

Preface

In order to optimize competitiveness, corporations frequently contemplate and incorporate aspects of legal systems, legal processes and legal players, such as litigation and lawyers, into their long-term strategic decision making processes. These types of strategies, i.e. ones that incorporate law and legal resources, are the subject of increased focus and scrutiny in current legal literature and scholarly analysis.

The term ‘strategy’ in its historical and/or traditional sense, is associated with the organized movement of armies in war. Today, the term has also come to encompass a broader perspective, denoting the art of devising and implementing a skilled and systematic plan of action in order to reach a given objective. Hence, plans of action by corporations that involve the evaluation, incorporation and manipulation of law, legal frameworks and legal players in order to increase the bottom line, can be described as corporate legal strategies.

Notwithstanding the foregoing however, not every corporate strategy related to law can or should be regarded as a true legal strategy.

Current academic literature describes legal strategy as a strategy rooted in the perception that the law, the court, legal rules and procedure, etc., can be readily manipulated so as to achieve a specific outcome. This strategic perception of the constraint and role of law is perhaps most readily illustrated by the methods and tactics employed in the area of litigation, whereby parties and their lawyers attempt to construct a specific legal outcome through strategies involving, for example, forum shopping and procedural delay.

Conversely, corporate economic planning that integrates the legal environment into business strategy is rejected as a true legal strategy on the basis of what appears to be a widely accepted premise that corporations perceive the law as static and supreme. Under this view, the corporation regards the law as a necessary restriction in respect of firm business such that all it can do is try to make the best out of a restrictive situation and seek advantage from within the superior legal framework.

Certainly, economic strategy within a legal framework premised on the view that the law is supreme arguably does not amount to a “true” legal strategy. However, it

is also apparent that not all corporations view the law so simplistically, i.e. as a necessary facet of the business environment. Rather, many companies adopt what can be described as a ‘legal management approach’ whereby long-term business strategies are formulated through active assessment of the interaction of legal systems, processes and players. Hence, while there has been some academic resistance to the existence of true corporate legal strategy, it is clear that corporations are engaging in legal strategy premised on the view that the law is malleable.

With the above in mind, the first goal of this book is to identify, describe and critique current theories of corporate legal strategy. To this end, two relevant tracks can be observed: litigation and/or the adversarial process; and corporate practices with respect to long-term business planning.

The second goal is to identify, through the use of case studies, legal strategies based on the mobilization and allocation of legal resources within a corporation.

The third goal of this book is to identify and evaluate the legitimacy of regulatory responses, if any, that attempt to minimise the impact of a particular legal strategy on the business market. Thus, this book also explores regulatory competition law from the corporate perspective.

The overall objective of this book is to assist in the development of legal strategy theory and a precise definition of corporate legal strategy. Thus, this text is less concerned with examining the impact of legal norms on the corporate business environment and more concerned with exploring how corporations develop and implement “vertical” strategies (those between the corporation and regulatory bodies) and “horizontal” strategies (those between competitors outside or inside the same legal system). We hope that exploring corporate activities from this vantage point will not only assist in the development of an accurate definition of corporate legal strategy, but will also assist in identifying the methods by which law, rightly or wrongly, can be transformed into a mere corporate resource.

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