are associated with the asset under consideration. This is particularly useful not only to the purchaser of the asset but also to the seller as it will aid negotiations of the asset sale agreements ensuring optimal risk transfer between the parties. Where appropriate, the environmental audit also helps the parties mitigate their risks as it may for instance enable them devise and cost appropriate remedial plans.

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183 See section 24 (5) of the National Environmental Standards and Regulation Enforcement Agency Act 2007, Act No. 25

184 See section 27 (2) of the National Environmental Standards and Regulation Enforcement Agency Act 2007, Act No. 25

185 See section 27 (3) of the National Environmental Standards and Regulation Enforcement Agency Act 2007, Act No. 25

Typically, parties involved in negotiating an asset sale agreement, would attempt to negotiate extensive representations and warranties that the property is not contaminated with hazardous substances. The parties may also attempt to negotiate remediation agreements where one party commits to undertake certain clean-up responsibilities in connection with the property after the contractual closing date. One of the parties may also negotiate an indemnity provision that assures that the other party will cover costs relating to the environmental conditions arising from operations or use of the property prior to closing. Other typical clauses considered by the parties are 'As Is' clauses, releases and pre-condition clauses.

Most of the judicial decisions relating to environmental liability originate from the United States, particularly because of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),<sup>186</sup> also referred to as the "Superfund." The CERCLA imposes liability on owners or operators of sites from which there have been releases of hazardous substances. Under the CERCLA, the offending parties are responsible for the costs incurred by the United States' Environmental Protection Agency implementing any clean-up along with any resulting natural resource damage. Crucially under the CERCLA, liability for environmental degradation may be imposed on a current owner or operator of a property. However, in contrast to the United States, there is a paucity of judicial interpretation of these types of environmental provisions in Nigeria. It is however believed that even though Nigerian courts are not compelled to follow the United States courts, they may be persuaded by some of their decisions, therefore decisions from the United States are used below to elaborate on the effect of some of the contractual clauses. As will also be evident from the discussions that follow below, the importance of careful drafting of contractual clauses cannot be overestimated as it invariably directs the courts on the intentment of the parties. The lawyer involved in drafting them must ensure that if and when the provisions or clauses come up for judicial scrutiny that the true and correct intentment of the parties is clear.

Below is an overview of possible contractual provisions commonly used for allocating risk/liability. Many of the contractual provisions can be used singularly or in combination to achieve the desired result.

### **Representations and Warranties**

In negotiating a contract of sale or other agreement, the buyer will generally require the seller to give representations and warranties concerning environmental matters affecting the business or property. A representation is an express statement of fact made by a party to a contract that induces the other party to enter into the contract. A warranty is a promise that the representation is true. In other words, representations and warranties confirm the existence of material conditions which have been declared by the seller and may now therefore be said to be within the knowledge of the buyer. The consequence is that the buyer may not turn around on a future date and claim to be unaware of the existence of the material conditions that are the subject matter of such representation or warranties.

Typical environmental representations cover matters such as past use of the seller's facilities, hazardous materials present onsite and actions or claims by the government or private parties relating to environmental compliance or cleanup. It is a good strategy for the seller to resist from making too many representations or warranties and insist that the purchaser rely on the results of environmental due diligence/audits. Where however the seller decides to issue such representation and warranties, the seller's lawyer must ensure that a limit or cap is placed on its effect. For example, the seller might limit the survival period of such representations and warranties, or restrict the use of the representations to the buyer only as opposed to extending it to the buyer's

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<sup>186</sup> See section 27 (4) of the National Environmental Standards and Regulation Enforcement Agency Act 2007, Act No. 25

successor. The seller may also require that any amount of claim for breach of warranty exceed a certain threshold before the buyer is entitled to compensation.

In certain red flag/high risk industries it might be better for seller to employ an “as is” clause. This clause, if properly used, usually recites that the buyer has had the opportunity to investigate the environmental conditions at the property to discover any problems prior to closing and agrees to take the property “as is”. It is important to note that merely inserting an “as is” clause into an agreement does not automatically transfer environmental liability. There must be a positive and unambiguous intention of the parties to do so. For instance in the United States case of **New West Urban Renewal Co. v. Westinghouse Electric Corp.**,<sup>187</sup> a section of a sales contract entitled “Property Sold as is” provided that the property was to be sold in its present condition and that the seller would have no obligation to alter, restore, repair or develop the property. The court held that this “as is” provision did not automatically transfer liability for site contamination to the buyer, noting that the agreement was silent regarding allocation of environmental liability. The court rejected the argument that the buyer was a sophisticated developer that knowingly assumed liability for environmental conditions at the property.

For maximum effect therefore, the seller's lawyer may in addition insert a clause into the agreement specifically transferring environmental liability to the purchaser. An example of such a clause is: 'The buyer assumes all responsibility for any damages caused by the conditions on the property upon transfer of title.' This was the case in **Niecko v. Emro Marketing Co.**<sup>188</sup> In this case the purchase agreement not only contained an “as is” clause but also recited that the buyer assumes all responsibility for any damages caused by the conditions on the property upon transfer of title. The court found that the buyer was liable for environmental conditions on the property not merely because of the ‘as is’ clause, but also because of the specific assumption of liability language of the contract.

