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Proactive Law for Managers

A Hidden Source of Competitive Advantage

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Seize Competitive Advantage: A Legal Plan for Managers

Congratulations! Last year the chief executive officer of your company named you general manager of one of the firm's most important divisions. Your first year as head of the division has been a success, as you have exceeded the goals set by corporate headquarters.

Condolences! You have no time to savor your early success. You and the CEO recently analyzed current business trends. You both anticipate that the market for your products will become much more competitive, especially with a recent increase in foreign competition. The CEO emphasizes that your division must gain competitive advantage over rival companies in order to survive.

Beyond concerns about the survival of your division, you have other worries. If you fail as leader of the division, in the current economic climate you may be unable to find a general manager position at another company. You also feel responsible for the division's employees. The division is the largest employer in your town, and a shutdown would devastate the local economy, as well as the families of your employees.

As you plan for the coming year, you develop a list of your goals. High on your list are access to, and retention of, key talent; the ability to adapt to change; the strength of your brand and reputation, and high-quality customer service. To this list you add a personal goal—managing time and stress—because your work increasingly pulls you away from your family and you have little time for recreation.

You then list key obstacles that might prevent you from achieving your goals (while also increasing your stress levels). Among these you list several legal concerns. For instance, you are worried about a lawsuit that might have a significant impact on the company and on you personally. A year ago, when you took over leadership of the division, you fired an employee of your division's US subsidiary company who was not performing up to your expectations. The employee has now sued you and the company, claiming breach of contract. The employee also claims that you defamed him by making untrue statements about his performance. As a result of this lawsuit, you are reluctant to terminate other poor performers, for fear that they might also file suit.

If it is any consolation, you have lots of company among managers at firms around the world. Achieving competitive advantage is critical to the success and even the survival of companies that cross a variety of industries and cultures. Managers at these companies share many of the goals you listed. Like you, they need to strike a balance between surviving immediate market conditions and making certain their companies endure and succeed over the long term. In fact, talent, agility, reputation, and customer service top

the list of managers worldwide. According to the PricewaterhouseCoopers Annual Global CEO Survey 2009,¹ more than 90 percent of CEOs believe that these four features are important or critical to long-term growth. In this survey, covering over 1,100 CEOs from more than 50 countries, PricewaterhouseCoopers found that the following are considered to be the critical drivers of long-term success by managers worldwide:

EXHIBIT 1.1 CRITICAL DRIVERS OF LONG-TERM SUCCESS²

1. Access to, and retention of, key talent
2. Ability to adapt to change
3. Strength of your brand and reputation
4. High-quality customer service
5. Customer or market intelligence
6. Technological innovation
7. Efficient sourcing or supply chain management
8. Access to capital
9. Ability to implement successful collaborative business partnerships
10. Strength of your corporate social responsibility programs
11. Access to affordable natural resources (for example, raw materials, water, energy)

The concerns faced by managers worldwide are increasingly similar. They relate to trends and issues such as globalization, outsourcing, networking, ethics, and social responsibility. The PricewaterhouseCoopers survey shows that after the financial crisis that began in 2008 many CEOs around the world were fighting threats to their companies' survival. The scale of the damage was not all that took senior executives and government ministers by surprise; so did the fact that the world markets were much more closely connected than most people had believed.³ As businesses try to survive immediate market conditions, they are also trying to make certain that they endure and succeed over the long term. CEOs have long believed that critical sources of competitive advantage take years, not quarters, to build.⁴

Concern over the impact of the law in general has emerged as one of the most important factors in the external environment in which business operates. It is estimated that in the United States, Fortune 500 executives spend 20–25 percent of their time on litigation-related matters.⁵ It is no wonder that business executives attending management development programs rank law among the three most important business topics, along with human resources and finance.⁶ Yet law, as Wharton Professor G. Richard Shell explains in his book *Make the Rules or Your Rivals Will*, “is perhaps the most hidden of all competitive strategy tools. Many in business fear getting tangled up with lawyers, lobbyists, and bureaucrats, so they keep their distance from legal matters. But it is just this aversion that makes legal knowledge such a rich source of competitive advantage for those who take the time to understand how legal systems really work. Someone, after all, is going to make the rules. The only question is who.”⁷

John Seeley Brown, Director of Xerox Research Center, once observed that “Managers don’t make products; they make sense.”⁸ In your leadership role, as you attempt to make sense of legal challenges in your competitive environment, it is easy to become mesmerized by the complexity of the issues, looking much like a deer in the headlights. In a sense, the

goal of this book is to provide a plan, called the Manager's Legal Plan™, that will enable you to cross the legal highways that intersect your business strategies—maximizing your opportunities while minimizing the risk of being struck down by unexpected legal liability. In a broader sense, however, the goal is to help you recognize the ways in which the law can work for you as a competitive strategy tool and as an enabler, rather than work against you as an obstacle. Along the way, you may notice that the law—even the so-called legal problems—can in reality be opportunities for competitive advantage.

This chapter will introduce the Manager's Legal Plan™ by first explaining the business concept of competitive advantage. The chapter will next describe the traditional approach used by many managers when confronted with the law (the law being too often, incorrectly, understood as meaning legal problems). The traditional, *reactive* approach will then be contrasted with a different, *proactive* approach that enables you to use the law and your legal capabilities to prevent problems, promote successful business, and achieve competitive advantage. The chapter will close with a brief overview of the remaining chapters in the book.

The Essence of Competitive Advantage

The concept of competitive advantage is central to business success around the world. The definition of competitive advantage is straightforward: Your goal in business is to gain an *advantage* over your *competitors*. If you were a college basketball coach, you would try to gain advantage over competitors by recruiting athletes who are taller and faster than players on opposing teams. You would attempt to develop game plans that maximize your strengths and exploit your opponents' weaknesses. You would develop a training program and organize practices to improve the performance of your athletes. In other words, your goals as a coach would be similar to the goals in Exhibit 1.1: talent, agility, and reputation. In order to succeed, you and your team need to master the rules of the game—something so self-evident that you probably do not even think about it.

Of course, college basketball teams and businesses use different measures of success. In college basketball, the success of a coach is determined primarily by whether fans are satisfied with the number of games that the team wins during the season. In business, a manager must also satisfy the fans (customers) but must do so in a manner that produces profits for the firm's owners.

