

ASSET MANAGEMENT CORPORATION OF NIGERIA – A PRETENTIOUS SPECIAL PURPOSE VEHICLE

BY

KUNLE AINA

Senior Lecturer, Faculty Of Law, University Of Ibadan, Nigeria

ABSTRACT

In contemporary financial world, business organisation most especially financially distressed companies and companies with low or mid-tier credit ratings have securitised different types of assets (loans, credit cards, auto receivables, intellectual property, etc.) through the use of SPVs .The enactment of the AMCON ACT 2010 was specifically to bail out the Nigerian banks by buying and taking over the 'toxic' assets that were threatening to destroy the banks and the economy. This paper analysed the essential features of the procedure for securitisation and asset management modules as a background to critically examine the AMCON ACT and whether the Asset Management Corporation is an SPV or not. The paper concludes that AMCON is not an SPV but a special statutory creation to solve a special problem confronting the banks and the economy.

INTRODUCTION

Securitization is a financial process of pooling and repackaging debt into securities that are sold to investors.¹ According to analysts, the evolving field of structured finance² has

¹ Kravitt, J. H. P. 1996. *Introduction in asset-backed securitization in Europe*. Theodor Baums & Eddy Wymeerscheds.

opened up a number of innovative approaches for institutions in the developing economies to access the international financial and debt capital markets.³ One of such approaches is securitization. Several exotic variants of securitisation are being utilised globally, ranging from the securitisation of foreign currency future receivables to the securitisation of receivables from existing local currency assets, either directly by the entity seeking to raise funds or indirectly using a special purpose vehicle (SPV) in order to achieve a true sale.⁴

Securitisation has benefited businesses and helped improve the economy of developed economies. Nevertheless, it was one of the catalysts that ignited the recent global economic crisis.⁵ In undertaking securitisation process, companies essentially must create an SPV. The Federal government of Nigeria through the direct intervention of the Central Bank of Nigeria enacted the Asset Management Corporation Act (AMCON) to *inter alia* acquire the Non Performing Loans from commercial Banks in Nigeria and to securitise the Non Performing Loans acquired from the Eligible Financial Institution, in a bid to directly intervene and save the Banks from collapse and invariably protect the depositors of these Banks. The question that will necessarily agitate one's mind is whether AMCON is an SPV or an Asset Management Company. This paper will answer this question by analysing the essential components of the procedure for securitisation and SPV and examine the AMCON Act to determine whether the entity created in the Act is an SPV.

GENERAL FORM, BENEFITS AND FUNCTIONS OF SECURITISATION

² Structured finance deals involve complex transactions offered by large financial institutions for companies with very unique financing needs, which may take the form of collateralised debt obligations, syndicated loans and synthetic financial instruments.

³ Atuanya, P. 2012. Future flow financing as innovative lending tool. *Business Day*. October 31. Retrieved July 13, 2013 from <http://businessdayonline.com/NG/index.php/economic-watch/46772-future-flow-financing-as-innovative-lending-tool->.

⁴ Ibid.

⁵ Murakami, Y. 2012. *Innovative securitisation after the Crisis? Whole business securitisation in the U.S. and Japan*. M.A Project. Harvard Law School. Harvard. Retrieved on July 13, 2013, from <http://www.law.harvard.edu/programs/about/pifs/symposia/brazil/yusuke-murakami.pdf>

Securitisation is a well-established practice in the global debt capital markets.⁶ In contemporary financial world, business organisation most especially financially distressed companies and companies with low or mid-tier credit ratings⁷ have securitised different types of assets (loans, credit cards, auto receivables, intellectual property, etc.). It has been suggested that it is a possibility to securitise third world debts.⁸ This part therefore investigates the nature and practice of securitisation generally. It also discusses benefits of securitisation and possible negative outcomes associated with unregulated securitisation.

Historical Background of Securitisation

Contemporary Securitisation has its root in the structured financing of mortgage pools in the 1970s.⁹ In February 1970, the U.S. Department of Housing and Urban Development created the transaction using a mortgage-backed security. Prior to this, the Federal Home Loan Mortgage Corporation¹⁰ and Federal National Mortgage Association¹¹ acquired home mortgage from lending institutions, raising the finance for such acquisition through the issuance of securities that were backed by the pools of the home mortgages. The Government National Mortgage Association¹² gave guarantees for such securities. Progressively, in the USA, Investment Banks set up in-house departments to deal with such Ginnie Mae papers.¹³

⁶ Booth, C. D. 2002. *Securitisation in emerging markets, including government promotion of securitisation. A comment on Hill & Arner*. Retrieved July 14, 2014, from <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1180&context=djcil>.

⁷ Nwogugu, M. *securitisation is illegal*. Retrieved on July 13th 2013 from http://privateaudio.homestead.com/Exhibit_G_Securitization.pdf.

⁸ Tigert, R. R. 1988. Recent regulatory perspectives on debt-for-equity swaps and securitisation of third world debt. *University of Illinois Law Review*. 481. See also Plehn, R. 1989. Securitisation of third world debt. *International Lawyer*. 23:161.

⁹ Gaschler, T. E. *Understanding the securitisation process and the impact on consumer bankruptcy cases*. Proceeding of the 15th Annual Rocky Mountain Bankruptcy Conference. American Bankruptcy Institute. Retrieved July 13, 2013, from <http://www.abiworld.org/committees/newsletters/consumer/vol7num12/securitisation.pdf>.