The purchaser on the other hand should resist the wholesale use of these provisions as much as possible. Representations and warranties, if used properly, has a number of advantages. For instance, it can identify and qualify the environmental liabilities, allocate risks and adjust the purchase price. It will also help the seller organize its disclosure and records and enable the buyer focus its due diligence as it is able to streamline its due diligence focusing only on matters that need to be checked. It is able to do this because of the assurance that if the representations are untrue it can bring a breach of warranty claim.

### **Indemnities**

An indemnity clause is an undertaking obtained by a party in a contract against the other party (or third parties) as a security against any future loss or liability arising from the activity which the indemnity seeks to cover. Generally, indemnifications provide that one party to a contract promises to compensate or reimburse the other party for environmental losses or damages arising after contractual close. Indemnities are very good tools for allocating risks as they can be used in a very flexible manner. In a contract for the sale of an asset, the purchaser will typically require the seller to indemnify it against any liabilities resulting from the presence of any pre-existing contamination at the time of sale.

There are several options open to the seller. Firstly, the seller may seek to limit the indemnity with time limits. For instance, the seller's obligation to indemnify may be structured in such a manner that it decreases over a given time frame or may expire at the occurrence of a particular event or by effluxion of time. Secondly, the indemnity

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<sup>187</sup> US District Court for the District of New Jersey, 909 F. Supp. 219 (1985)  
<sup>188</sup> 973 F.2d 1296 (1992)

may be structured to only trigger after a certain financial threshold is met. Thirdly, the seller's indemnity may be subject to a financial cap, or fourthly, structured in a manner that the indemnity given for known liabilities identified from the due diligence report is significantly different from those that are unknown.

The lawyer for the seller must ensure that the provisions in the agreement are drafted in a clear and precise manner and the indemnity clauses are not contradictory. For example, in the decision of **CBS Inc V. Hasbro Inc**,<sup>189</sup> the general indemnity and the environmental indemnity clauses in a purchase agreement were in conflict. In the general indemnity, the seller agreed to indemnify the buyer for all liabilities relating to the purchased property not expressly assumed by the buyer. In the environmental indemnity, the seller agreed to indemnify the buyer for liability based on conditions identified in the environmental assessment report. The court rejected the seller's argument that it had retained liability only for the conditions identified in the report, as provided in the environmental indemnity. The court concluded that the purchase agreement, read as a whole, allocated all environmental liability to the seller under the general indemnity. The lesson here is that the seller's lawyer must always ensure that the environmental indemnity provision should be the exclusive provision dealing with environmental matters by using language that clearly expresses that the seller shall retain no other environmental liability except as provided in the indemnity provision, or by expressly providing that the buyer assumed that liability.

Also in **Bancamerica Commercial Corp. v. Trinity Indus., Inc.**,<sup>190</sup> a 1995 case in which a bank took possession of a steel plant which acted as security for a defaulted loan. The bank agreed to indemnify the current operator (lessee) of the property for any claim in which it is alleged that [the current operator] is liable as a transferee or successor to [a prior operator]. The court held that the current operator's liability was based on its status as an operator of the steel plant, not on its status as a transferee or successor, and thus was not covered by the indemnity. The court noted that the fact that the current owner might be jointly and severally liable with the bank did not make the current owner a transferee or successor.

In **Taracorp Inc. v. NL Industries, Inc.**,<sup>191</sup> the Seventh Circuit found that a seller retained liability for off-site cleanup costs based on the particular choice of words in an indemnification agreement. The court decided that use of the phrase environmental hazards 'associated with a site' created a broader liability than language allocating liability for contamination located 'at', 'on' or 'near' a site. NL Industries had used one phrase in an agreement to sell an Illinois facility and the other phrase in the sale of a Minnesota facility. The district court concluded that while the phrase 'associated with' was not as precise as the phrase 'at', 'on', or 'near', the entire context of the agreement supported reading the phrases as having the same scope and meaning. The Seventh Circuit rejected the district court's reasoning and found that when parties to the same contract use different language to address the same issue, it is reasonable to infer that they intended the language to encompass different things. Thus, by using the broad phrase 'environmental hazards associated with a site,' NL Industries retained off-site CERCLA liability for hazardous wastes generated at the site.

Finally in **Stimson Lumber Company v. International Paper Company**,<sup>192</sup> the dispute centred around the duration of the indemnity that was given by the seller, International Paper Company to the buyer, Stimson, under an asset sale agreement in 1993. The indemnity related to pre-closing conditions for a period of 10 years. In 2008, after the indemnity had expired, Stimson sued International under the CERCLA for contamination cleanup costs. International argued in defence that the 1993 contract barred Stimson's claims because

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189 US District Court for the District of New Jersey, 909 F. Supp. 219 (1985)

190 973 F.2d 1296 (1992)

191 1994 U.S. Dist. LEXIS 11317

192 U.S. District Court for the District of Kansas - 900 F. Supp. 1427 (D. Kan. 1995)

International transferred its environmental liability to Stimson following the expiration of the 10-year contractual indemnity period. Alternatively, International argued that Stimson impliedly contracted to release its rights to pursue statutory CERCLA claims against International after the expiration of the 10-year indemnity period.

The court, however gave judgment in favour of Stimson, noting the absence of any express language in the agreement stating that Stimson would assume International's environmental liabilities once International's indemnity obligations under the contract expired. The court distinguished this from the language used in **Armotek Industries, Inc., v. Freedman**.<sup>193</sup> In this case, the seller had promised to indemnify the buyer for any breach of the warranty for a fixed period of time, with a proviso that after the indemnity period expired, 'no claim for indemnification for losses, costs or expenses... shall be made against the seller.' The court held that the contract reflected the parties' unambiguous agreement that the seller's environmental liabilities shifted to buyer after expiration of the indemnification period and therefore barred buyer's statutory claims.