As a result, a company seeking competitive advantage must create value for its customers that is superior to the value offered by its competitors. Superior value, as Harvard Professor Michael Porter explains in his book *Competitive Advantage*,⁹ "stems from offering lower prices than competitors for equivalent benefits or providing unique benefits that more than offset a higher price." The amount that buyers are willing to pay for this value must exceed the company's costs in order for the firm to be profitable. As Porter puts it, "Competitive advantage grows fundamentally out of value a firm is able to create for its buyers that exceeds the firm's cost of creating it."¹⁰

In order to create value in today's economy, companies can no longer rely on merely internal resources; they must use external resources as well. They may spend 50 percent or more of their revenue to acquire the goods and services necessary to conduct their business. New technologies have enabled networking, outsourcing, and alliances across borders in a way that was not possible earlier. Competitive advantage can no longer

be built on the position of individual companies within one industry or country: the ability to leverage external resources and the creation of value in collaboration with other companies has become a key source of competitive advantage.¹¹ It has been said that *companies* no longer compete; *supply chains* and *business networks* compete.

When considering competitive advantage, we thus must take into account not only individual companies and their resources and capabilities but also those of the companies they work with, as well as the relationships between them. And we need to have expertise in the rules that apply, whether those rules are made by regulators or by private actors through their contracts.

In today's business environment of increased inter-corporate dependency, complexity, and uncertainty, companies must take good care of their relationships. They must detect and strengthen weak links in their supply chains and manage their projects and transactions well. Contracts and contracting practices can help them in this enterprise. This book will present contracts in this context, as self-made rules of the game and as tools that can be used proactively for business success and problem prevention. This is particularly relevant for you as a manager, as a large part of the negotiation and drafting of business contracts is actually carried out by managers and not lawyers.

As we will see in the chapters that follow, law can play an important role in all these aspects. Business, law, and contracts are intertwined, and the latter two can increase or decrease business costs, liabilities, and risks. If contracts fail, apart from the legal issues, there are business and relationship issues. If a contract dispute arises, business performance will suffer and a lot is at stake, including good-will and reputation.

As a solution to the challenges faced by today's managers, the chapters that follow will introduce a *proactive* approach and related competencies that help prevent problems, promote successful business relationships, and secure sustainable competitive advantage.

If all companies took full advantage of their contracts and legal resources, any resulting advantage over the competition would disappear. However, because law and contracts are an almost untapped source of competitive advantage that will continue to be misunderstood by many managers, selected companies should be able to leverage their contracts and legal resources into a source of competitive advantage.

Strategy scholars have long known that companies gain competitive advantage by developing hard-to-imitate core competencies. By applying the Manager's Legal Plan™ to complement your company's technological, marketing, sourcing, and other capabilities, you as a manager can create for your company competitive advantage that is sustainable over the long term.

The Challenge: the Conventional, Reactive Approach to Law— “Flight or Fight”

In the vocabulary of many managers, the word “law” implies legal problems that must be solved by legal means. Some managers seem to think about the law only when approached—or threatened—by lawyers. They then want their lawyer to get them out of legal trouble.

Such a reactive approach to legal matters contains many pitfalls. It may lead you to start with a mindset that separates legal issues from the normal strategic and operational aspects of the business. Too often, legal concerns are treated as problems to be resolved

as quickly as possible so that attention can be focused on business goals. This attitude overlooks the fundamental point that, even if legal matters are viewed as problems, they affect the business goals of both you and your competitors. The companies and managers that can best resolve these problems create an opportunity to seize competitive advantage. As later chapters will illustrate, proactive managers ask the question: How can this situation create an opportunity to gain an advantage over our competitors?

Given the current approach that too often separates legal and business concerns, managers typically engage in a two-step process when addressing their legal concerns. The first step is to meet with an attorney to discuss their rights and obligations. For instance, in responding to an alleged breach of contract or product liability lawsuit, you would first meet with your attorney to determine whether the claim has any merit. During the course of your conversation, the attorney would explain the issues involved and would also discuss whether the claimant might win in court, the potential damages, and the costs of the litigation.

Following the briefing by an attorney, the second step is to activate the flight-or-fight responses that have developed in humans over millions of years and allow us to survive in dangerous situations. In a legal sense, there are two basic flight options for your company (see Figure 1.1). First, flight might involve settlement of the case. Second, if certain types of cases are so common that they prevent your company from achieving its objectives, then flight might involve, for instance, ceasing certain operations or moving them to another country. Class actions, employment laws, or environmental burdens might cause you to consider such measures.

The fight response also includes two basic options. One option is to fight individual claims in court on a case-by-case basis. The other option is to take the fight to a different level and fight to reform laws that have a detrimental impact on business. For instance, in addition to fighting individual customs duty, tax, or workers' compensation cases, your company might push for legal reform that would change the customs duties or taxes or reduce the financial burden of workers' compensation.

For reasons stated in the sections that follow, the traditional flight or fight responses have become more difficult—or in some situations impossible—to execute successfully. Thus, in a global economy, the flight or fight approach to legal concerns is often no longer realistic.

| | <i>Specific Cases</i> | <i>Broader Concerns</i> |
|---------------|-----------------------|-------------------------|
| <i>Flight</i> | Settle | Move Business |
| <i>Fight</i> | Litigate | Law Reform |

Figure 1.1 Conventional approach to legal problems

DIFFICULTIES WITH THE “FLIGHT” RESPONSE

Both of the characteristic flight responses can lead to problems in the current environment. Sometimes, neither settlement of a specific case nor movement of your business makes sense.

The strategy of settling specific cases

Flight from litigation through settlement of a specific case often appears to be a logical course of action. This may be the case even when it is likely that your company will win if the case goes to trial. While in most countries the winning party is entitled to recover its litigation costs, this is not the case in the US. If you can settle a case for \$50,000 and it will cost you \$100,000 to litigate the case even if you win, common sense tells you to settle.

The total cost of settlement might be much higher than litigation costs when, by settling the case, you signal to potential plaintiffs (and their attorneys) that you are willing to pay to settle future cases in order to avoid a trial even when you have a winning case. Professor John Coffee of Columbia Law School, in commenting on a 2001 Merrill Lynch settlement with a client who lost money on a stock market investment, put it this way: “[Settlement] is like putting out warm milk for a stray cat that meows. You get 30 more cats the next night. This will create an incentive for others” to sue.¹²

The strategy of ceasing or moving certain operations of the company

When certain types of liability, such as liability resulting from class actions, tax or labor laws, or environmental regulation, become burdensome, it is tempting to consider the flight option of ceasing certain operations or moving them to another country. Under traditional notions of *comparative* advantage, certain countries have a comparative advantage over others as a result of cost advantages, including legal costs. But in a global economy, countries face difficulty in achieving comparative legal advantage for two reasons illustrated by Figure 1.2: (1) the cross-border movement of goods, services, and investments, and (2) the increasing convergence of legal rules and regulations.