¹⁰ Popularly known as 'Freddie Mac'

¹¹ Popularly known as 'Fannie Mae'

¹² Popularly known as 'Ginnie Mae'

¹³ For decades before that, banks were essentially portfolio lenders; they held loans until they matured or were paid off. These loans were funded principally by deposits, and sometimes by debt, which was a direct obligation of the bank (rather than a claim on specific assets). After World War II, depository institutions simply could not keep pace with the rising demand for housing credit. Banks, as well as other financial intermediaries sensing a market opportunity, sought ways of increasing the sources of mortgage funding. To attract investors, bankers eventually developed an investment vehicle that isolated defined mortgage pools, segmented the credit risk, and structured the cash flows from the underlying loans. Although it took

The National Mortgage Association sold securities backed by a portfolio of mortgage loans. To facilitate the securitisation of non-mortgage assets, businesses substituted private credit enhancements. First, they over-collateralised pools of assets, thereafter, they improved third-party and structural enhancements. In 1985, securitisation techniques that had been developed in the mortgage market were applied for the first time to a class of non-mortgage assets – automobile loans.¹⁴ A pool of assets second only to mortgages in volume. Auto loans were a good match for structured finance; their maturities, considerably shorter than those of mortgages, made the timing of cash flows more predictable and their long statistical histories of performance gave investors more confidence.¹⁵

In the late 1980s, emerging markets began using securitisation. The first transaction was done by the Mexican telephone company TelMex.¹⁶ TelMex securitised its rights to receive payments from AT&T for the Mexican portion of telephone calls made to Mexico from the United States.¹⁷ In the securitisation transaction, TelMex sold its rights to the payments from AT&T to a pool; the pool sold interests in the payments to investors, and paid to TelMex the amount it received from the investors.¹⁸

The first significant back credit card sale came to market in 1986 with a private placement of \$50 million of outstanding bank card loans. This transaction demonstrated to investors that, if the yields were high enough, loan pools could support asset sales with higher expected losses and administrative costs than was true within the mortgage market. Sales of this type allowed banks to receive sales treatment for accounting and regulatory purposes (easing balance sheet and capital constraints), while at the same time allowing them to retain origination and servicing fees. After the success of this initial

several years to develop efficient mortgage securitisation structures, loan originators quickly realized the process was readily transferable to other types of loans as well.

¹⁴ This early auto loan deal was a \$60 million securitisation originated by Marine Midland Bank and securitised in 1985 by the Certificate for Automobile Receivables Trust (CARS, 1985-1) See Hearing before the U.S. House subcommittee on Policy Research and Insurance in “Asset Securitisation and Secondary Markets” (July 31, 1991), page 13.

¹⁵ Dugan J. Op. Cit.

¹⁶ Hill, A. C. 1998. Latin American Securitisation: the case of the disappearing political risk. *Virginia Journal of International Law*. Vol. 38. 293. Retrieved July 13, 2013 from http://www.securitisation.net/pdf/gulc_latin_030198.pdf.

¹⁷ The portion taking place between the United States-Mexico border and the Mexican destination.

¹⁸ Hill, A. C. Op. Cit.

transaction, investors grew to accept credit card receivables as collateral, and banks developed structures to normalize the cash flows.¹⁹

UNDERSTANDING SECURITISATION

Securitisation is the process of pooling and repackaging of homogenous, illiquid financial assets into marketable securities that can be sold to investors.²⁰ Securitisation can also be used to refer to the process that leads to the creation of financial instruments that represent ownership interest in, or secured by, a segregated income producing asset or pool of assets.²¹ The term can be used to imply the structured financial process in which bank assets are repackaged in marketable forms and traded in options and other derivative securities.²²

In all of these cases, securitisation allows a batch of illiquid²³ assets to be transformed into a liquid tradable instrument with a known flow of income payments. Investors buy these assets by making loans which are secured against the underlying pool of assets and its associated income stream. Securitisation thus converts illiquid assets into liquid assets²⁴ by pooling, underwriting and selling their ownership in the form of Asset Securities. Securitised mortgages are known as mortgage-backed securities²⁵ while securitised assets²⁶ are known as asset-backed securities.²⁷ In all cases, the transformation is made possible through the use of SPV, like a limited company or a limited partnership.

¹⁹ Dugan J. Op. Cit.

²⁰ Sundaresan, S. Op. Cit.

²¹ Merritt C. Op. Cit.

²² Sarathchandra C. A. Op. Cit.

²³ Assets that cannot easily be sold. It is common in the real estate industry, where it is applied to pools of leased property, and in the lending industry, where it is applied to lenders claims on mortgages, home equity loans, student loans, vehicles loans and other debts. A list of the types of financial debt instrument that have been securitized is included so long as they are associated with a steady amount of cash flow.

²⁴ Masters, B. and Grant, J. Securitisation. *Financial Times*. Retrieved June 4, 2014, from <http://lexicon.ft.com/Term?term=securitisation>.

²⁵ Known as MBS.

²⁶ Non-mortgage loans or assets with expected payment streams.

²⁷ Known as ABS.

The SPV must, by law, be separate from the entity that has ownership rights to the instrument.²⁸

In the sense in which the term is used in present day capital market activity, securitisation has acquired a typical meaning of its own, which is at times, for the sake of distinction, called asset securitisation. It is taken to mean a device of structured financing where an entity seeks to pool together its interest in identifiable cash flows over time, transfer the same to investors either with or without the support of further collaterals, and thereby achieve the purpose of financing.²⁹ Though the end-result of securitisation is financing, it is not “financing” as such, since the entity securitizing its assets is not borrowing money, but selling a stream of cash flows that was otherwise to accrue to it.³⁰ This refers to the process of turning assets into securities – financial instruments that can be readily bought and sold in financial markets, the way stocks, bonds and future contracts are traded. When used in relation to real estate, securitisation means taking mortgages issued by banks and other lenders and converting them into securities that can be sold to investors.³¹

In its simplest form Securitisation involves:

- a. the sale of a large pool of receivables by an entity (Originator) that creates such receivables (or purchases the receivables from entities that create them) in the course of its business to a bankruptcy-remote SPV in a manner that qualifies as a true sale and is intended to achieve certain results for accounting purposes, as well as protecting the receivables from the claims of creditors of the Originator,³² and

²⁸ Cerrato, M. *The Securitisation market in the UK*. Adam Smith Business School. Retrieved July 4, 2014, from <http://www.gla.ac.uk/schools/business/newsandevents/aspire/issue10autumnwinter2011/the-securitisationmarketintheuk/>

²⁹ Kothari, V. 2003. *What is securitisation?* Retrieved July 4, 2013, from http://india-accounting.com/arc/whatsz_securing.PDF

³⁰ Ibid.

