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CORPORATE GOVERNANCE IN TRINIDAD & TOBAGO

Petal S. Roopnarine & M. Glenn Hamel-Smith



The world has seen an unprecedented surge in corporate scandals due in part to inappropriate management and board practices. In response, Governments have sought to reform corporate governance practices by the introduction of best practices, guidelines and in some cases legislation. The *OECD Principles of Corporate Governance* first published in 1999 by the Organization for Economic Cooperation and Development and revised in 2004, provide non-binding international standards and reference point for good practices as well as guidance for implementation by both OECD and non-OECD countries alike. In the United States, the *2002 Sarbanes-Oxley Act* introduced a tight regime of control for companies listed under its Securities Exchange Commission. In the United Kingdom, the *Combined Code* consisting of the *Listing Rule with the related Principles of Good Governance and Code of Best Practice* has passed its transitional phase and a new *Companies Act* containing several measures has been passed.

In this article, we describe the legal framework for Corporate Governance in Trinidad & Tobago and review the steps being taken to bring our practices in line with international standards. Partly influenced by international developments, the need for good corporate governance has been recognised by many stakeholders in Trinidad & Tobago, who are becoming increasingly aware of their respective rights, duties, obligations and liabilities.

“Good” Corporate Governance requires that the relationships of stakeholders such as directors, shareholders, managers, auditors, regulators, investors, creditors, consumers and employees are fair and well balanced. Companies which put in place proper practices will not only benefit from more effective control of their companies but as a result will inspire

greater confidence in their lenders and investors, whether local, regional or international. The Central Bank of Trinidad & Tobago has been a forerunner in this area introducing guidelines for the Financial Sector. The Government has also produced draft guidelines to improve governance in State Enterprises. These we hope, are the starting point for the introduction of further and more comprehensive best practice guidelines and laws in all sectors of the business community.

Our laws

- The *Companies Act* contains the provisions dealing with relationships of directors, officers, shareholders, auditors, receivers, liquidators and creditors;
- All publicly-listed companies have additional requirements contained within the *Securities Industry Act* and related guidelines;
- Specific industry-sector companies must also comply with legislation applicable to them such as the *Insurance Act* for insurance companies and the *Financial Institutions Act* for banks and other financial institutions, along with regulations and guidelines to those Acts promulgated by their governing authorities;
- The *Income Tax Act* and the *Corporation Tax Act* govern tax requirements of companies and;
- The *Environmental Management Act 2000* and related regulations provide for compliance with environmental matters and in certain cases, impose personal liability on the part of directors, supervisors, managers and other officers for a range of infringements.

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CORPORATE GOVERNANCE IN TRINIDAD & TOBAGO

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Guidelines, Standards, Practices and Ethics

International Standards

The *OECD Principles*, although non-binding, set the international standard and reference for practices worldwide and hence in Trinidad and Tobago.

Caribbean Initiatives

In September 2003, Trinidad and Tobago was a participant in the First Caribbean-Wide Forum on Corporate Governance in St. Kitts establishing a platform for participants to discuss ways to develop a region-wide position to be benchmarked against OECD principles. It was agreed that a balance of “official regulation” such as legislation and guidelines and “self regulation” such as codes of ethics and standards among professional bodies was best for the region.

The 2003 Caribbean Forum outlined three strategic factors from the perspective of institutional investors as influencing corporate governance: the auditing environment; composition and functioning of boards; and leadership.

Areas of concern were as follows:

- There is a wide expectation gap between what the public perceived an independent auditor was responsible for and what auditors considered to be their responsibility;
- Whilst most medium and large sized companies may have annual audits, small businesses may only do so for credit purposes;
- Often companies do not carry out effective board recruitment practices, looking only at the players and not to the team as a whole.

Several suggestions were made to address the above:

- Auditing standards are necessary and all companies should follow the *IFRS* or if this was impracticable, all departures from these standards must be clearly listed by auditors;
- Directors who are otherwise employed should not serve on more than six boards or be Chairman or Deputy of more than three regardless of standing;
- At least 80% of directors should be non-executive;
- Chief Executives should always be appointed by the board and terms of service and tenure governed by an employment contract;
- The CEO should not be chairman of the board unless he owns or controls directly a major block of shares or is appointed by shareholders who own 50% or more of the shares.
- State Enterprises should adhere to these principles.

Self and Official Regulation in Trinidad & Tobago

Companies are rising to the challenges and embracing new trends and practices. These changes are in fact necessary for US subsidiaries operating in the country and for Caribbean companies raising capital in the U.S. which fall under the *Sarbanes Oxley* regime. Companies are revisiting policy guidelines, holding “awareness” seminars and are creating their own best practice. As a result, companies have become more aware of the broader interests of various stakeholders. Mechanisms currently used for stakeholder participation include employee stock option plans (“ESOPS”), other profit sharing mechanisms and employee representation on Boards.