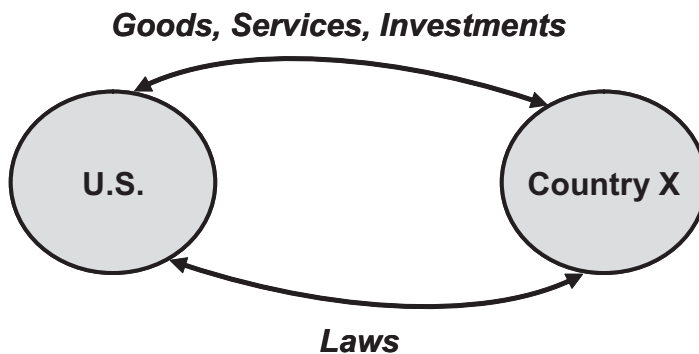


Figure 1.2 Decline of comparative advantage

Cross-border movement of goods, services, and investments

The movement of goods, services, and investments across borders means that you can be subject to regulation and liability in other countries regardless of where the goods and services are produced. For example, if you are operating a plant in Country X and your goods are exported to the US (see Figure 1.2), you are subject to liability for injuries caused by your goods in the US. This can be the case even if you did not export the goods yourself. You may, for instance, have sold components to another company in your country (or in a third country), and this other company may have incorporated them into equipment that was later exported.

The rationale for this liability was explained in a 1988 Nevada case involving the band Judas Priest. One evening two young men went to an empty churchyard and attempted to commit suicide. The first man succeeded, after propping a sawed-off shotgun under his chin and pulling the trigger. The second man somehow survived a similar suicide attempt, but suffered severe injuries. The survivor and the mother of the decedent filed a lawsuit in Nevada against the members of Judas Priest, who were residents of Great Britain. They claimed that the suicidal actions were caused by one of the band's albums, *Stained Class*.

Before deciding whether the band was liable, the Nevada court first had to determine whether it had the right to hear a case involving residents of another country. The court determined that the courts of Nevada could hear cases like this because “the band members consciously and deliberately chose to develop a world-wide market.”¹³

In today's global economy, where electronic commerce facilitates global product reach, companies increasingly choose “to develop a world-wide market.” As a result, they must be prepared to defend lawsuits in other countries, even those that they eventually win—as did the members of Judas Priest. In many cases, their products must meet the regulatory requirements of other countries. In other words, in a world where the mantra “think globally, act locally” applies to law as well as to other aspects of business, the option of flight to a country with minimal legal requirements might no longer be available.

Convergence of legal rules

Laws increasingly move across borders, resulting in convergence of the legal rules that govern business practice. The European Union (EU) has harmonized many of the laws of its Member States. In many cases, US rules and regulations have spread to other countries. An article in *The Economist* on a new California law begins by describing this legal migration pattern: “California today, America tomorrow—and the rest of the world the day after.”¹⁴ However, Figure 1.2 illustrates that law reform moves in two directions, as laws in the EU and in countries elsewhere also influence legal developments in the US.

Law can be divided into two broad categories—substantive and procedural—both of which have been affected by convergence in recent years. *Substantive law* deals with the substance of the law—the legal rules and regulations that govern business operations and management decision making. *Procedural law* is the body of law relating to the enforcement of substantive law.

The following examples illustrate the convergence of substantive law:

1. *Sales law*. The United Nations Convention on Contracts for the International Sale of Goods, the CISG (also known as the Vienna Convention, the UNCITRAL Convention, and “the uniform international sales law”) establishes a uniform set of rules for

contracts involving buyers and sellers of goods from different countries. These rules have now been adopted by more than 70 countries accounting for more than three-quarters of all world trade. By reducing legal differences from one country to another, the CISG lowers contract law barriers to international trade.

Adopted by a diplomatic conference in Vienna in 1980, the CISG establishes a comprehensive set of rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract, and other aspects of the contract. To find CISG texts in different languages, a map, and list of contracting states, guides, articles, CISG-Advisory Council's opinions relating to the interpretation and application of the CISG, or cases on the CISG, you can go to the Pace University School of Law CISG database.¹⁵ This award-winning database is compiled from submissions by many contributors. The Section "Applying the CISG" containing "Guides for Managers and Counsel" and "Drafting CISG Contracts" is particularly valuable for managers and practitioners.

2. *Contract law.* Beyond the sale of goods, there has been convergence of general contract law, especially in the EU. The European Parliament and Council have consistently affirmed the need for greater coherence in order to ensure the proper functioning of the internal market. The European Commission has undertaken a series of initiatives aimed at increasing the overall coherence of European contract law.¹⁶

The Commission on European Contract Law, chaired by Professor Ole Lando, has prepared the Principles of European Contract Law (PECL).¹⁷ The Rome I Regulation on the law applicable to contractual obligations seeks to ensure that the courts of all EU Member States apply the same rules to disputes related to contractual obligations in case of a conflict of laws.¹⁸

3. *Product liability laws.* Product liability, your company's liability for bodily injury or property damage caused by your products, will be discussed in Chapter 2. As noted in that chapter, product liability is no longer a US specialty but has spread to the EU and to the Pacific Rim, including Australia, China, the Philippines, and Japan. Describing product liability laws in Europe in an article entitled "Sue everywhere," *Forbes* magazine notes that "savvy companies are starting to realize they face a whole new continent of potential plaintiffs."¹⁹ European legislation parallels the laws of the EU Member States in order to ensure a high level of consumer protection against damage caused to health or property by a defective product.²⁰
4. *Environmental law, securities regulation, and anti-corruption law.* Environmental regulation and potential liability has spread throughout the world. Countries around the world have come to realize that fair and consistent regulation is necessary if companies are to have faith in the market and investors in securities transactions. Extraterritorial law is frequently also embedded in international conventions, such as the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention, in International Chamber of Commerce (ICC) Rules of Conduct, and in codes of conduct adopted by multinational companies.²¹

Procedural law, as noted previously, deals with the enforcement of substantive law. Historically, six features of the legal process distinguished the United States from the rest of the world. In recent years convergence has had an impact on these features in two ways. First, the impact of some features (see the first three items on the following list)

has been diminished by law reform in the United States. Second, other features (the second half of the list) have been exported to other countries.