³¹ See generally Merrit, C. Op. Cit., Gaschler, T. E. Op. Cit., Ajayi, O. Op. Cit., Marques-Ibanez, D. and Scheicher, M.

³² Dorris, M. S. and Potenza, V. A. 2004. *Securitisation for first-time issuers*. Retrieved on June 5, 2014, from <http://www.dechert.com/files/Publication/2c2c9f17-c368-4ced-9537-ffd70e34262/Presentation/PublicationAttachment/fa9530e4-2d0c-4e26-82bl-05421408e705/M.%20Dorris.%20V.%20Potenza%20-%20Securitisation%20for%20First%20Time%20Issuers.pdf>.

- b. the issuance and sale by the SPV, in either a private placement or public offering, of debt securities that are subsequently satisfied from the proceeds of and secured by the receivables.³³

Professor Kettering³⁴ explained the distinctive feature of securitisation thus:

[T]he distinctive feature of securitisation is that the transaction... is structured to isolate the asset pool from the Originator [(the debtor)] in such a way that, if the Originator later becomes subject to an insolvency proceeding, the proceeding will not interrupt the continued receipt by the financiers [(the creditors)] of the payments due to them, as and when due, through realization on the asset pool ... [T]hat goal may sometimes be referred to as 'bankruptcy isolation' of the securitized assets.³⁵

That is why securitisation transactions involve a transformation device called Special Purpose Vehicles. The SPV is an essential device in the securitisation process because it allows the isolation process necessary in the transfer of risks off the balance sheet of the originator. Security buyers can only look at the assets bought, not the overall financial health of the originator, and, in case of bankruptcy of the originator, the security buyers' claim is limited strictly (at least in theory) to the securitized assets without any additional recourse on the originator.³⁶

A Special Purpose Vehicle is essentially a transformation device, whose main purpose is to convert an asset into a capital market security. The oldest form of securitised paper – that is, equity share, is re-invented to transform assets into securities.³⁷ Similarly, if an originator wanted to sell some specific assets, then he might transfer these specific assets to a specific corporation, which may issue its own securities to the investors. As long as we ensure that this special corporation holds only the assets transferred by the originator, and neither anything more nor anything less, we have thereby ensured that an investor

³³ Leixner, C. T. 1999. *Securitization of financial assets*. Retrieved June 4, 2014, from <http://mx.nthu.edu.tw/~chclin/Class/Securitization.htm>.

³⁴ Kettering, K. 2008. Securitisation and its discontents. *Cardozo Law Rev.* Vol. 29. 1553.

³⁵ Ibid at page 1561.

³⁶ Tymoign, E. 2009. *Securitisation, deregulation, economic stability, and financial crisis, Part I the evolution of securitisation*. Retrieved on June 4, 2014, from http://www.levyinstitute.org/pubs/wp_573_1.pdf.

³⁷ Kothari, V. Op. Cit.

buying the securities of this corporation is buying a fraction of the assets transferred by the originator.³⁸

The primary structural features of a typical securitisation that distinguishes it from traditional methods of funding are:

- a. Nature of the assets: The assets which are securitised or converted into securities are mostly financial assets. The investor primarily looks at assets, as if he is paying money to buy certain assets, and not as an obligation on the part of the originator to pay. These assets are of course specific and ascertainable assets of the originator, because investing in the general assets of the originator is no different from buying a security of the originator.
- b. Utilization of a Special Purpose Vehicle to hold the assets to be securitised and to issue the securities.
- c. Transfer of the assets to the SPV in a manner that should be legally recognized as a true sale and not merely as a security arrangement. This is done both to ensure investors' full and supreme legal control over these assets, and also a legal isolation of the assets from the originator – such that neither the originator nor any of his creditors can ever have any claim against those assets.
- d. Imposition of various restrictive covenants limiting the SPV's activities to those directly related to the securitisation and requiring the SPV to operate as an entity separate from the originator.
- e. Requiring that the SPV have one or more independent managers or directors in order to strengthen further its separate identity from the originator.³⁹
- f. Marketable securities with the objective of creating a capital market instrument, the assets of the investor are transformed into capital market securities, such that the investors buying these securities are in fact buying a fractional claim on the originator's specific assets.⁴⁰

³⁸ Ibid.

³⁹ Wildman, T. R. and Carragher, D. J. 2004. *Originator insolvency: the ultimate test for United States securitisation transactions*. Retrieved July 4, 2014, from <http://www.daypitney.com/news/docs/dbh/news.3435.pdf>.

⁴⁰ See generally Kothari V. Op. Cit.

KEY FEATURES OF AN IDEAL SPV

An ideal SPV for securitization purpose must have the under listed features to be able to effectively answer the needs of both the originator and the investors.