### **Release/Waiver Provisions**

A release clause functions to waive or surrender a right, claim or interest. In the context of negotiating environmental liability, the releasing party generally agrees not to seek from the released party damages arising out of environmental conditions in the property. A release or waiver provision is particularly useful for the seller of the asset where in exchange for an agreement by the seller to remediate certain environmental conditions (where the seller prefers this course of action), the seller may obtain a full release from any future environmental claims that could be asserted by the buyer under any statute or common law.

### **Remediation Agreements**

Where there is evidence of the presence of adverse environmental conditions at a site, or where the adverse conditions are discovered on the property in the course of due diligence, the parties may decide to enter into a remediation agreement. The essence of this agreement is to compel one of the parties to perform certain environmental remediation on the property post contractual close or otherwise the obligation is made a condition precedent to contract close. The seller may choose to take control of the process and perform the remediation itself as opposed to allowing the buyer carry out the remediation and then reimburse the buyer. This may have the advantage of the seller not having to pay for a buyer's excessive or ineffective remediation efforts. However, this strategy transfers the risk of remediation to the seller and therefore is not always advisable. The better option from a risk management perspective is for the seller to allow the buyer do the remediation. The seller may however manage the process by inserting a cap on the cost of the clean-up or generally place a limitation on the level of clean-up that is carried out. For instance, the remediation may be limited to 'only up to the level that is required to satisfy regulatory agencies with jurisdiction over the matter.'

Also where the buyer is responsible for the clean-up, it is also advisable that the agreement specifies standards required, imposes a duty on the buyer to cooperate with seller with respect to the clean-up exercise and that the seller's lawyer addresses issues like access, permits and other issues regarding the seller's ability to interfere with ongoing operations post closing. Once again, it is important to note that the remediation agreement should be carefully worded and should specifically address which costs and expenses are covered. For example, whether interests, lost value and oversight expenses are included as applicable costs.

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193 No. 95-1876.

## Strategies to address, limit and/or transfer environmental liabilities

Due to a history of lack of supervision or enforcement of environmental laws and regulations in Nigeria by regulatory agencies, it is most likely that economic activities carried out prior to sale and transfer of assets would have greatly degraded or contaminated the environment especially in high risk/red flag industries. For this purposes, the types of environmental contamination and resultant liability can be divided into four categories.

- i. Onsite environmental contamination (e.g. soil contamination)
- ii. Offsite environmental contamination (for example, ground water aquifer contamination)
- iii. Injuries and illness suffered by employees of a facility
- iv. Damages to third parties (for example health problems borne by neighbouring residents)

During the sale process, there are four options open to the seller in allocating these types of liabilities:

- i. **Price reduction:** The seller may agree with a buyer to discount the value of their bid to a value commensurate with the cost of the remediation. The problem with this strategy is that at this early stage of the transaction, buyers are unlikely to understand the full extent of the contamination and therefore would not be in the best position to forecast the extent of potential clean-up costs with absolute certainty. The resultant effect is that the seller might end up paying far more than necessary or far too little. In asset sales carried out by public authorities, this strategy has been known to be counterproductive for the public authority seller because the private sector investor/buyer usually tries to protect itself in such situations by adding a high risk premium to the estimated clean-up cost.
- ii. **Indemnification of buyer's liability using reimbursement schemes:** As stated above, the seller may either do the clean-up itself or allow the buyer do the clean-up and then reimburse the buyer later. The problem that is likely to arise where the seller commits to reimbursing the buyer is that the buyer may be excessive and unnecessarily aggressive in implementing the clean-up programme. The seller may checkmate this by monitoring the clean-up, however this may also create the additional problem of the seller ending up incurring very high administrative costs for operating or monitoring the reimbursement program. Another problem with this strategy is how to draw up an effective monitoring of the remediation program and grant appropriate access to the other party.
- iii. **Setting aside a portion of the consideration paid by the buyer and earmarking the funds for reimbursement of clean-up costs borne by the new owner:** The parties may enter into an escrow agreement to provide the mechanism for managing this process. The escrow agreement is particularly useful to the buyer where the seller is disposing of the entire asset and the purchaser fears that the sales proceeds may be easily dissipated.
- iv. **Insurance:** The parties may also procure insurance policies to cover potential environmental risks. The problem here is to determine which of the parties is to bear the premium for such policies and also whether there exist appropriate insurance products within the Nigerian market to cover these sorts of risks.

## Recommendations and Conclusions

### General

The seller may adopt any of the options discussed above depending on the nature of the assets which is being sold. However, care must be taken by the seller not to give a blanket cover. The indemnification (or whatever option chosen) must be limited in terms of time and money. For instance, a time cap not exceeding six years may be placed in relation to all suits arising after sale as the statute of limitation compels aggrieved parties to bring an action not more than six years after act complained of occurred.<sup>194</sup> This will help in preventing the buyer from lumping both past and future contaminations together in the event of a suit. Where the seller is the government under privatization or other forms of public-private partnerships, the government should place a corresponding duty on the investor to comply with future government environmental regulations and policies. This allows the government effectively shape or influence the way that the public enterprise is managed environmentally in the future.