1. *Jury trials.* Unlike most countries in the world, the US still allows litigants the option of a jury trial in civil lawsuits. However, the right to jury trial has diminished as a result of a combination of factors, including an increase in the use of arbitration, requirements that judges hear certain types of cases, and dismissal of cases by judges before they reach a jury.
2. *Punitive damages.* The US is unusual in allowing plaintiffs to recover punitive damages when defendants have engaged in egregious behavior. Over the past several years, however, Supreme Court decisions and state legislation have limited punitive damages.
3. *Legal expenses.* Unlike other countries, which typically use a “loser pays” approach, in the US the winning party must pay most of its own legal costs. This traditional American rule is being eroded as new legislation in the US frequently provides that the loser must pay the winner’s full legal costs.
4. *Contingency fees.* In the US, contingency fee agreements—whereby the payment to a lawyer is contingent on the outcome of the case—are legal. For example, if you agree to pay your attorney a 30 percent contingency fee and the jury awards you \$10 million, the lawyer’s fee is \$3 million. If the jury decides that you are not entitled to damages, the attorney receives nothing (30 percent of 0). Other countries have joined the US in allowing contingency fees, including Canada, the United Kingdom, Japan, and China.
5. *Discovery.* Discovery is the process used by attorneys to locate evidence and witnesses for use at trial. For instance, the opposing lawyer has the right to search through your business records for evidence that might be relevant to the case. E-mail has been an especially fruitful source of evidence. In one case, after Atlantic Richfield Company (ARCO) sold its solar energy subsidiary to Siemens, ARCO employee e-mail messages such as the following were discovered: “We will attempt to finesse past Siemens the fact that we have had a great amount of trouble in successfully transitioning technology from the laboratory to the manufacturing floor.” These e-mail messages contributed to a Siemens lawsuit requesting \$146 million in damages.²² In recent years, other countries have moved closer to US-style discovery. In Japan, for example, rules adopted in 1998 make it easier to obtain evidence from the opposing side.
6. *Class actions.* If your company illegally overcharges a customer \$10 for your product, it is unlikely that the customer will bother filing suit for such a small amount of damages. But if the company overcharges a million customers, a lawsuit filed on behalf of these customers—called a class action—converts a \$10 claim to a \$10 million dollar lawsuit (or possibly \$30 million if damages are trebled, as they might be in the US in this type of case). Critics of class actions claim that the real winners in class actions are attorneys, whose 30 percent contingency fee would net them millions of dollars. Their clients, on the other hand, would receive the price of lunch (70 percent of \$10, or of \$30 as a best case) *before* expenses were taken out of their share. Despite their controversial nature, class actions are now allowed in a number of other countries, including Australia, Canada, the United Kingdom, Sweden, Finland, China, and Japan.

We have examined several examples of the convergence of substantive and procedural law. It is said that a butterfly flapping its wings in the US can cause a typhoon in Asia. Similar to this “butterfly effect,” convergence of the law causes a legal development in one country to change business practice elsewhere. Several years ago, for instance, an elderly woman sued McDonald’s in the US after she was burned when she spilled her cup of McDonald’s coffee. The woman was awarded close to \$3 million, although she later settled the case for substantially less. After this case was resolved, one of the authors traveled to Argentina to address the national association of corporate lawyers. While in Buenos Aires, he visited a local McDonald’s and purchased a cup of coffee. Printed in four places on the small cup in bright red letters were warnings that the coffee was hot: “PRECAUCION: CALIENTE!” These warnings were no doubt prompted by a legal decision in a country that, while far away in a geographic sense, has become much closer legally to the rest of the world.

DIFFICULTIES WITH THE “FIGHT” RESPONSE

Flight from legal concerns—through settlement of specific cases or movement of business operations to a supposedly friendlier legal environment—is often expensive and unrealistic in a global economy. The other option engrained into our genetic code is to stand and fight. There are two legal contexts for legal battles, each representing a different form of regulation of business: specific cases, in which court decisions represent a form of business regulation, and larger legislative and regulatory arenas in which law reform battles are fought.

The option of fighting specific cases has already been covered in discussing the settlement of cases. That discussion noted problems with litigating individual cases. Litigation costs are substantial, and a cost-benefit analysis can cause your company to settle even when you are confident that you would win at trial. And beyond the cost of settling individual cases, there is a risk that settlement will encourage future litigation.

This section will concentrate on the larger arenas in which the battle for law reform takes place. At first glance, law reform would seem to offer an opportunity to secure competitive advantage by lowering a company’s legal costs. However, the outcome of law reform often benefits all companies, whether or not they invested their time and money in the reform effort.

Even when all companies in a particular industry contribute equally to law reform that benefits only their industry (in other words, when there are initially no “free riders”), the reform might provide little or no competitive advantage to your company. For instance, a reduction in environmental burdens might make the industry as a whole more profitable, but companies will not share equally in these profits. And the increased profitability of the industry may well attract new competition, “free riders” from the outside.

Efforts to improve the legal system are often noble and necessary to improve the national economy. Before your company invests resources in reform initiatives, however, you should carefully analyze the goal of law reform. If your goal is to serve a higher purpose, such as benefiting society, then your efforts might be justified. But if your goal is to increase your own competitive advantage, you should carefully answer the question: “What’s in it for my company?”

In some cases a change in the law may provide your company with direct competitive advantage. For instance, time limits protecting intellectual property (IP) are sometimes

extended in a way that protects specific products. In 1998, the life of copyrighted works was extended from 75 to 95 years, a change supported by Disney Corporation to protect its exclusive rights to Donald Duck and Mickey Mouse. Suddenly Disney competitors were playing on a different field. In the words of Wharton Professor G. Richard Shell: “There has been a lot of legislative maneuvering to gain competitive advantage. To use a football analogy, it’s like making first and goal and suddenly finding they have lengthened the field by 30 yards.”²³ But in other situations, where there are no specific benefits, it is easy for companies to become so enthusiastic about a cause that they overlook the fact that the benefits do not provide competitive advantage.

Thus all four conventional approaches to legal problems depicted in Figure 1.1 are flawed:

- Settling of specific cases can encourage future litigation.
- Ceasing or moving your company’s operations is often unhelpful, given the global convergence of law.
- Fighting specific cases is often not cost-effective.
- Investing in law reform might benefit your industry or the country in general without creating competitive advantage for your company.

A Way to Meet the Challenges: the Proactive Approach

Traditionally, the steps in providing legal care have resembled those of medical care: diagnosis, treatment, and referral—all steps that happen after a client or a patient has a problem. Care has been *reactive*. You get sick, you seek treatment. You encounter a dispute, you turn to a lawyer. We need to move away from that model and, instead, adopt a *proactive* approach.