- a. An SPV must be capable of acquiring, holding and disposing of assets. It must therefore be a juristic person or be conferred with such powers of acquiring, holding and disposing of assets by special legislation.
- b. It would be an entity, which would undertake only the activity of asset securitisation and no other activity.
- c. An SPV must be bankruptcy remote i.e. the bankruptcy of Originator should not affect the interests of holders of instruments issued by SPV.
- d. An SPV should be bankruptcy proof. i.e. it should not be capable of being taken into bankruptcy in the event of any inability to service the securitised paper issued by it. However, this is not absolute. It will be contrary to the intent and spirit of Companies and Allied Matters Act to insist that a company should not be liquidated though circumstances exist for its winding up.
- e. An SPV must have an identity totally distinct from that of its promoters! sponsors/constituents/ shareholders.
- f. The investors must have undivided interest in the underlying asset (as distinguished from an interest in the SPV which is a mere conduit).
- g. A SPV must be tax neutral i.e. there should be no additional tax liability or double taxation on the transaction on account of the SPV acting as a conduit.
- h. A SPV must have the capability of housing multiple securitisations. However, SPV must take precaution to avoid co-mingling of assets of multiple securitisations. In case of transactions involving various kinds of assets, they should restrict the rights of investors to the specific pool

- i. The SPV agreement may not release its employees or trustees from their responsibility for acts of negligence and a willful misconduct.⁴¹

The reasons an SPV should have the above features are so that it will not be treated as a subsidiary of the originator, It will not be affected by the insolvency of the of the originator, and finally, its balance sheet will not be consolidated with the originators balance sheet

NON PERFORMING LOANS AND ASSETS MANAGEMENT COMPANIES

Non Performing Loans

Non performing assets, which are by-products of financial crisis, are defined as debt instruments whose obligors are unable to discharge their liabilities as they become due.⁴² If left unresolved, nonperforming assets can deepen the severity and duration of financial crisis and complicate macroeconomic management.⁴³

Two basic questions confronting policymakers in the formulation of policies to resolve nonperforming assets are where should nonperforming assets be managed and how can these assets be best resolved?

To achieve the above objectives, and in answer to the above questions, it has been suggested that good assets of distressed financial institutions should be separated from their bad assets and that Assets Management Companies should be set up as receptacle vehicle (i.e. SPV) to take over it.⁴⁴

⁴¹ See generally Anon. 2013. Special Purpose Vehicle. Retrieved May 10, 2014, from <http://priyankablogthoughts.com/special-purpose-vehicle-spv/>

⁴² Woo, D. 2000. Two Approaches to resolving nonperforming assets during financial crises. IMF Working Paper WP/00133. Retrieved June 8, 2014, from <http://www.imf.org/external/pubs/ft/wp/2000/0033.pdf>

⁴³ They can do so by tying up resources and impeding the recourse allocation process, thereby prolonging the economic stagnation accompanying financial crises. An example would be a nonperforming loan of which the lender can eventually recover at least a portion of the value by dating its underlying collateral. Until liquidation is completed, the lender's funds are tied up by the loan, whereas they could be put to use by a viable borrower in the form of a new credit. The same may be true for the collateral of a nonperforming loan (a factory, commercial or residential properties) which, until it is sold and reemployed in the economy, may be left idle, thus performing no useful function even as depreciation sets in. In addition, they can thwart economic recovery by weakening the financial system, whose dynamic financial intermediary role is critical for the resumption of economic crisis.

⁴⁴ Woo D. Op. Cit.

The use of SPVs to rehabilitate the books of troubled financial institutions has been an age-long practice.⁴⁵ There are documented examples of the use of SPVs in the U.S., Sweden, Germany and Ireland.⁴⁶ Recently in the U.S., the Troubled Asset Relief Program (TARP) was set up under the terms of the Emergency Economic Stabilization Act of 2008⁴⁷ which authorized the U.S. Department of the Treasury to establish programmes to stabilize the U.S. financial system and prevent its systematic collapse.⁴⁸

ASSET MANAGEMENT

Broadly defined, Asset Management is the process whereby nonperforming assets are identified and organized into one of these four categories of action.

- a. To sell a nonperforming asset, the market for such assets must exist and, if no such market exists, it must be organized. The sale of nonperforming assets facilitates diversification of risks and reallocation of resources.
- b. To recover a nonperforming asset, the holder of the assets initiates a process, often legal, by which a part or whole of the value of the assets can be recouped through the seizure and the liquidation of its collateral and/or through the sale of other assets in the possession of the asset's obligor. The effective functioning of this process largely depends on the existing legal framework and procedures, the perceived working of which often will have a significant influence on the market valuation of the asset and assets in general.
- c. To restructure a nonperforming asset, the holder of the asset enters into negotiation with the asset's obligor with the aim of strengthening the ability of the obligor to service and eventually to repay the principal. This usually involves redefining the terms of the original contract, a process that often entails some concessions on both the part of the holder and the part of the obligor. Successful

⁴⁵ James, B. Thomson, J. B. 2010. Cleaning up the refuse from a financial crisis: the case for a resolution management corporation. *Federal Reserve Bank of Cleveland Working Paper*. Retrieved May 12, 2015 from www.clevelandfed.org/research

⁴⁶ *Ibid.*, at p.3.

⁴⁷ It was signed into law by the then President of the United States, George W. Bush, October 3, 2008.

⁴⁸ Cassell, M. K. and Hoffinain, S. M. 2009. Managing a \$700 billion bailout: lessons from the home owners loan corporation and the resolution trust corporation. IBM Center for the Business of Government.

debt restructuring can benefit both creditors and debtors. However, the process should be initiated only if the economic return from the rehabilitation of the assets exceeds that of its liquidation.

- d. To write off a nonperforming assets, the holder of the assets takes a loss equivalent to its book value and removes it from the balance sheet. The holder will normally only do so when the prospect of recovery is very low and when the cost of recovery or maintenance of the assets exceeds its value.

Features of SPVS set up purposely to rehabilitate Troubled Financial Institutions

According to Kane, any SPV set up to buy up troubled assets of financial institutions should be proficient in four activities; namely: taking over the distressed assets (rescue); valuation of the assets (appraisal); protecting and enhancing the value of the assets (property management); and disposing of the assets (sales and related⁴⁹ activities).⁵⁰ In addition, the SPV must have experts in each core activity together with experts in the types of assets within its supervision.