## Representations and Warranties

In the course of negotiations, the seller should seek to limit or qualify the scope of its representations. The seller may for instance insist that its representations be qualified by “knowledge.” In other words, relating to those things which it had knowledge of before closure. Some of the areas which the representations may cover include:

- (a) The business or assets being sold have been operated in compliance with extant law. The advice to the seller is not to make an absolute representation that the business is in complete compliance with the law but rather that there are no material violations known to it.
- (b) The business has obtained all permits required to operate the business: This representation must be drafted in such a manner to exclude instances where the buyer plans to make substantial modifications that will require new permits and/or additional controls.
- (c) That there have not been any releases of hazardous materials at the property: In this instance it is advisable to the seller to insist on inserting knowledge qualifiers and the seller may also want to limit this representation to releases that subject the business to material liability.
- (d) That there have not been any releases at disposal sites used by the current company or its predecessors: The seller must try and limit the length of time of this representations and insist that knowledge or notice be a condition of the representation. For example, the seller may introduce a qualification that provides that to the best of its knowledge it has not received any notice of any releases at any disposal site used by the business during the past X years.
- (e) No environmental claims have been asserted against the business or any disposal site used by the business. The seller will want to add a knowledge qualifier for environmental claims not yet asserted.
- (f) Accuracy of documents: As part of the due diligence process, the seller will provide the buyer with relevant documents covering environmental issues. These documents help the purchaser assess the environmental conditions of the business and assist in development of the due diligence programme. A purchaser will often ask that the buyer represents that it has provided all documents relating to the environmental matters. The seller may limit this representation to documents that it has knowledge of and which are in its possession.

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194 CV 10-79-M-DWM-JCL (D. Mont. April 22, 2011)

## Indemnities

An environmental indemnity is usually one of the most heavily negotiated aspects of an asset sale agreement and therefore particular attention should be paid to this area. The strategy of the seller should be to try as much as possible to limit the level of indemnity it gives while the buyer should seek to increase it. For instance, the seller should insist on indemnifying the purchaser for contaminations caused by the operations of the present managers of the asset and not for historical contamination caused by previous owners or operators. Also, the environmental indemnity should be limited to environmental issues discovered during the due diligence period. The seller should try not to assume liability for personal injury and property damage suffered by persons living or working on neighbouring properties as a result of contaminants migrating from the manufacturing plants. However, this may be very difficult to achieve.

Another item that is frequently negotiated by the parties is the Indemnity Trigger. In other words, what events must take place to trigger the indemnity obligation? The purchaser may insist that the indemnity is triggered by discovering contamination on the plant. This is however too broad and the seller should limit it to actions required by law, such as the purchaser receiving an order or demand letter from a government agency or third party. The seller may also insist that before a purchaser can make a claim under the indemnity, the buyer must file a claim within a certain period or otherwise forfeit its right to seek the indemnity. It is also good practice for the seller to request that the purchaser should furnish the seller copies of reports on a periodic basis and furnish copies of correspondences or reports filed or received from regulators. The consequence of the failure to comply with these provisions will be the forfeiture of the indemnity claims.

Where the purchaser is to carry out clean-ups and invoice the seller, the seller should ensure that the purchaser is undertaking a rational clean-up and not using the indemnity to modernize the plant. The parties should establish a mechanism for determining the appropriate cleanup levels and criteria used to develop those standards. For example, the purchaser may be required to use the most cost-effective remedy. To make sure that the purchaser also has an incentive to control the cost of the cleanups the seller may insist on some sort of cost sharing approach, for example, by limiting the indemnity to historical contamination from a certain time period, or by placing a floor or cap with both parties sharing the cost thereafter. As regards the funding of the indemnity, the buyer may want collateral for the seller's promise to pay by, for example, insisting on holdbacks or deferred payments of the purchase price, or on establishment of an escrow account from the proceeds of sale, a letter of credit or bond. It is in the interest of the seller to, as much as possible, limit the amount of collateral it provides. It is also advisable to build in a dispute resolution mechanism into the agreement to resolve disagreements over the sufficiency of the cleanup or its costs.

Where it is possible, the seller should insert a waiver/release clause in the indemnity provision, that the indemnity provided is the sole and exclusive remedy of the purchaser and that the purchaser waives any other rights it may have to recover environmental damages that are not covered within the indemnity provision. The seller must also always remember to obtain a release for future liability where liabilities have been successfully allocated.

Finally, the purchaser should ensure that any existing environmental permits and licenses are transferred to it at closure. From experience, it is not uncommon for environmental audits to raise issues and risks that are not incorporated into or dealt with effectively in the asset sale agreements. There must always be a clear and unambiguous attempt to translate the findings of environmental audits and other environmental due diligence into final asset sale agreements, otherwise the whole objective of conducting such due diligence would be defeated. The key reason why there is a dissonance between the findings in the environmental audits and the provisions in the asset sale agreement is the lack of coordination between the environmental advisers and the legal advisers. It is therefore recommended for greater coordination between a party's environmental adviser and their legal advisers, if possible the environmental adviser, should be made to participate during the asset sale negotiations.

