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Nigerian Bar Association
Section on Business Law Conference

Corporate Counsel

Theme: Trends in Corporate Governance

Facilitator- **Mr. Igbadun**

Speakers- **Mr. Marcus Gabbert**
 Mr. Charles Mekunye
 Ms. Tola Jagun

Chairperson- **Prof. Bolaji Owosanoye**

Mr. Marcus Gabbert delivered his paper titled Trends and Development in Governance.

He defined Corporate Governance as the system by which the business corporations are directed and controlled.

He said in the early 90's, the real development started with the Cadbury right on the financial aspects of corporate governance to which was attached a code of best practice. It has two levels, namely:

1. Macro- Level: Adequate Laws
2. Micro- Level: How individual corporations are managed

Advantages of Corporate Governance

1. It brings better Performance
2. It improves access to capital companies
3. It leads transparency and better disclosure

Disadvantages of Corporate Governance

1. Remuneration
2. Board practices and incentive system
3. Risk management
4. Shareholder protection

Remedies

1. Don't encourage long term performance
2. Arms length principle
3. Too Complex

Consequences

1. More transparency on remuneration practices
2. Introduction of stricter requirements
3. Exercise independent judgement
4. Board members are personally liable, for example, where they make over generous packages
5. Legislation put stress on transparency and disclosure on remuneration

6. Golden Handshakes/Parachutes

In 2009, The United Kingdom published the Walker Review of Corporate Governance.

Risk Management

Weaknesses:

1. Risk managers separated from the management is regarded as a hindrance
2. No effective guidance
3. The boards do not review internally and also audit departments.

Consequences

1. Boards must monitor the structure of the company and its culture.
2. Weakness of the Board
3. Board will become incapable

Remedies

1. Objective Independent Judgement
2. Stronger Legal duties of the board and members

DEG Financing Criteria

1. Credit Standing
2. Qualified Management
3. Proven Track record
4. Environmental and social standard
5. Developmental effects
6. Sound Business plan
7. Investment Plan
8. Market Analysis
9. Due Diligence Study
10. Expected Return
11. Financing Shares of Owner and Contenders
12. Corporate Governance

Mr. Charles Mckunye delivered his paper on Sources of the law for Corporate Governance

He defined Corporate Governance as the system by which companies are directed and controlled.

Corporate Governance started because there is a separate legal entity a company enjoys. According to a legal Theory by Robert, Company law as a structure only pursues the interest of the company.

According to section 279(3) Companies and Allied Matters Act, the duty of a director is to pursue the shareholder's interest.

According to Stakeholder's Theory which is the only relevant theory, a company is set up for other interests and not just for shareholders but for shareholders, Contractors, employees, regulators, government amongst others. In other words, the interest of everyone should be pursued. Also according to Section 41 CAMA, the memorandum is a contract between the company and its members and officers. It also depends on the size of the company.

He emphasises the rules of corporate governance as it applies to the above provisions of CAMA and legal theories. To buttress his point he used the case of Longe, where it was held that companies are required to follow due process unless any decision taken is null and void.

How to Ensure Compliance

1. You must assert authority and independence
2. You must be seen as part of the team
3. You must ensure that the legal department is consulted when leaders intend to go into new areas of business
4. You must establish the right relationship with external counsel
5. You must ensure efficient running of legal department

He said that corporate governance are run according to the rules, regulations and laws, some are statutory while some are contractual and all these must be communicated transparently.

Ms Tola Jagun delivered her paper on regulation in emerging market- The Role of the Legal Profession.

Risks of Over- Regulation

1. Inflexibility
2. Irrelevance (“One size fits all approach”)
3. Disconnect between regulator and industry competition for resources.
4. Copy and Paste Method- Be Innovative and creative

The Industry requirements are laid out in a particular way and the regulator expects the industry to comply.

She opined that Nigeria should be a market-friendly environment, built up with incentive to comply.

- Ethical conduct contributes to the reputation
- Corporate Behaviour and conduct can give rise to reputational capital that can be cashed
- Effective consistent implementation of laws

Self Regulation

1. It interests all corporations
2. It ensures a level playing field
3. Self policing is more effective than naming and shaming

Role of Legal Profession

1. Taking Instructions
2. Reporting up and reporting out
3. Lawyer- Auditor relationship and disclosures
4. Board education and evaluation- The content of this should be effective
5. Develop a culture of governance creating awareness

We cannot rely only on statutory requirements to regulate our moral behaviour.

Question and Answer Session

1. There is a mix of politics and economics, for example the Lekki concession company handling the repairs of Lekki expressway and the issue of tolling, Bi-Courtney also is handling Murtala Mohammed Airport 2;
 - What are we adopting as the model to run such companies?
 - Political Expediency

Comments and Observations

2. Shareholders have enough rights but what their interest is dividends, they make short term and undermine long term to suit shareholders during meetings.
3. Whistle Blowing: Clauses should not be inserted in your contract against whistle blowing and one should not be punished for whistle blowing.
4. A code is rolled out every year but we still have corporate failures, we should look at our specific environment to prepare a code and not just copy.
5. The legal department is too thin because there are always few people in the department and this constitutes a legal hindrance, how effective is a legal department? There should be a strong corporate counsel forum and the corporate governance lapse is more on the lawyers.
6. The more the allowance you pay to directors, the higher their liability. The company secretaries usually overlook the boardroom politics.

Responses

Mr. Marcus Gabbert- It is not about only rights but how they enforce their rights and how quickly they do it.

Mr. Charles Mekunye – Corporate Governance is nothing new with all the reviews. It is when it is blatantly violated and there are consequences that the state and the regulator come up with codes. Corporate Governance of a company starts with the memorandum of association and the articles of association of the company.

Whistle blowing everywhere in the world has a limitation to the protection you get but for private companies there is no protection.

Ms. Tola Jagun – Corporate Governance is evolving and not static, Corporate Governance will evolve around everything that comes up, and that it evolves in the right direction.

The role of the Nigerian Bar Association and the Section on Business Law here is that they should lobby for the protection of its members and also the profession, particularly the profession.

Professor Owosanoye – strong section of In-house counsel is needed in corporations. Developing a code of corporate Governance is imperative although people will do what they want to do. Enforcement is also a major problem in Nigeria and regulators should have capacity to enforce although regulators are usually not as knowledgeable as those in the field.

Mr. Igbadun advised that In-house counsel should be properly organised and Annual General Meetings should be held to ensure growth, strength and proper organisation.