Consequently, Cassell and Hoffman⁵¹ highlights ten lessons of such SPV drawing from the U.S. Home Owners' Loan Corporation and the Resolution Trust Corporation as follows:

- a. A temporary, dedicated administrative entity.
- b. Clear formulation of the critical task is crucial.⁵²
- c. Autonomy and discretion are needed in performing critical tasks.
- d. Flexibility to adapt in the field is essential.
- e. The temporary administrative entities must understand and be responsive to market conditions.

⁴⁹ To be completed in March 2001.

⁵⁰ Kane, E. J. 1990. Principal agent problems in S&L Salvage. *The Journal of Finance*. 756-757

⁵¹ Cassell, M. K. and Hoffmann, S. M. 2009. *Managing a \$700 billion bailout: lessons from the Home Owners' Loan Corporation and the Resolution Trust Corporation*. IBM Center for the Business of Government, Financial Management Series, Washington. Pp. 7.

⁵² See generally Jones, J. H. and Angly, E. *Fifty billion dollars: my thirteen years with the RFC, 1932-1945*, New York: The Macmillan Company 1951.

- f. Government must have the expertise to hit the ground running in responding to demands of the economy.
- g. Government must have the ability to effectively monitor and manage contractors.
- h. Government must have sufficient financial and personnel resources to complete the task.
- i. Government must have exit strategies.
- j. There must be clear and transparent oversight.

According to Thomson,⁵³ Cassell and Hoffman's ten lessons complement Kane's four principles for asset salvage. However, eight key features can be deduced for SPVs used in the resolution of the troubled assets of banks . These are: temporary, dedicated entity; formulation of critical task; autonomy; flexibility; management of contractors; availability of financial and personnel resources; transparency; and exit strategy.⁵⁴

These can be said to be international best practices as such SPVs as can be gleaned from experiences in other jurisdictions.

Assets Management Corporation of Nigeria (AMCON)

AMCON was set up as a resolution mechanism for the Nigerian banking crises. AMCON sold bonds to fund the purchase of bad debt and took over three of the rescued banks after regulators deemed them unlikely to meet a re-capitalisation deadline.⁵⁵ Specifically, AMCON's job was to reform the financial institutions and stabilise the banking industry. In addition, the corporation was giving the responsibility of tackling the restructuring of the bad debts which have been put at a total of 12,000 individual loans.

⁵³ James B. Thomson, *supra* at p. 8.

⁵⁴ On the features of such SPVs, see generally, O. Emre Ergungor and James B. Thomson, 2006. "Systemic Banking Crises" in Andrew H. Chen (ed.) *Research in Finance* (Elsevier 2006) and O. Emre Ergungor, "On the Resolution of Financial Crises: The Swedish Experience," Federal Reserve Bank of Cleveland Policy Discussion Paper No. 21, June 2007, at pp. 7 -9.

⁵⁵ The zero coupon bonds are three year in tenor, guaranteed by the federal government, they qualify as liquid assets and are fully registered on the Nigerian Stock Exchange. These funds have been used to buy ERAs from financial institutions, recapitalize the three banks presently owned by AMCON and provide financial accommodation to the five banks that have successfully gone into mergers and acquisition arrangement. A small portion of these is issued for AMCON's operations.

According to Mofoluku Dosunmu,⁵⁶ AMCON has since its creation bought EBAs in three tranches in the Nigerian banking industry as well as provided financial accommodation to 8 institutions.⁵⁷ The EBAs comprises of non-performing loans as well as systemically important loans in Nigerian banking sector.

Data from AMCON shows that it spent N5.6 trillion (\$35.5bn) in 2011 to acquire NPLs, giving banks more capacity to lend to the private sector. The intervention by AMCON has helped to reduce the banking industry NPL ratios to an industry average of about 5 percent from over 30 percent in 2010. Earnings are increasing at Nigerian banks as a result, leading to a recovery in their share prices.⁵⁸

A brief review of the AMCON Act will be undertaken to know whether it falls into the category of an SPV discussed above for the purpose of assets salvage for securitisation purposes which was one of its mandates.

Establishment and Independence of the AMCON

Section 1(1) of the AMCON Act provides for the establishment of the AMCON. The law provides that, it shall be a body corporate with a common seal, having perpetual succession and may sue and be sued in its corporate name.⁵⁹ Furthermore, it may acquire, hold and dispose of movable and immovable property for the purpose of its functions and objects.⁶⁰ It is intended that the AMCON shall be sufficiently independent in the

⁵⁶ Executive director, fiancé and corporation, AMCON

⁵⁷ Mrs. Mofoluku Dosunmu had explained that the first purchase, which was done in December 2010, was for the corporation to buy all NPLs that had to do with the capital market as well as in all the then 8 rescued banks. The next set of purchase was done on April 6th 2011 while the last one was done 28th December, 2011. That last purchase was to finally clean up all the NPLs in the bank's books as well as to take out loans that were systemically important. AMCON purchased total EBAs N4.02 trillion at a price of N 1.76 trillion. Dosunmu added, the sources of funds open to AMCON are three folds, first, is our share capital of 10 billion which was created by the CBN and the Ministry of Finance. Thereafter, AMCON issued N500 million debentures, fully subscribed to by the CBN and then we issued zero coupon bonds, which we used in purchasing all the NPLs, EBAs and the recapitalised of financial institutions in Nigeria.

⁵⁸ Anon. 2013. *AMCON and Nigeria's banking sector reform*. Retrieved July 7, 2014, from <http://businessdaynigeria.com/amcon-and-nigeria-s-banking-sector-reform>. Zenith Bank, Nigeria's third largest lender by market value, reported last year that net income for full-year 2012 rose to N100.68 billion (\$636m) from N48.7 billion a year earlier, the highest ever for any Nigerian bank. The stock is 58 percent in the past year.