# Book Reviews

## Public-Private Partnerships in Nigeria: Managing Risks and Identifying Opportunities

BY GEORGE NWANGWU  
MACMILLAN PUBLISHERS LTD. LONDON  
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*Public-Private Partnerships in Nigeria: Managing Risks and Identifying Opportunities* by George Nwangwu is possibly the only major text on the subject matter in Nigeria, as the author is one of the very few professionals in this evolving concept. Public-Private Partnerships (PPPs) is the way forward for infrastructural development in most developing countries. The government has moved from total ownership and regulation of different sectors to acting as regulators only because it cannot drive the level of development required for a fast changing world on its own. Thus, this book is a useful tool for professionals and students alike who would like to broaden their knowledge of a concept that is fast becoming the solution to infrastructural deficits in evolving economies and a tool for maintaining development in much more advanced ones.

The book is a 10-chapter expose on the topic as it moves from defining concepts to laying the groundwork for the legal and institutional framework of PPPs. Other chapters discuss the PPP transactional cycle, the contractual structure of the project, the value for money question, to risks, and finally the future of PPPs in Nigeria and the way forward. The author suggests that PPPs in Nigeria can be enhanced through better project risk management.

The various definitions of PPPs were based on two ideals, political and economic, which inform the decision of jurisdictions to reshape the concept to fit into their mandate. According to the author, most definitions are manipulated to fit into the specific goals and aims of the defining authority.

Definitions were thus explored from the viewpoint of different institutions that are involved in PPP transactions across the world, such as the International Monetary Fund (IMF), and the US's National Council for Public Private Partnerships. These definitions were based on the objectives of the institutions. These definitions help create a clearer understanding of the essential elements of the concept.

For instance the IMF defines PPPs as the supply of infrastructure and services that are traditionally provided by government. The author stresses the novelty of this definition but also points out its shortcomings, some of which are that there are no pointers to PPP, and there is more or less no elaboration on the relationship formed between the two entities driving the agreement.

The Parliament of Australia is a direct contrast to the IMF's definition of the PPP concept as it stresses the importance of including the concept of partnerships. The Canadian Council for PPP does not only point out the relationship but talks about the risks attendant to both parties. The National Council of PPP in the US elaborates on the contractual nature of PPPs.

The Organization for Economic Corporation and Development (OECD) outlines the alignment of interest between both parties; this is also possibly the only definition that points out a three-level contractual relationship between the parties.

In the UK, Her Majesty's Treasury accommodates all other transactions where there is a convergence of the public and private sector however, this isn't always the case as PPPs are different from privatization, public procurement and other similar concepts - as the author notes in the book.

According to the author, the Asian Development Bank (ADB) has the most comprehensive definition as it defines PPP as a range of possible relationships among public and private entities in the context of infrastructure and other services. PPPs present a framework that- while engaging the private sector- acknowledge and structure the role for government in ensuring that social obligations are met and successful sector reforms and public investments achieved.

The author ends with his own definition of the concept which is that PPP is a long-term relationship between the public sector agencies and private sector entities under which the responsibility for any or all of the combination of designing, financing, construction, management and operation of public infrastructure and utilities that were traditionally undertaken by the public sector and which is contractually shared and jointly undertaken by both the public and private sectors, usually in proportion to the type and quantity of risks each party can best carry.

He moves from the "what" question to the critical position of "why", which is that in developing economies the inadequacy of public funds to meet the increased demands of infrastructural deficits necessitates some form of salvaging.

The "why" question exemplifies the divide between the developing and developed jurisdiction's use of the concept because while that of the former is more rudimentary, such as for infrastructural deficits, that of the latter is more sophisticated promoting an efficient procurement regime and reformation of the public sector. Other benefits include better value for money, and better efficiency in providing services and infrastructure by the private sector judging from their expertise, experience and the availability of funding for these projects.

The "why" also makes a comparison between nationalization and privatisation. It suggests a reduction of government debt, which is not always correct because it defers government spending to a later period.

However, sufficient gains like the speedy completion of projects and the presence of adequate funding that has no cost overruns, makes the concept a welcome development.

The author sheds some light on the criticisms of the concept which range from high legal fees to longer periods of negotiation, and from increasing public sector risks to reducing the competition (i.e. shutting out companies in the procurement process).

However the benefits of the concept far outweigh the demerits. Some are: it saves cost, better value for money due to the private sectors' innovation and efficiency, and the speedy completion of qualitative projects.

As earlier stated, these arguments explain the political and economic consequences of PPPs. There appears to be some contradiction with the benefits of PPPs, because in one breath the author seems to suggest that government may use PPPs to get accounts off balance sheets and in another he says it helps with corruption issues. Where do we draw the line here? That seems to be a question he needs to throw more light on.

The history of PPPs may have originated from the UK's Private Finance Initiative (PFI) scheme, however, other jurisdictions can boast of some form of originality, some of which are the Power Purchase Agreements (PPA) signed by the US authorities, and the French concession model. PPP has become globally accepted as it has seen projects from electric power generation, to water and sanitation to roads, airports, healthcare, and railways.

As rightfully pointed out by the author, there are several types of PPPs and they are:

- BOT (Build-Operate-Transfer)
- BOO (Build-Own-Operate)
- BOOT (Build-Own-Operate-Transfer)
- BLT (Build-Lease-Transfer)
- Build lease operate transfer
- Build lease transfer maintain
- Build transfer operate
- Build own operate remove
- Design build finance operate
- Design build finance operate manage
- Lease develop operate
- Lease renovate operate transfer
- Joint venture (special purpose vehicle)
- Operations and management contracts
- Concessions

There are however, critical success factors for PPPs which are a favourable legal framework and a well-organized public agency. There are several others but the above two are mostly recognized.

