Chapter 1
Introduction

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This diverse and provocative collection of papers by authors from different countries, economic regimes and legal systems and traditions, makes for fascinating and perhaps at times uncomfortable reading. It should be of great interest to lawyers, and perhaps even more so to corporate executives, particularly those whose enterprises operate in the global economy.

This collection begins to chart what is coming to be recognized as a new field of study, now only partly discovered, with much awaiting further exploration. It asks what role legal strategic planning has or may have in the decisions made and directions taken by business corporations, using law, not just as datum or context – such as liability risk – but as a core element of executive thought and action. Accordingly, the study of corporate legal strategy requires examination beyond the role of law as a mere constraint, i.e. economic strategy within a legal framework, to focus instead on how "the law" – along with its systems, processes, policies, players, perceptions and norms – is evaluated, incorporated or manipulated by firms to optimise competitiveness. This exploration therefore canvasses the question: What legal choices/means may be adopted to achieve a desired business or economic outcome?

Broadly put, the responses fall into two potential divisions.

One – which can be described as the "vertical" dimension of the subject – concerns ways in which a firm may, as a litigant or party, influence the legal or economic outcome of litigation or a regulatory process. In this book, contributors discuss, often with concern for a larger public good, the effect of time and complexity in litigation strategy;[1] the use of economic and game theory to chart or predict conflict resolution strategies that in the face of cost or other disadvantages

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[1]See for example, L.M. Lopucki and W.O. Weyrauch at Chap. 4; A. Masson at Chap. 3; D. Danet at Chap. 8; and D. Rossa Phelan at Chap. 16.

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will be thought most likely to produce the optimal realizable result;[2] the uneven playing field between parties in tax litigation;[3] strategies for influencing litigation by the collection and presentation of evidence;[4] means that were adopted to secure "lighter" public regulation of hedge funds;[5] the flight from the Courts to alternative dispute resolution methods;[6] the potential for adopting, appropriating or manipulating ADR to realize intended outcomes;[7] and so on.

The second theoretical division of the subject – its "horizontal" dimension – is the use of legal strategies on an ongoing basis to secure competitive advantage against corporate competitors. Various essays consider legal strategic capacities within firms,[8] how firms can integrate legal strategy within their corporate planning,[9] how corporations may seek to avoid liability under modern statutes imposing criminal culpability in some circumstances,[10] how in emerging states with limited business law and regulation, investing parties have, by agreements, created legal regimes favourable to their purposes,[11] means by which manufacturers seek to ride on another firm's established brand,[12] and, very important today, the importance of intellectual property protection to economic security and dominance.[13] Of course, all these examples of strategy serving the apparent economic benefit of a corporation raise grave issues of morality in public policy. Light or inadequate regulation of financial markets or instruments may look quite different in 2009 than it did in 2007! Accordingly, contributors draw attention to the responses that may be made by the state to self-interested corporate projects, and which then themselves must become part of the strategic planning environment.[14] The laws and public policy of the state may seem at times to point in different directions: while protection of intellectual property may be seen as sound policy, too extensive or complete a monopoly will curtail or eliminate competition, also seen as serving the public good.[15]

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[2]See for example, R. Macey-Dare at Chap. 7; A. Masson at Chap. 6; B. Bolaños-Guerra, G. Dupont and E. Picavet at Chap. 5; and B. Aliouat at Chap. 14.

[3]See for example, L.M. Lopucki and W.O. Weyrauch at Chap. 4; and D. McBarnet at Chap. 18.

[4]See for example, T. Manoir de Juaye at Chap. 17.

[5]See for example, E. Hellebuyck at Chap. 13.

[6]See for example, M.J. Shariff, M. Pomrenke and V. Hilder at Chap. 9.

[7]Ibid.

[8]See for example, C. Roquilly at Chap. 2; A. Belcher at Chap. 11; D. McBarnet at Chap. 18; and B. Aliouat at Chap. 14.

[9]Ibid.

[10]See for example, D. MacPherson at Chap. 10.

[11]See for example, D. McBarnett at Chap. 18.

[12]See for example, R. Petty at Chap. 15.

[13]See for example, B. Aliouat at Chap. 14.

[14]Ibid; See also for example, E.I. Hyslop at Chap. 19 and discussions in A. Masson at Chap. 3; and M.J. Shariff, M. Pomrenke and V. Hilder at Chap. 9.

[15]See for example, D. Lim at Chap. 20.

In trying to arrive at a theory of corporate legal strategy, the response can also be approached from the differing theoretical perspectives such as the judicial approach,[16] the cognitive approach,[17] the systemic approach,[18] the economic approach[19] or the law and management approach.[20]

Beyond these theoretical divisions and perspectives however, the strategies and perspectives discussed herein also lend support to the suggestion that law is a resource to be mobilized and aligned with business and economic agendas. Thus examination of legal strategy also requires consideration of the increasing sophistication of this alignment which has been aptly coined "legal astuteness" by Constance E. Bagley,[21] the perceptions and influence of the players involved,[22] and whether there is any uniformity or similarity in strategies implemented. Such considerations in turn raise additional questions regarding the potential misuse of strategies for socially and ethically unacceptable purposes.

Taken together, the contributions within this book portray something of the character, potential and challenge of "legal strategy", and provide much good fodder for thought and controversy. However, this is but a start. Much more remains to be done at the theoretical and practical levels before we can adequately understand this subject and all its implications. One can readily imagine another book, responding to the ethical questions raised by the very modern version of legal realism asserted herein and otherwise challenging and responding directly to these essays as well as another book dedicated to public and state responses to corporate legal strategies and the enlarged role and responsibility of regulators, particularly in light of what is currently emerging in the wake of the financial excesses and failures of the immediate past.

If, as one hopes, such further studies and debates now follow, the editors and authors of this pioneering volume will deserve much credit, as they now deserve thanks for opening this field of corporate activity to our view.

[16]See for example, L.M. Lopucki and W.O. Weyrauch at Chap. 4.

[17]See for example, A. Masson at Chap. 6; and D. Danet at Chap. 8.

[18]See A. Masson at Chap. 6.

[19]See for example, R. Macey-Dare at Chap. 7.

[20]See for example A. Belcher at Chap. 11; and B. Aliouat at Chap. 14.

[21]C.E. Bagley, "Winning Legally: the Value of Legal Astuteness" (2008) 33(3) Academy of Management Review 378.

[22]See for example L.M. Lopucki and W.O. Weyrauch at Chap. 4; and P.J. Zwier and D.C. Siemer at Chap. 21.

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