There is however no “official” regulatory regime in Trinidad and Tobago which sets out any fixed code of practice or requires a company to

report on best practices or to furnish corporate governance compliance statements.

State Enterprises

In 1993, Trinidad & Tobago’s Ministry of Finance first published its Performance Monitoring Manual which outlines the structure under which state enterprises should operate. The Ministry produced a draft Code of Best Practice, and has proposed Bylaws, both of which are currently being reviewed. State enterprises are required to publish a summary of audited financial statements in a newspaper of major circulation within a stated time period, and state agencies are mandated to publish a summary of the un-audited half-yearly statements. The Freedom of Information Act and the Integrity in Public Life Act have been introduced as an integral part of the governance framework for State Enterprises.

Trinidad & Tobago officially launched its involvement in the Extractive Industries Transparency Initiative (“EITI”), a global initiative launched at the 2002 Earth Summit and which aims to ensure greater transparency and understanding of revenue generated in the country’s extractive sector.

The Banking & Finance Sector

In September 2004, the Central Bank of Trinidad and Tobago published its revised draft Corporate Governance Guidelines intended for institutions licensed under the *Financial Institutions Act* as well as insurance companies and intermediaries registered under the *Insurance Act*.

Auditing and Accounting Bodies

Many auditors and auditing firms now work under a tightly-controlled environment having adopted the *International Financial Reporting Standards* (the “*IFRS*”) with its strict internal controls.

APPELLATE MOOTING LESSONS

Anika Farmer

We are pleased to present this article by Anika Farmer who shares her experience and insights gained as a member of the winning team in the Inaugural Hamel-Smith Appellate Mooting Competition of the Hugh Wooding Law School.

The Inaugural Hamel-Smith Appellate Mooting Competition infused a breath of new life into the Law School. The Moot Court was transformed to the Court of Appeal, and the students, attorneys in waiting, were now advocates for Mrs. Cody in her groundbreaking application under the Oppression Remedy provisions of the Companies Act of Trinidad & Tobago.

The problem was a well thought out scenario that was interesting to research. Each team's motivation was the desire to find the best grounds for Mrs. Cody and Octonal Company, and to win based on the strength of the legal arguments and the persuasiveness of our advocacy skills.

The competition was keen. From the preliminary rounds to the finals, the Judges said they were impressed by the students' advocacy skills. In the final hearing before Justice Nelson of the CCJ, and Justices Hamel-Smith and Kangaloo of the Trinidad & Tobago Court of Appeal, the judgment was not determined in Mrs. Cody's favour. Nevertheless she can safely say that she

received some of the best pro bono representation from lawyers in training!

The experience was invaluable for all participants. Developing the skills of a good advocate involves traditional teaching methods, as well as exposure to seeing advocates in practice, and most importantly, a structured forum where the student can hone these skills. The Inaugural Moot afforded such an opportunity. Let me share some of the lessons that surely will stay with me.

PREPARATION

Teamwork is the foundation of a successful case. One must be able to accept and give constructive criticism, respect other people's time, and give one's all even at the worst of times.

THE SKELETON ARGUMENT

This is an opportunity to make a first impression on the judges. Thorough research, ensuring that the authorities on which you are relying have not been overruled, is paramount. Careful drafting of the grounds and the supporting reasoning is requisite. Ensuring that the skeleton arguments are error-free is critical, as having to correct mistakes detracts from the force of one's oral presentation.

ORAL ARGUMENTS

The real test is the ability to strike the balance between asserting legal arguments, especially where one is

challenging the law, and knowing when to concede. One must have the confidence to back up an assertion and the perceptiveness to know when the court is inviting you to adopt a particular position.

The judges expressed the view that the participants in the inaugural competition set a high standard, and it is up to those in the coming years to continue to raise the bar, and to keep the interest in the competition alive. It is hoped that the competition will become a permanent feature of the Law School's calendar.



The winning team: from left:: Timothy Affonso, Anika Farmer and Afi Ventour with Philip Hamel-Smith, Managing Partner.

CORPORATE GOVERNANCE... (cont'd)

The Way Forward

Companies in Trinidad & Tobago need to improve practices in many areas. Corporate Governance can only be achieved by expanding and modernising systems of control to monitor all aspects of a company's business, effectively managing the sharing of information among different categories of persons, devising means to balance the interests of employees and shareholders and paying due regard to the physical environment as well as the economic, social and ethical issues of concern to the market on which it impacts.

Directors should review the corporate governance status of their companies or set up a committee for that purpose. The Directors may wish to retain the services of professionals to determine and understand the requirements of various pieces of legislation and to ensure compliance with them. Where legislation is absent, companies should strive to meet the best practice standards set out in the *OECD Principles* and other codes described above in a manner that is sensibly tailored to meet the particular needs of each company and the local business environment.

Please Circulate

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