The author goes further to touch on infrastructural development in Nigeria from the economic to social development which necessitates the use of PPPs in Nigeria and indeed the rest of the world. Funding to revive these projects in Nigeria by 2020 to make her one of the largest economies in the world necessitates the need for PPPs as a viable alternative to public funding.

The writer goes on to holistically explain the moves potential investors must make i.e. which level of government would be directly involved in the sector it wants to engage in business, that is the items on the exclusive and concurrent lists. This in turn will determine the sets of laws that will regulate such a project.

He goes on to classify the laws that may be put in place as:

- Federal laws
- State laws
- Tax legislations
- General laws of contract i.e., English Law

It must be noted that there is a multiplicity of laws and institutions which might be confusing to investors and pose regulatory risks. The author thus recommends a harmonization of these laws, as several regulatory bodies such as the ICRC and the BPE have clashed several times.

There is also an exposition on foreign investor's preference for ADR to settle disputes that may arise for lack of trust in the Nigerian legal system because of the perceived delay in the dispensation of justice.

Other laws include:

- Contract law
- Tax law

- Health and safety laws<sup>195</sup>
- Insurance
- Labour and employment issues
- Environmental standards
- Lender issues

It is trite to point out that these laws and institutions only duplicates staff and cause waste of resources because it is clear that PPP wasn't part of the thought out plan to finance public project which sees the perceived conflict and confusion caused between the various legislations.

The author therefore makes the following recommendations: enactment of new PPP legislation to replace Infrastructure Concession Regulatory Commission Act 2005 and the merging of the major institutions involved in PPPs in Nigeria. This will in essence encourage investors and provide the much needed confidence to invest in the country.

One of the most important areas in this work is the PPP transaction cycle which is listed below:

- **Preparation stage** which involves the public sector, the selection and execution of projects
- **Actual transaction stage** which is the project procurement of the private sector partner (interaction between both private and public sectors)
- **Post-transaction stage** this is the third and final stage of the cycle and it entails the evaluation and monitoring of the project

The author points out that while the above stated stages are important to the success of PPPs, the procurement stage is the most intricate stage, because it involves the delicate and sometimes complex interplay of activities and relationships between two parties with differing motives but, ultimately, seeking the same outcome, which is the successful closure of the PPP project.

It is also important to take into consideration the ways a PPP may come to an end, which are:

- Effluxion of term of contract
- Termination of contract by either party
- Breach of contract
- Force majeure event

The author presents practical steps for navigating through the different project stages in Nigeria and reveals the shortcomings in the legal and regulatory framework from the project selection to the post contract stages. He recommends the need for a new legal framework and improve regulatory environment for PPP in Nigeria.

Risks associated with PPP:

- Insurance risk
- Design, construction and technical specification risks
- Planning and approval risks
- Legislative change risks
- Operational performance risk

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195 798 F. Supp. 383 (D. Conn. 1992),

- Financial/economic risk
- Exchange rate risks
- Default risks
- Demand risks
- Political and legal risks

Finally, the author concludes by making recommendations on the various risks involved in PPP projects in Nigeria and opines that the country urgently needs a decision making framework, which could be either a refined Public Sector Comparator (PSC) framework that takes into consideration the social and economic realities of the country, or a credible alternative.

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# Commercial Arbitration Law and Practice in Nigeria

BY PAUL OBOARENEGBE IDORNIGIE  
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The author starts by exploring the various customary conflict resolution mechanisms available before the advent of colonization in Nigeria and the introduction of the “Received English Law” in the Nigerian judicial system which gave rise to the setting up of English-style courts. It will be shown that from the pre-colonial time to the present, there existed traditional indigenous institutions that adapted a variant of this adversarial process. It will also be shown that, quite contrary to the euro-centric view that arbitration is a preserve of the western world, traditional African societies had variants of arbitration or alternative dispute resolution before the advent of colonialism.

Recent analyses confirm that corporations prefer arbitration as a method of resolving their disputes. Having said that, arbitration is not a new phenomenon. Indeed, one of the focal points of this work, especially in relation to dispute resolution mechanisms in Nigeria, is that customary arbitration existed before the advent of colonialism. What is clear is that arbitration is here to stay. Regrettably, in the Nigerian context, it appears that the legal framework for, and the general commitment to, the arbitral process has not kept pace with modern developments.

Over the years, there has been widespread dissatisfaction with the delays and costs associated with conventional courts. Consequently, commentators advocated a shift towards the utilization of alternative dispute resolution (ADR) mechanisms. Others recommended a “multi-door” courthouse as an alternative to the “mono-door” approach.

The author laments the neglect of the concept of arbitration in tertiary institutions in Nigeria. However, landmark decisions by Nigerian courts in several cases, as pointed out in the book, show improvements in this area.

As the subject of arbitration evolves and new themes emerge, there is a need to add to the existing literature. The book is aimed at not only sustaining the trend, but expanding and updating the scope of existing literature. To achieve this objective, this book broken down into eleven chapters.

Chapter one explores the essence of arbitration. This chapter navigates the evolution of the arbitral process, using Nigeria as a case study. The author examines the concept of customary arbitration, which has been of interest not only to academics and practitioners but also to those who live in non-urban areas in Nigeria. The author outlined this phenomenon. The interest generated by alternative dispute resolution (ADR) is also examined in this chapter.