Being proactive is the opposite of being reactive or passive. The word proactive implies acting in anticipation, taking control, and self-initiation.²⁴ These elements are all part of the proactive approach to law (also known as *Proactive Law*), which includes two further aspects of proactivity: a *promotive* dimension (promoting what is desirable; encouraging good behavior) and a *preventive* dimension (preventing what is not desirable; keeping legal risks from materializing).

Traditionally, the focus in the legal field has been on the *past*. Legal research has been mainly concerned with *failures*—shortcomings, delays, and failures to comply with the law. The focus of the *proactive* approach is different; it is on the *future*. The approach is focused on *success* rather than failure. It is about taking the initiative to promote and strengthen factors that drive success.

The idea of proactivity in law—or legal foresight—is not new in itself. It has been known for years that the earlier a dispute or a potential dispute is addressed, the better the chances of a fair and prompt solution. Most contract lawyers and in-house counsel actually practice future-oriented law: they help clients to plan and structure transactions and manage risk.

In the context of practicing law, the idea of prevention was first introduced by Louis M. Brown, a US law professor and legal practitioner recognized as the “Father of Preventive Law.” In an effort to help people minimize the risk of legal trouble and maximize legal benefits, he published the treatise *Preventive Law* in 1950, followed by numerous other

books and articles on the topic.²⁵ In this treatise, he states a simple but profound truth that has not lost any of its value in more than 50 years: “It usually costs less to avoid getting into trouble than to pay for getting out of trouble.”²⁶

The approach specifically called *Proactive Law* emerged in Finland in the 1990s. Its origins are in *Proactive Contracting*.²⁷ Originally, the goal was to provide a framework for integrating legal foresight into the tangible practice of everyday business and to merge good contract, legal, project, quality and risk management practices with Preventive Law.²⁸ In response to a need to further develop practical methods and legal theories in this emerging field, the *Nordic School of Proactive Law* was established in 2004.²⁹ In 2009, the importance of the work of the Nordic School of Proactive Law was recognized in the EU, in the Opinion of the European Economic and Social Committee (EESC) on “The proactive law approach: a further step towards better regulation at EU level” published on July 28, 2009 in the *Official Journal of the European Union*.³⁰

Both the preventive and promotive approaches to law have similarities with preventive medicine: a branch of medical science dealing with methods (such as vaccination) of preventing the occurrence of disease. Using the analogy of health care and preventive medicine, the *Proactive Law* approach can be said to combine aspects of health promotion with those of disease prevention: the goal is to help individuals and businesses stay in good “legal health” and avoid the “disease” of legal uncertainties, disputes, and litigation.

Today, a growing number of legal professionals—especially in-house counsel—have begun to adopt the *proactive* approach. They are concerned about how to promote better performance and sound business practices. They want to aid in the prevention and prompt resolution of issues that can adversely impact relationships. Whether working on their clients’ sell-side or on the buy-side, they care about a commercially justifiable allocation of risks. In contracting, they seek to secure success through incentives for good performance and arrangements where rights, responsibilities, risks, and remedies are effectively identified and realistically assessed, shared, and managed.

In traditional *litigation*, it is essential for the lawyer to predict what *a court* will do. In *preventive* and *promotive law*, it is essential to predict what *people* will do. Here, the core is not about applying legal rules to facts that happened in the past, but about applying sound legal practices to create future facts and to plan a future course of conduct. As noted by Edward A. Dauer, a pioneer of Preventive Law: “Litigation law is mostly law. Preventive law is mostly facts. And the critical time for preventive lawyering is when those facts are first being born. As a lawyer speaking to business people, I would have one request of them: Please let us be involved in the making of those facts.”³¹

The immediate purpose of preventing disputes is to reduce the staggering burden of wasted time and money caused by conflict, and to avoid the fracturing of carefully-created business relationships. At the same time, a proactive/preventive approach to law can produce the additional benefit of improving business efficiency and creating competitive advantage—provided that you, the manager, take the lead. As Wharton Professor G. Richard Shell states in his book *Make the Rules or Your Rivals Will*, you are the decision maker, as strategic decisions (for example, whether to sue or settle) are made by business leaders who see their legal options against a broad background of pricing, marketing, advertising, resource allocation, and production issues. While you need legal professionals, “[i]n conducting competitive legal strategy, you are the commander in chief.”³²

The Manager's Legal Plan™

Managers faced with myriad business concerns frequently take a reactive approach to the law. Given their reactive stance, it is not surprising that managers often view law as an obstacle rather than an enabler and that they tend to mentally separate the law from the issues that are considered more central to competitive advantage.

No wonder managers often feel incapable of creating a plan for dealing with legal matters. But every plan does not have to be great or flawless; even an imperfect plan can be better than nothing. Albert Szent-Gyorti, Nobel Laureate in medicine, tells the story of a military reconnaissance team that was lost in the Swiss Alps following a snowstorm. The soldiers had given up hope of returning to their main unit alive when one of them discovered a map in their equipment. Having the map calmed the soldiers and, with the sense of direction provided by the map, they found their main unit. Upon their return, they showed the map to their lieutenant, who discovered that it was a map of the Pyrenees, rather than the Alps.³³

This story illustrates that a leader does not need a perfect legal or strategic plan to calm employees and get them moving in the right direction. When a manager is faced with a confusing situation, be it a rapidly changing legal environment or new forms of competition, simply having a plan is often enough to inspire action that can lead to positive results. As noted by Karl Weick of the Ross School of Business at the University of Michigan, one of the world's leading organizational theorists: "Followers are often lost and even the leader is not sure where to go. All the leaders know is that the plan or the map they have in front of them are not sufficient to get them out. What the leader has to do, when faced with this situation, is instill some confidence in people, get them moving in some general direction, and be sure they look closely at cues created by their actions so that they learn where they were and get some better idea of where they are and where they want to be."³⁴

In today's business environment, skill at using legal tools for competitive advantage is a requirement—not an option—in business.³⁵ Taking informed action is better than the paralysis that can result when managers encounter legal aspects of business. In this spirit, the following four-step Manager's Legal Plan™ is intended to enable managers to move from a reactive approach to an ability to actively and proactively use the law to uncover and develop new forms of competitive advantage.

STEP ONE: UNDERSTAND THE LAW

This step starts with an interest in and a basic understanding of the legal dimensions of business. It goes beyond having legal resources available when an issue labeled "legal" arises. It involves recognizing the legal aspects of business, exercising informed judgment when managing them, and knowing when professional legal help is (and is not) required.