AMCON Act, Sections 1 (2)(a) and (b).

⁵⁹ Section 1(3) AMCON ACT

⁶⁰ Section 1(4) AMCON ACT

discharge of its functions.⁶¹ This provision is of dubious utility. In the first place, the AMCON being a statutory body can only be controlled by external bodies to the extent that its enabling statute permits such interference. Secondly, the involvement of the Central Bank of Nigeria in the affairs of the AMCON is statutorily provided for in the AMCON Act. It is, therefore, unclear who the AMCON is being declared independent from by virtue of section 1(4). Perhaps, the essence of the independence conferred on the AMCON is to the effect that in carrying out its functions and exercising its powers, the AMCON is not bound to seek the consent, or obtain the approval, of any authority or person, except as stipulated in the AMCON Act.⁶²

Objectives of the AMCON

The main objects of the AMCON are to assist Eligible Financial Institution (EFI) to efficiently dispose of Eligible Bank Asset (EBA);⁶³ to efficiently manage and dispose of eligible assets acquired by it;⁶⁴ and to obtain the best achievable financial returns on eligible assets or other assets which it may acquire.⁶⁵ In doing so, it is expected to take in account the need to protect or otherwise enhance the long-term economic value of those assets; the cost of acquiring and dealing with those assets; its cost of capital and other costs; any guidelines or directions issued by the CBN; and any other factor which it considers relevant to the achievement of its objects.⁶⁶

Functions of the AMCON

The AMCON is expected to undertake certain functions in furtherance of which it is conferred with certain powers by the AMCON Act 2010. These functions are stated in Section 5 of the AMCON Act. These includes the following;

⁶¹ Section 6(3) AMCON ACT.

⁶² Section 4(a) AMCON ACT. The core objectives of AMCON and similar agencies all over the world are the same to wit; to purchase the toxic loans and bad loans and remove it from the balance sheet of the banks, return the banks to liquidity by bringing it shareholders funds to a zero level, aggressively pursue the recovery of debts.

⁶³ Section 24, AMCON ACT.

⁶⁴ Section 4(a), AMCON ACT.

⁶⁵ Section 4(c) AMCON ACT.

⁶⁶ Section 4(c)(i) — (v) AMCON ACT.

- a. The acquisition of EBAs from EFIs in accordance with the provisions of the AMCON Act.⁶⁷

In order to create liquidity in the banking sector, AMCON is empowered to purchase or acquire eligible bank assets from eligible financial institutions. To aid AMCON in this respect, the corporation is empowered to issue bonds or other forms of debt instruments as consideration for the acquisition of toxic assets of banks and other financial institutions. In purchasing the EBAs, AMCON has the discretion to choose the assets to be purchased; however the valuation of the subsequent purchase or acquisition of the EBAs are to be determined in accordance with guidelines issued from time to time by the CBN. The Act also makes provision for a category of assets known as tainted EBAs.⁶⁸

Following the acquisition of the EBAs, the acquired assets automatically become vested in AMCON and AMCON is then empowered to exercise all the rights and obligations previously enjoyed by the EFIs in relation to the purchased assets. In exercising this power, AMCON can among other things, institute court actions to protect, perfect or enforce any existing security rights or exercise all powers conferred by any document that forms part of the bank assets. The consideration mechanism for the acquisition of the EBAs centres on the issuance of bonds and other debt securities by AMCON as consideration for the acquired toxic assets. In carrying out its debt issuance mandate.

⁶⁷ The term “eligible bank assets” is defined by section 61 of the AMCON Act to mean those assets of EFJs specified by the Governor of the CBN to be eligible for acquisition by the AMCON pursuant to section 24 of the AMCON Act. Furthermore, by the same section the term “eligible financial institution” is defined to mean a bank duly licensed by the CBN to carry on the business of banking in Nigeria under the Banks and Other Financial Institutions Act. The term also includes a bank or other financial institution, whose banking license has been revoked by the CBN, pursuant to the Banks and Other Financial Institutions Act. See also sections 4 and 5 of the Asset Management Corporation of Nigeria Guidelines No. 1 of 2010.

⁶⁸ Section 37 AMCON ACT. These are basically EBAs which comprise of loans, credits and other financial accommodation obtained by insiders of or in breach of the rules and regulations of the EFIs that ‘granted the loan in situations where; the loans were obtained in breach of the rules and regulations of the EFIs; secured against the shares or other securities of the EFIs or in breach of the prevailing rules and the regulations of the CBN.

- AMCON is empowered to borrow or raise money with or without the guarantee of the CBN, with the effect that the issuance would be backed by the Federal Government of Nigeria pursuant to the Fiscal Responsibilities Act 2007.
- b. To purchase or otherwise invest in eligible equities on such terms and conditions as the AMCON, with the approval of the Board of the CBN, may deem fit.⁶⁹
 - c. To hold, manage, realise and dispose of EBAs (including the collection of interest, principal and capital due and the taking over of collateral securing such assets) in accordance with the provisions of the act.
 - d. To pay coupons on, and redeem at maturity, bonds and debt securities issued by the corporation as consideration for the acquisition of EBAs in accordance with the provisions of the act.

Powers of the AMCON

The powers of the Corporation are wide. Section 6 of the AMCON Act provides for the general powers of the AMCON. A proper perusal of the AMCON Act explicitly reveals that the powers conferred on the AMCON by the section do not represent the totality of its powers. Mention must therefore be made of those powers which are not stated in section 6 but can also be seen in the AMCON Act. Consequently, a comprehensive consideration of the powers of the AMCON is best undertaken under three broad categories: General Powers; Specific Powers; and Special Powers.