The focal point for chapter two is on the form and character of the arbitration agreement. Arbitration is hinged on fundamental principles. Two of these are the principles of party autonomy and separability. The author examines one major distinction between customary arbitration and statutory arbitration, which is the requirement that the arbitration agreement be in writing. The question arises as to what this means in the age of technology? In international commercial arbitration, the issue of the applicable law is of interest to all users of this process.

Chapter three examines the principle of arbitrability. Is this principle becoming elusive? What line is drawn between arbitration and litigation? Are the following subject matters: taxation of companies, fraud, corruption, void and illegal contracts and admiralty issues, arbitrable? Finally, he questions the link between the principles of arbitrability and separability.

Chapter four evaluates the regulatory regime of commercial arbitration. At what point is an arbitration international and not domestic? What is the main difference between a model law and a convention, treaty, protocol or international agreement? What decisions will parties have to adopt with regards to institutional or ad hoc rules? What is the desirability for institutional rules as against ad hoc rules?

The entire arbitral process is the crux of chapter five and it examines how arbitral proceedings are commenced and arbitral tribunals established; conflict of interest rules, the challenge of procedure and powers, duties and liabilities of arbitrators. He also juxtaposes judges and arbitrators whereby, unlike judges who are generally judicial officers appointed by the state, arbitrators perform other functions that may impinge on their impartiality and independence.

Chapter six examines the following: how arbitral proceedings are conducted, progressing from the preliminary meeting to procedural orders, hearings, the appointment of experts and the making of awards. What are the formal and substantive requirements of a valid award?

In chapter seven the author considers the various ways in which an arbitral award can be set aside or enforced. What procedure is there for applying to the court to enforce an award motion ex parte or motion on notice? And finally, the priority for when there are concurrent applications to set aside an award and another to enforce it?

Chapter eight evaluates the relationship between the courts and arbitral proceedings. Has arbitration finally made away with the jurisdiction of the courts? Can arbitral proceedings be sustainable without the courts and what is the extent of the court's intervention?

The focus of chapter nine is on investor/state arbitration or investment treaty arbitration. Nigeria being a signatory to the Washington convention of 1965 has also entered into over 22 bilateral investment treaties. How did the investor/state arbitration develop? What conflict resolution procedures have been adopted in investor/state arbitration where there are procedural, substantive and jurisdictional issues?

The penultimate chapter focuses on limitation statutes and arbitration, and other dispute resolution processes. The effect of these statutes on litigation is settled. However, do the statutes apply to arbitration, mediation, conciliation, negotiation and other alternative dispute resolution mechanisms?

Finally, chapter eleven concludes with the need for an improvement of arbitration laws in Nigeria and recommends that the draft arbitration and conciliation bills of 2006 be passed into law by the federal government, and the remaining states follow the precedence laid by Lagos State which has passed the draft bill into the Lagos State Arbitration Law, 2009.

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# Case Note

The case was between

**Barrister Toluwani Yemi Adebisi**

v.

**Nigerian Electricity Regulatory Commission (NERC) & 12 Ors**

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## Introduction

In this case, **Barrister Toluwani Yemi Adebisi v. Nigerian Electricity Regulatory Commission (NERC) & 12 Ors**, the plaintiff is Barrister Toluwani Yemi Adebisi and the defendants are as follows:

1. Nigerian Electricity Regulatory Commission (NERC)
2. Abuja Electricity Distribution Plc
3. Ibadan Electricity Distribution Plc
4. Eko Electricity Distribution Plc
5. Ikeja Electricity Distribution Plc
6. Kaduna Electricity Distribution Plc
7. Kano Electricity Distribution Plc
8. Jos Electricity Distribution Plc
9. Benin Electricity Distribution Plc
10. Enugu Electricity Distribution Plc
11. Port Harcourt Electricity Distribution Plc
12. Yola Electricity Distribution Plc
13. Ziklasis Networks Limited

The case was decided in the Federal High Court, Lagos Division.

The legal issues included the following:

1. Whether with the self-evidently poor power supply in the country, the defendant has lived up to its statutory objects and functions, which is to ensure adequate supply as per the Electricity Power Sector Reform Act 2005.
2. Whether with the 30 minutes of light on and 23 hours 30 minutes of blackout in most communities in Nigeria, the 2<sup>nd</sup> to the 12<sup>th</sup> defendants had made available an adequate supply of electricity to consumers.

3. Whether with the unstable, unreliable, epileptic supply of electricity to consumers in the country, the defendants have been true to their statutory objects and functions provided in section 32(i)(e) of the Electricity Power Sector Reform Act 2005 to ensure safety, security reliability and quality of service in the production and delivery of electricity to consumers.
4. Whether having regard to the absence of meaningful/significant improvement in power supply in the country, the 1<sup>st</sup> defendant has justified its statutory objects and functions as provided in sections 32(i)(a) of the Electricity Power Sector Reform Act 2005 to create, promote and preserve efficient power industry and market structures, ensuring optimal utilization of resources for the provision of electricity services.
5. Whether with regard to section 32(i)(a) of the Act, which creates an efficient power industry, the 1<sup>st</sup> defendant has indeed created an efficient power industry with her 2,347 megawatts for population of over 150 million compared with South Africa with her 44,000 megawatts for a population of less than 50 million.
6. Whether in view of the failure to comply with the statutory responsibility of ensuring adequate supply of electricity to consumers, and in the absence of any improvement in supplying power to the consumers, this justified the defendants to increase electricity tariff and without following due process, particularly section 76 of the Electricity Power Sector Reform Act.
7. Whether in view of the unreliable, unstable, and epileptic supply of electricity to consumers, contrary to section 32(i)(e) of the Act, and with no traceable evidence or sign of possible improvement, the defendants should still go ahead and increase the electricity tariffs of residential consumers who form 80% of the consumers.
8. Whether in view of individual businesses collapsing, industries closing down, residents unable to sleep comfortably at night, companies and commercial houses groaning under throat-cutting power bills, all from a poor power supply and a gross failure of defendants to live up to their statutory responsibilities, the defendants should still go ahead and increase electricity tariffs.
9. Whether or not adequate electricity supply should be balanced with the new charges, and for both to be commensurate with each other.
10. Whether the intention of the defendants to increase tariffs in spite of poor power supply and with no visible improvement is morally equitable and statutorily justified.