As discussed in later chapters, an obvious reason for this broader perspective is to prevent future litigation and to promote your company's legal health. Beyond this goal, the broader view is essential to your career growth. As you move higher in the organization you will increasingly face business decisions that have legal implications. You will also discuss legal matters with a variety of parties, including customers, suppliers, employees, government officials, the media, shareholders, the board of directors, and creditors.

According to Ben Heineman, Senior Vice President of General Electric, “People who lead corporations need to have an appreciation for the whole public side of their job as they go higher and higher up the ladder. Law [is] a significant part of any corporate entity’s life.”³⁶ A former CEO of General Motors reputedly put it more bluntly: “My lawyer and I go steady.”

The fields of law you will need to understand will of course depend on your company and your industry. In highly regulated industries you will need to master the core regulations that have an impact on your business. Depending on your industry, you may benefit greatly from learning about IP, such as patents, copyrights, trademarks, or semiconductor chip protection, which you might use to obtain a legal monopoly for your company’s products or services, fend off rivals, and earn royalties. In manufacturing, you may want to learn about sales and warranty laws and how you can pass on obligations to your suppliers.

Understanding the law and acquiring legal capabilities involve both gaining your own legal knowledge and learning how to manage and work with legal professionals. One of your most important resources is a lawyer who has the ability to guide and coach you. A survey of CEOs by the Association of Corporate Counsel (ACC) concluded that the most important role of a corporate attorney is that of an educator on legal issues.³⁷ The study of business law is also an important facet of a manager’s formal education. In some countries, including the US, the legal environment of business is a key component of undergraduate, MBA, and executive education. In other countries, the importance of understanding business law is highlighted by the fact that legal education is a popular alternative to a business education for students who intend to become managers.

STEP TWO: KNOW HOW TO COPE WITH LEGAL PROBLEMS AND LEARN FROM THEM

If you do face a legal problem, you have the choices of “fight or flight”: fighting or settling cases, ceasing or moving operations, or possibly seeking legal reforms as summarized in Figure 1.1. While resort to one of these solutions is often inevitable, you should keep in mind their limitations in the global economy, as described earlier in this chapter. Once you have resolved your legal problems, you do not want to leave it at that: the third step in the Manager’s Legal Plan™ reminds you that you will want to learn from your experience for the future.

If you are fortunate enough not to face legal problems yourself, you can still learn from problems encountered by others and use those learnings for the next step. There are many cases and examples that are highly educational as you, for example, develop and implement your strategic marketing plans.

STEP THREE: DEVELOP BUSINESS STRATEGIES AND SOLUTIONS TO PREVENT FUTURE PROBLEMS

The third step in the Manager’s Legal Plan™ goes beyond the traditional approaches by searching for business strategies and solutions to prevent legal problems. From a business perspective, many disputes should be settled rather than litigated at Step Two and, better still, they should be resolved before they become legal disputes. But best of all, they should be prevented. Often, it is possible to plan on three different levels of prevention *before*

things go wrong: first, how to prevent the cause from arising; second, how to prevent the cause from doing harm; and, third, if harm occurs, how to limit the damage.

The third step in the Manager's Legal Plan™ prompts you to apply sound business judgment when faced with legal decisions. Even when addressing a litigation decision, you do not want to become so focused on the legal issues that you forget to use a financial analysis that includes calculation of net present value and opportunity costs in making settlement decisions. But Step Three goes beyond applying business tools to litigation. For example, a manager confronted with wrongful discharge litigation should take actions that move beyond the narrow decision to settle or fight. You should review the company's hiring practices, revise company documents, and provide employees with training that will prevent them from making statements that could result in liability.

STEP FOUR: CLIMB TO THE BALCONY TO SEE THE BIG PICTURE AND BECOME MORE PROACTIVE

It may be tempting to conclude the Manager's Legal Plan™ at Step Three. After all, once you have completed the three steps, you have a broad understanding of the law, you know how to cope with and learn from legal problems, and you have applied best business practices in an attempt to resolve legal problems and prevent them from reoccurring.

However, one step remains, beginning with the following questions: Are you framing the situation correctly? Do you see the big picture? Mental frames that help us simplify and organize the complexity in our world are necessary for rational decision making. But simplification often comes at a cost. In viewing the world through a particular window, such as the window provided by a legal problem, we see only part of the landscape. In narrowing the scope of our vision, we risk what decision researchers call frame blindness, which is similar to the blind spot in a car's rearview mirror. By failing to take into account the entire picture when making decisions, we often overlook the best options.³⁸

Your challenge as a manager, when dealing with a problem that appears to relate narrowly to a particular function—whether law or marketing or finance or manufacturing—is to step back from the details of the problem in an attempt to broaden the frame. This book will provide numerous examples of the art of reframing issues and seeing things in a new light.

In his book *Getting Past No*, author William Ury uses the phrase “going to the balcony” as a metaphor for the mental detachment that is necessary when you are attacked or rebuffed by the other side during a negotiation.³⁹ In your role as a manager, a trip to the balcony can give you a broader perspective of the entire playing field without the blind spots that hinder your decision making when you are closer to the action. This broader perspective may enable you to reframe what you originally thought was a legal problem as a business opportunity. Or it may enable you to reframe the way in which you approach your next new deal or contract. This, in turn, will allow you to generate new options for discovering new value with and for your customers to gain competitive advantage. Though you may be unable to reframe every legal problem that you face, the attempt should at least encourage you and others in your organization to think about where you are and where you want to be.

This step starts with changing the belief that “the law” relates only to legal problems or someone threatening to sue, leading you from being reactive to becoming proactive. This step encourages you to focus not only on preventing what is not desirable, such as

future legal problems and their causes, but also on promoting what is desirable to enhance future opportunities.

The law and your contracts have the ability to help you strengthen your customer relationships and protect your commercial transactions. They help you define property rights and allow you to seize strategic control of innovations. All of these are critical to your ability to create and capture value and to your success in the market. From Coca-Cola's secret formula to Nike's Swoosh, hundreds of billions of dollars hinge on the legal strategies used to protect and exploit IP.⁴⁰ As much if not more is likely to hinge on the relational capital and intangible assets embedded in contracts.

Law is perhaps the most hidden of all competitive strategy tools.⁴¹ It is sometimes complex, and not all managers like to deal with it—or with lawyers. The Manager's Legal Plan™ is designed so that you as a manager will not fall into the trap of neglecting law as a competitive tool. By using the Manager's Legal Plan™ along with deal maps, decision trees, and other visualization tools, you may see alternatives, connections, and potential rewards—or gaps and potential risks—that you didn't know existed, and can act accordingly. By incorporating legal issues into the normal strategic and operational aspects of your business you can reframe issues and find new sources of innovative solutions and new competitive advantage.