Problems with AMCON as an Asset Securitisation SPV

An SPV must have an identity totally distinct from that of its promoters and sponsors. However, the most pervasive and domineering influence of the CBN over the AMCON is a difficulty facing AMCON. Though CBN holds 50 per cent equity in the AMCON, the level of control the CBN has over the AMCON *ex facie* would suggest that the AMCON is a wholly owned subsidiary of the CBN; which is not the case. It is conceded that the creation of the AMCON is the brain-child of the CBN, but that is not an excusable justification for such pervasive dominance.

⁶⁹ The term “eligible equities” is not defined in the AMCON Act.

The valuation method for troubled assets could be another destabilising provision. Section 28 of the Act states that the purchase of eligible bank assets shall be determined in accordance with the guidelines issued by the CBN. This provision could be seen as giving CBN power to be partial in their treatment of eligible bank asset.

A major problem with AMCON is in regards to the securitisation of its acquired NPLs. Generally, the assets that are more suitable for securitisation are those with predictable cash flows, low delinquency rates, and whose underlying collateral have high liquidation value. Nonperforming assets usually do not have these characteristics, a fact that places greater demands on the design of their securitisation.

There are also several other arguments against the separation of nonperforming loans from performing loans and bad assets.

a. Loss in institutional knowledge

Separating nonperforming loans from their originating banks, by weakening the knowledge base about these loans, reduces the probability of their recovery. Furthermore, lessons learned by credit officers from loan recovery and collection can strengthen their credit assessment skills and reduce the probability of recurrence of bad and lax lending.

b. Weakening of credit discipline

Transferring loans out of banks may increase the difficulty of recovery. Borrowers are less likely to repay AMCON with which they do not have an ongoing relationship, on which they cannot rely for new funding.

c. Difficulty in pricing transferred assets

It is difficult to price nonperforming assets correctly, especially during financial crisis. The absence of market benchmarks for assets prices may lead to sellers transferring too many of their assets to the AMCON and the AMCON paying too much for them.

d. Political interference

It would be difficult to insulate the management of AMCON from political interference and pressure from the borrowers.

Still on the quality of assets, the originators need to have a minimum viable amount of quality assets to make the securitisation transaction attractive in view of some minimum expenses to be incurred for fees, structure, rating agencies, lawyers, auditors etc. NPLs will not give them that satisfaction. It can be argued however, that a quality credit enhancement that can attract high credit rating can boost the quality of these assets.

In addition, securitisation requires a sophisticated market infrastructure whose development may take time. For this reason, asset management companies may not be adequate primary vehicles of assets disposition via securitisation especially in most developing and emerging economies like Nigeria. It must be borne in mind that a lack of a sophisticated debt market in Nigeria and lack of knowledgeable investors will make the securitisation of these non performing assets difficult if not impossible.

In addition, another problem created by the AMCON Act is that the Act created major impacts on existing laws thus making AMCON bogged down by litigations. Already some cases have been instituted in court against the AMCON.⁷⁰ It is reasonable to expect that there would be a deluge of litigations against the AMCON as it continues to pursue the debtors to these EFIs in respect of the non-performing loans.⁷¹ This contention is predicated on the fact that the AMCON did not contact some of the debtors before purchasing the EBAs from the EFIs. A good example of the impact is on loan agreements.

Most loan agreements restrict lenders' rights to transfer loans without the prior consent of the borrower. These restrictions are found in most loan agreements with banks in Nigeria. The practice seems quite understandable from the borrower's perspective as some borrowers may have certain rights they may wish to protect under the loan contract with the lender which may not survive the transfer to a third party, such as any right of set-off against the lender. There is also the possibility that borrowers may prefer to continue

⁷⁰ Oyesina, T. 2010. Challenging the Asset Management Corporation of Nigeria, (AMCON) Act 2010. *Nigerian Tribune*. September 6 2010. Retrieved June 4, 2014 from <http://www.tribune.com.ng/index.php/tribune-law/10584challenging-the-asset-management-corporation-of-nigeria-amcon-act-2010>

⁷¹ Onuoha, R. 2011. Non-Performing Loans: Debtors might take AMCON to court. *Vanguard*. April 12, 2011. Retrieved July 24, 2014, from <http://www.vanguardngr.com/2011/04/non-performing-loans-debtorsmight-take-amcon-to-court>

their relationship with the lender clue to some long-standing relationship between them, as opposed to a third party with whom they have had no prior relations and who may aggressively pursue debt recovery actions against them.

To circumvent the difficulties that may arise where relevant loan agreements contain such restrictions, AMCON Act provides that any assignment made to AMCON shall take effect notwithstanding any contractual restrictions on acquisition, assignment or transfer of the bank asset or any requirement for consent, notification, registration, authorisation, or license. A transfer of title in English law is made by way of assignment. This position also applies in Nigeria. In England, legal assignment is governed by the Law of Property Act 1925, which stipulates among others that express notice in writing must be given to the debtor in order to qualify as an Assignment. Relying on the leading case of *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*,⁷² Chitty posits that if rights arising under a contract are declared incapable of assignment, a purported assignment will be invalid as against the debtor.⁷³ It may however be effective as between the assignee and assignor, as any attempt to invalidate the latter assignment may be ineffective on grounds of public policy. Though Section 34(2)⁷⁴ has effectively taken care of the difficulties that may have arisen from contractual restrictions on assignment of eligible bank assets, that is not to say however, that banks are completely absolved from liability. The banks may be exposed to liability for breach of the provisions of the loan agreement with the debtor where for instance any requirement for consent was not complied. Interestingly, the Act contains provisions requiring eligible financial institutions to give relevant notice of transfer of assets to the borrowers after the transfer has been made.⁷⁵ However, it absolves the Corporation from liability for failure or delay in notifying relevant debtors of the assignment to the Corporation.⁷⁶ To circumvent this difficulty in direct assignments, it has been argued that a loan be structured as a transferable instrument, or a

⁷² (1994) 1 A.C 85.