Reliefs sought by the plaintiff:

1. An order restraining the 1<sup>st</sup> defendant, the distribution companies, their agents or servants from foisting further hardship and unjustifiable increase of electricity tariff on Nigerian citizens without a meaningful and significant improvement in power supply at least for 18 hours a day in most Nigerian communities.
2. An order mandating the 1<sup>st</sup> defendant to do the needful and ensure generation of more power to meet the electricity need of Nigerians, so as to get value for the payment consumers are making.
3. An order mandating the 2<sup>nd</sup> to 12<sup>th</sup> defendants to make available to all consumers within a reasonable time of 2 years maximum, prepaid meters as a way to stop the indiscriminate and throat-cutting estimated bill.
4. And an order of court for pecuniary compensation against the Ikeja Electricity Distribution Plc.

## Background

The plaintiff claimed that the defendant being a power distribution company in Nigeria failed woefully in being true to her motto, goal, mission and statutory responsibilities of providing a reliable, affordable and uninterrupted supply of power to the Nigerian people. Electricity rates were hiked without any consequential improvement in power supply, while residents of the Mowe/Asese/Magboro areas of Lagos/Ogun states have been without light for the past two years and residents of Command area of Ipaja have been in utter darkness for over two weeks. The plaintiff being a citizen and taxpayer in Lagos State hence instituted the action.

## Questions on Law Answered

The learned judge dealt with the issues of jurisdiction before delving into the merits of the substantive suit and relied on the decisions of the appellate court in **Senate President v. Nzeribe** (2004) 9 NWLR (PT. 878) 251 and **Inakoju v. Adeleke** (2007) 4 NWLR (PT. 1025) 427.

The case called for the interpretation of sections 32 and 76 of the Electricity Power Sector Reform Act 2005 (EPSRA). The court held that the suit was properly commenced by originating summons. With respect to the issue of *locus standi*, the court stated that tax payers have the *locus standi* to approach the court to enforce the law and ensure that their tax money is utilized by the government frugally or prudently. See **Fawehinmi v. President FRN** (2007) 14 NWLR (PT. 1054) 275. Therefore, the plaintiff was entitled to approach the court to enforce the law in this case.

Based on the facts of the case, there was no doubt that the action was instituted within time, therefore, it was not a statute barred by the provisions of Section 2(a) of the Public Officers Protection Act, Cap P41 LFN, 2004.

On the reasonable cause of action, it was held that to have a reasonable cause of action, a plaintiff must also ensure that his action is justifiable or enforceable in a court of law. The learned trial judge, having perused the affidavits filed by the plaintiff herein, surmised that the plaintiff had set out the alleged wrongful acts of the defendants which gave him his cause of complaint and consequent damage. The fact, or combination of facts, which gave the plaintiff the right to sue had been properly pleaded. His lordship held that the suit disclosed a reasonable cause of action against the defendants. Therefore, on procedural issues, the court held that it can validly exercise jurisdiction over the matter.

For the substantive issues, the court examined sections 31, 32 and 76 of the Electricity Power Sector Reform Act 2005 (EPSRA). Section 31 established the 1<sup>st</sup> defendant, section 32 states the objects and functions of the 1<sup>st</sup> defendant. Section 76 (4) and (6) empowers the 1<sup>st</sup> defendant to establish and approve tariff methodologies and to observe and prescribe due process in doing so. The learned trial judge opined that “of all the requirements, it appears that the only one fully complied with by the 1<sup>st</sup> defendant was that it announced the new tariffs in the newspapers. There was no hard evidence that it gave notice in a gazette as spelled out in the EPSRA. It follows therefore that the recent increase in tariffs is procedurally *ultra vires* and illegal.”

On the issue of indiscriminate increase of tariffs, the court further stated that there is no doubt that unfettered discretion is a contradiction in terms. Every legal power must have legal limits, otherwise there is a dictatorship. The courts are the only defence of the liberty of the subject against departmental/executive aggression. Therefore, in light of what was stated above, the court held that the action was meritorious and consequently made the following orders:

1. The increment of electricity tariffs which took effect after the institution of the action and while the order that *status quo ante bellum* be maintained was subsisting, was declared illegal and set aside.
2. The 1<sup>st</sup> defendant was directed to reverse to the *status quo ante bellum*.

3. The 1<sup>st</sup> defendant was hereby restrained from further increasing electricity tariffs except in strict compliance with the relevant provisions of EPSRA, and the procedure spelt out in Section 76 of the EPSRA.
4. N50,000 (fifty thousand Naira) cost was awarded in favour of the plaintiff against the defendants.

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