How this Book is Organized

The chapters that follow will apply the four steps of the Manager's Legal Plan™ to issues that relate to various stakeholders—parties with an interest in your company. In creating value for the owners of your company, the shareholders, you must manage relationships with a variety of other stakeholders in a cost-effective manner. Especially important among them are your customers, your suppliers, your employees, and society at large, represented by government. The Manager's Legal Plan™ will be used to explore the most controversial legal problems relating to these stakeholders.

Chapter 2 will focus on product liability, as well as hidden new product opportunities represented by this type of litigation. Chapter 3 will show how the Manager's Legal Plan™ enables you to secure access to key talent (employees and others) while avoiding employment pitfalls. Chapter 4 will deal with government and use examples of environmental regulations to show how these can create opportunities for competitive advantage. Chapter 5 will focus on the important role intangible assets and IP play in your business and how you can use these to seize strategic control of innovations and sustainable strategic advantage. Chapter 6 deals with contracts and contracting, showing their profound impact on business success and how you as a manager can design your contracts and contracting processes so that they promote business success and prevent problems.

Each of these chapters will offer concrete examples of ways in which the Manager's Legal Plan™ can generate opportunities for competitive advantage.

Beyond the issues covered in Chapters 2 through 6, several generic matters apply to a wide variety of legal aspects of business. For instance, given the importance of the law to business success, how can you ensure that you have the best legal resources and that you are maximizing the value of your legal talent? What tools are available for you to control and resolve disputes and how can you use systems design to best apply these tools? And

how can your use of the law to achieve competitive advantage encourage ethical decision making within your company? These questions will be addressed in Chapter 7.

Chapter Summary

Law plays an important role in achieving competitive advantage. For example, law allows companies to seize strategic control of innovations and gain a legal monopoly through intellectual property rights (IPR). Law allows companies to “make their own laws” through their contracts in business-to-business relationships, and enforces those contracts. However, many managers do not actively think about the law until faced with a lawsuit or a legal problem. The conventional, reactive approaches to the law do not allow managers to make best use of the law to gain competitive advantage.

Given drawbacks with conventional approaches to the law, a new approach is necessary to maximize the use of law to gain competitive advantage. This new approach, based on *Proactive Law*, is embedded in the Manager’s Legal Plan™, which involves the following four-step process:

Step One: Understand the law.

Step Two: Know how to cope with legal problems and learn from them.

Step Three: Develop business strategies and solutions to prevent future problems.

Step Four: Climb to the balcony to see the big picture and become more proactive.

The Manager’s Legal Plan™ is about changing the belief that “the law” relates only to legal problems or someone threatening to sue. It helps you reframe legal concerns and find new business opportunities. The chapters that follow will provide specific examples of how this plan can be used to achieve sustainable competitive advantage.

Notes

- 1 PricewaterhouseCoopers 2009. *12th Annual Global CEO Survey. Redefining Success—Future Proof Plans* [Online]. Available at: http://www.pwc.ch/user_content/editor/files/publ_corp/pwc_12th_annual_global_ceo_survey_e.pdf [accessed: August 1, 2010].
- 2 Figure 3.1.2.1 in PricewaterhouseCoopers 2009, 24.
- 3 PricewaterhouseCoopers 2009, 10.
- 4 PricewaterhouseCoopers 2009, 24.
- 5 Cavenagh, T.D. 2000. *Business Dispute Resolution*. Cincinnati, OH: West Legal Studies in Business, 84.
- 6 Siedel, G.J. 2000. Six forces and the legal environment of business: The relative value of business law among business school core courses. *American Business Law Journal*, 37(4), 727.
- 7 Shell, G.R. 2004. *Make the Rules or Your Rivals Will*. New York, NY: Crown Business, 9. See also Bird, R.C. 2008–2009. Pathways of legal strategy. *Stanford Journal of Law, Business & Finance*, 14(1). Also available at: <http://www.allbusiness.com/company-activities-management/company-strategy/13483188-1.html> [accessed: August 1, 2010]. Bird proposes that there are five pathways that firms pursue when interacting with their legal environment, arguing that some firms treat laws as just a nuisance to be ignored, while others implement prevention programs to avoid litigation. Only a few firms, according to Bird, apply a genuine legal strategy to capture value in the marketplace.

- 8 Siedel 2000, 728.
- 9 Porter, M. 2004. *Competitive Advantage: Creating and Sustaining Superior Performance*. New York, NY: First Free Press Export Edition, 3.
- 10 Porter 2004, 3.
- 11 Dyer, J.H. 1996. Specialized supplier networks as a source of competitive advantage: Evidence from the auto industry. *Strategic Management Journal*, 17(4), 271–92.; Dyer, J.H. and Singh, H. 1998. The relational view: Cooperative strategy and sources of interorganizational competitive advantage. *Academy of Management Review*, 23(4), 660–79.
- 12 Gasparino, C. 2001. Merrill is paying in wake of analysts' call on tech stock. *Wall Street Journal*, July 20, C1.
- 13 *Judas Priest v. Second Judicial District* [1988] 760 P.2d 137.
- 14 1989. No, California, there is no Santa. *Economist*, May 13, 33.
- 15 See <http://www.cisg.law.pace.edu>.
- 16 In July 2010 the European Commission published a Green Paper outlining seven kinds of new systems the EU could adopt. The options range from the publishing of suggested model contracts to an EU-wide law replacing all national contract laws. See Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, http://ec.europa.eu/justice_home/news/consulting_public/0052/consultation_questionnaire_en.pdf [accessed: August 1, 2010].
- 17 See <http://webh01.ua.ac.be/storme/PECLre.html> and http://frontpage.cbs.dk/law/commission_on_european_contract_law [accessed: August 1, 2010].
- 18 The Rome I Regulation, which applies to contracts concluded after December 17, 2009, replaced the Convention on the Law Applicable to Contractual Obligations (Rome Convention). See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF> [accessed: August 1, 2010].
- 19 Ebeling, A. 2000. Sue everywhere. *Forbes*, October 16, 128.
- 20 See http://europa.eu/legislation_summaries/consumers/consumer_safety/l32012_en.htm [accessed: August 1, 2010].
- 21 Further examples of the convergence of laws include competition (or antitrust) laws and laws against sexual harassment. Many laws, such as laws protecting employees or commercial representatives, contain mandatory provisions that have extraterritorial reach. Some laws, such as EU competition rules, apply to non-EU companies acting inside the EU and even when acting outside the EU, when their conduct has an impact on EU trade.
- 22 Patrick, M.J. 1993. E-mail data is a ticking time bomb. *National Law Journal*, December 20, 14.
- 23 2001. Are efforts to extend patent and copyright laws good for business or good for society? *Knowledge@Wharton*, June 20 [Online]. Available at: <http://knowledge.wharton.upenn.edu/article.cfm?articleid=378> [accessed: August 1, 2010].
- 24 Dictionary definitions of the word *proactive* highlight two key elements: an *anticipatory* element, involving acting in advance of a future situation, such as “acting in anticipation of future problems, needs, or changes” (proactive. 2009a. *Merriam-Webster Online Dictionary* [Online]. Available at: <http://www.merriam-webster.com/dictionary/proactive> [accessed: August 1, 2010]), and an element of *taking control* and *causing change*, for example: “controlling a situation by causing something to happen rather than waiting to respond to it after it happens” (proactive. 2009b. *WordNet® 3.0*. Princeton University [Online]. Available at: <http://wordnetweb.princeton.edu/perl/webwn?s=proactive> [accessed: August 1, 2010]).
- 25 See, for example Brown, L.M. 1950. *Preventive Law*. New York, NY: Prentice-Hall, Inc., 3. Also published under the title of *Manual of Preventive Law*, New York, NY: Prentice-Hall, Inc., 1950.