⁷³ Chitty on Contracts supra.

⁷⁴ AMCON ACT.

⁷⁵ Section 33(1), AMCON ACT.

⁷⁶ Section 33(2), AMCON ACT.

bond.⁷⁷ In this way, the debtor from the onset knows that once he is not able to pay up his debt, it can be transferred to a third party.

The Asset Management Corporation is endowed with certain extraordinary powers under the Act that are not exercisable by a normal spv. For instance, Section 48 of the Act gives powers to the Corporation to act or appoint a receiver for a debtor company whose assets have been charged, mortgaged, or pledged as security for an eligible bank asset acquired by the Corporation. This powers surprisingly will include taking over and managing the debtor company⁷⁸. The Commission is also empowered to apply to the court *ex-parte* to possess properties of debtor companies of EBAs.⁷⁹

A very interesting provision in the Act is giving powers to the Commission to circumvent some legislation in order to achieve their purpose of recovering debts of bank customer transferred to them. The commission may apply for a receiving order against any debtor who fails to pay to the Corporation within 30 days notwithstanding the provisions of the Bankruptcy Act. In fact the Act specifically provides 'Notwithstanding the provisions of the Bankruptcy Act, where a receiving order is made against a debtor under this Act, the court may adjudge the debtor bankrupt'.⁸⁰ The Corporation is also empowered to apply to the court to wind up a debtor company and appoint a liquidator for the company. This is also notwithstanding the procedure for winding up of companies under the Companies Act 2004.⁸¹ The Corporation is also given special powers for debt recovery contrary to the rules of the Court.⁸² As we noted above, the CBN continues to exercise supervisory role over the Corporation, these include, approving the codes of practice prepared by the Corporation, supervise and regulate the activities and functions of the Corporation, appoint examiners to carry out special or routine examination of the books of the

⁷⁷ Kothari V. 2012. Securitisation Guidelines 2012. Retrieved July 22, 2015, from <http://www.vinodkothari.com/Securitisation%20Guidelines%202012.pdf>

⁷⁸ Section 48(1)(c) AMCON ACT.

⁷⁹ Section 49, AMCON ACT.

⁸⁰ Section 51 (3), AMCON ACT.

⁸¹ Section 52, AMCON ACT.

⁸² Section 53, AMCON ACT.

Corporation.⁸³ While a properly structured SPV is not subject to any external control even by the originator.

The above clearly shows that the Corporation is not an SPV but probably a special statutory creation to confront a special circumstance threatening the survival of the Banks.

There are numerous justifications to contend that every effort has been made to ensure that the AMCON succeeds. These can be gleaned from the provisions of the AMCON Act. They include the fact that members of its Board of Directors are required to act in utmost good faith, with care, skill and diligence;⁸⁴ the declaration of debt obligations by members of its Board of Directors and employees;⁸⁵ avoidance of conflict of interests;⁸⁶ indemnification against worthless collateral ;⁸⁷ non-prejudice by lack of notice to debtors by EFIs;⁸⁸ subrogation of rights of EFIs;⁸⁹ dedication of a special judge to handle AMCON-related matters;⁹⁰ comprehensiveness of offences under the AMCON Act and their penalties;⁹¹ the Attorney-General of the Federation or any other person appointed by him being designated to handle AMCON-related matters;⁹² and the exemptions granted to the AMCON in respect of certain statutes.⁹³ Most importantly, the exemption from tax which is very important for SPV. It is important that AMCON succeed as it is seen as a major tool for the resolution of the financial crisis in the Nigerian banking sector which has negatively impacted the capital market and real sectors of the economy.

From all the analysis above it is evident that an SPV is a legal entity created to undertake a specific activity or series of activity for the benefit of its sponsor(s). AMCON meets this definition. Asset management companies are established by monetary authorities as SPVs for the purpose of rehabilitating ailing financial institutions. AMCON is set up for

⁸³ Section 58, AMCON ACT.

⁸⁴ Section 11, AMCON ACT.

⁸⁵ Section 16(1) and (4) AMCON ACT.

⁸⁶ Section 16(2) and (5) AMCON ACT.

⁸⁷ Section 32 AMCON ACT.

⁸⁸ Section 33(2) AMCON ACT.

⁸⁹ Section 35 AMCON ACT.

⁹⁰ Section 53 AMCON ACT.

⁹¹ Section 54 AMCON ACT.

⁹² Section 55 AMCON ACT.

⁹³ Section 60(1) AMCON ACT.

this purpose. The only safe conclusion to make is that AMCOM is an SPV in the mould of a receptacle vehicle for the purpose of rehabilitating Nigeria's distressed banks.

Conclusion

Special Purpose Vehicle refers to legal entities created at the direction of a sponsoring firm to fulfill narrow, specific temporary objectives for the benefit of the originators and the investors. Its main function is to transform an asset into capital market security and issue security based on those assets.

SPV structures are employed in programs for residential mortgage backed securities, commercial mortgage backed securities, collateralised debt obligations, collateralised loan obligations, asset backed commercial paper and structured investment vehicles. A defining feature common to many of these SPVs is that of bankruptcy remoteness whereby an SPV's assets are isolated from creditors of its sponsoring firm should the latter go into bankruptcy. SPV is useful for tax planning, risk management, project financing and company restructuring among others.⁹⁴

It is also clear that an SPV must have its identity totally distinct from those of its promoters and sponsors. This is not the case with AMCON as AMCON cannot do anything without the guidelines of CBN, Ministry of Finance and of course the fact that its bond is guaranteed by the Federal Government. It may be safe to conclude that AMCON is not a true SPV but an amalgam created by statute to solve a particular problem in Nigeria.

⁹⁴ Na'im, A. 2006. Special purpose vehicle institutions: their business natures and accounting implications. *International Journal of Business*. Vol. 8. NO 1.