- See also Brown, L.M. 1955. *How to Negotiate a Successful Contract*. Englewood Cliffs, NJ: Prentice-Hall, Inc.; Brown, L.M. 1972. *Planning by Lawyers: An Introductory Course in the Practice of Preventive Law*. Fourth Temporary Edition. University of Southern California Law Center; and Brown, L.M. 1986. *Lawyering through Life. The Origin of Preventive Law*. Littleton, CO: Fred B. Rothman & Co.
- 26 Brown 1950, 3. Louis M. Brown's legacy is carried on through the Louis M. Brown Program in Preventive Law and the National Center for Preventive Law (NCPL) at the California Western School of Law in San Diego. The NCPL is dedicated to preventing legal risks from becoming legal problems and acts as a clearinghouse for information and as a network for those interested in the theory of Preventive Law, or how it applies to particular areas of practice or the courts. See <http://www.preventivelawyer.org>.
- 27 For Proactive Contracting and related resources, see Chapter 6. In recent years, legal scholars in the US and Europe have explored the role of law as a positive force within companies. At the time when the Proactive Law movement developed in Europe, the focus in the US has been on law as a source of competitive advantage. For an overview of the history of these parallel developments and their intersections, see Siedel, G.J. and Haapio, H. 2010 (in press). Using Proactive Law for competitive advantage. *American Business Law Journal*, 47(4), Winter, Special Issue "Law as a Source of Strategic Advantage." Available as Working Paper at: <http://ssrn.com/abstract=1664561>. The Special Issue of the *American Business Law Journal* in which this article is published contains several articles illustrating ways in which the law can create value and strategic advantage.
- 28 The proactive approach to law builds on the preventive focus of Louis M. Brown and Edward A. Dauer and the work of Thomas D. Barton, who added a new emphasis on legal problem solving, the environments in which problems arise, and the need for lawyers to think preventively and proactively. See Barton, T.D. 2009. *Preventive Law and Problem Solving. Lawyering for the Future*. Lake Mary, FL: Vandeplass Publishing. In the fall of 2000, a group of practitioners and academics gathered at California Western School of Law to discuss the traditions and new directions of Preventive Law. For the early steps of building a bridge between the US and Nordic approaches, see, for example, Rudanko, M. 2000. *Preventive Law and International Trade*. Preventive Law Symposium, San Diego, CA, November 10–11, 2000, National Center for Preventive Law, California Western School of Law [Online]. Available at: <http://www.preventivelawyer.org/main/default.asp?pid=essays/rudanko.htm> [accessed: August 1, 2010].
- 29 See <http://www.proactivelaw.org>. Among the publications following conferences organized by the Nordic School are three English language books, Wahlgren, P. and Magnusson Sjöberg, C. (eds) 2006. *A Proactive Approach*. Scandinavian Studies in Law, Volume 49. Stockholm: Stockholm Institute for Scandinavian Law; Nystén-Haarala, S. (ed.) 2008. *Corporate Contracting Capabilities. Conference Proceedings and Other Writings*. Joensuu, University of Joensuu Publications in Law, No 21; and Haapio, H. (ed.) 2008. *A Proactive Approach to Contracting and Law*. Turku: International Association for Contract and Commercial Management & Turku University of Applied Sciences. Some of the early work of the Nordic School is available in Finnish or Swedish only. These include two books edited by Soile Pohjonen: *Ennakoiva sopiminen—liiketoimien suunnittelu, toteuttaminen ja riskien hallinta*. [Proactive Contracting—Planning, Implementing and Managing Risk in Business Transactions.] Helsinki: WSOY Lakitieto, 2002, and *Ex ante—ennakoiva oikeus*. [Ex ante—Proactive Law] Helsinki: Talentum Media Oy, 2005.
- 30 European Economic and Social Committee (EESC) 2009. Opinion of the European Economic and Social Committee on "The proactive law approach: a further step towards better regulation at EU level", 2009/C 175/05. *Official Journal of the European Union* C175, vol. 52, July 28, 26 [Online]. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:175:0026:0033>:

EN:PDF [accessed: August 1, 2010]. Available in all official EU languages. The Section for the Single Market, Production and Consumption, under the leadership of Mr Jorge Pegado Liz, was responsible for preparing EESC's work on the topic, and author Helena Haapio acted as Expert in this work.

- 31 Dauer, E.A. 1988. Corporate legal health: Preventive Law dictates going to root causes to prevent claims from arising. *Preventive Law Reporter*, September.
- 32 Shell 2004, 20.
- 33 Weick, K.E. 1995. *Sensemaking in Organizations*. Thousand Oaks, CA: Sage, 54–5.
- 34 Weick 1995, 55.
- 35 Shell 2004, 19.
- 36 Benjamin W. Heineman Jr., 1994. *ACCA Docket*, Fall, 26.
- 37 American Corporate Counsel Association, 2001. *In-House Counsel for the 21st Century*. September 7 [Online]. Available at: <http://www2.acc.com/Surveys/CEO/> [accessed: January 31, 2010].
- 38 Russo, J.E. and Schoemaker, P.J.H. 1990. *Decision Traps*. New York, NY: Fireside, Chapters 3 and 4.
- 39 Ury, W. 1993. *Getting Past No*. New York, NY: Bantam Books, 38.
- 40 Shell 2004, 22.
- 41 Shell 2004, 9.