

Wrestling with Volatility:

How General
Counsel are
Adapting to a
VUCA World



LexMundi
World Ready

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Lex Mundi Horizon Scanning Tool

Lex Mundi’s unique Horizon Scanning Tool helps companies spot future vulnerabilities and benchmark risk expectations.

Using a survey methodology, Lex Mundi member firm experts assign multiyear rankings to various areas of risk and provide qualitative indicia of what to look out for.

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About This Report

The tectonic plates of the global political-economic order are undeniably shifting with no region spared the tremors and aftershocks. Business leaders are by now getting accustomed to operating in an environment characterized by a backlash against globalization and a heavier hand of regulatory activism. Meanwhile, technological advances are opening an era of Schumpeterian “creative destruction” in which alluring new frontiers are adding to the stress on existing operating models.

The acronym most used to describe the above conditions is VUCA (volatile, uncertain, complex and ambiguous). The core vulnerability for many business leaders is that of anticipating events in their blind spots and preparing for the next Black Swan – i.e., a highly improbable occurrence that has extreme impact. More than ever, organizational leadership and vision presuppose a relentless questioning of old assumptions, the assimilation of voluminous information and the acumen to separate the signal from the noise.

The 11th annual Lex Mundi Summit gathered senior in-house counsel of multinational companies for a 1.5-day leadership workshop dedicated to exchanging and enhancing management practices for a VUCA world. During structured, interactive sessions, general counsel swapped insights, techniques and tools for assessing what lies over the horizon.

Specifically, general counsel discussed how VUCA conditions have led to a paradigm shift in how they carry out their responsibilities, whereby they are less guided by precedent and must think in new categories of risk. In response to this shift, four key techniques came to light, which innovative general counsel are using to build greater agility into their organizations:

- Monitoring latent risks such as political and regulatory developments;
- Looking beyond existing paradigms to consider scenarios that are “off the radar”;
- Embedding fast-flow learning in the culture; and
- Driving change through the organization, including at the board level.

Lex Mundi was pleased to partner with Control Risks for its unique perspective on the macro-environment as well as a practical scenario-planning simulation to help participants hone methods for identifying latent risk when back at headquarters.

At Lex Mundi we look forward to continuing to work with the companies at the Summit on risk spotting and mitigation, in particular leveraging Lex Mundi’s unique tools and deep local resources in over 100 countries.

To learn more about Lex Mundi or how to participate in a future Lex Mundi Summit, please contact Eric Staal or Carl Anduri.

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This publication is not intended to represent a comprehensive guide nor legal advice on the matters covered but rather provide a general overview on the subject. It may only be used as an indication, and advice should always be sought from the appropriate Lex Mundi member law firm.



Introduction: VUCA and Its Impact

The Legal Function in a VUCA-Era

Contrasted with the greater predictability of bygone days, the Lex Mundi Summit shed light on how, in this VUCA-era, progressive, entrepreneurial-minded general counsel are fundamentally redefining their role in corporate leadership.¹

What emerges from our analysis of Summit discussions are road signs pointing to how general counsel are dealing more effectively with the impact of the VUCA environment through the provision of multifaceted and broader leadership to their organizations.

Previously, organizations and general counsel faced a world that was more reliable, one that had more consistency in the direction, volume and speed of change. In short, times were simpler. And that called for a simpler legal department structure, a simpler relationship with the business, a simpler relationship with external law firms and a simpler perspective on the future (i.e., an assumption that it would be more or less like the present).

In today's world, general counsel face an ever-increasing demand to manage exponentially more risks, involving greater complexity, in much shorter time frames and with more potential impact on business performance. It is a circle that cannot be squared.

Organizations are more broadly exposed to VUCA in every jurisdiction as a consequence of the globalization of supply chains and business linkages. At the same time, new technologies (and interactions of technology) are causing their own set of complexities and ambiguities. One participant from the automotive sector stated, "Disruptive technologies are a threat and an incredible opportunity: Automation! Electric, driverless! When do you invest? When is it going to hit the market? You don't want to be too early and don't want to be too late."

For another general counsel, a completely new product platform and approach to contracts were part of a response to a shift in Chinese policy that had led to aggressive price dumping in the global market and posed an existential threat to the company. The shift also meant asking law firms to share the burden during a time of tight budgets. Internal business teams had to adapt to working with new terms and conditions for external partners.

Another participant put his finger on the nub of the conundrum: "Law has always been about precedent. Lessons from yesterday guiding actions today. But how does a legal team address the risks of the future, the risks of a world in flux?"

We are in a time when turning to precedent as the basic tool of good lawyering will be of little help. The legal team must not only be guided by past precedent, but also become better at predicting (and placing bets) on the range of possible futures facing the organization.

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¹ See also Heinemann, Ben W. 2016. *The Inside Counsel Revolution: Resolving the Partner-Guardian Tension*. Ankerwycke: 2nd Printing edition.

In light of these challenges, Summit proceedings focused on four innovative techniques to help general counsel deal with the VUCA environment:

- 1 Horizon Scanning**
- 2 Scenario Planning**
- 3 Silo Busting**
- 4 Embedding Fast-Flow Learning in the Culture**

These techniques have emerged in response to the way the corporate legal function has had to evolve in recent years to take account of the VUCA conditions.

A Paradigm Shift for Corporate Legal

Legal departments have long been involved in risk management, often as a part of broader organizational efforts, which are heavy on historical analysis, data gathering and step-by-step processes. However, in the words of Professor Robert Bird, in a VUCA world such approaches can end up being “little more than analytic placebos for quantitative minds.”² A VUCA world requires that legal departments become more strategic and future-oriented to cement their role as trusted business advisers.

Based on input at the Summit and further analysis of the ways in which the VUCA environment impacts corporate legal functions, Lex Mundi has come up with the illustrative comparison below between expectations upon legal departments traditionally and how innovative general counsel are adapting today.

Advisory Role of the Corporate Legal Function

	Pre-VUCA	VUCA
Risk-spotting methodology	Focus on high likelihood, high-impact risks	Scan more rigorously for uncertain, ambiguous and less likely risks
Time horizon	Ad hoc/responsive	Longer-term predictive/strategic
Approach	Empirical focus: “Is it legal?”	Normative business focus: Should we do it?
Organizational role	Narrow/silo perspective to protect integrity of legal	Broad/multi-lens perspective; integral player as part of cross-functional collaboration involving strategy, risk, communications, etc.
Managing workflow	Immediate issue(s) get most attention	Triage most important issues for attention
Setting priorities	Annual	Quarterly or rolling
Value to the organization	Legal as an internally focused, cost function	Legal as business enabler addressing diverse stakeholders
Government affairs	Manage relationships with regulators; lobbying is siloed	More important to business than ever Strategic regarding public policy covering uncharted territory, e.g., driverless cars, IOT, data privacy, products and services outside current regulatory categories, etc. Oversight of, or collaboration with, Government Relations team

²Bird, Robert C. 2018. “VUCA and the Management of Legal Risk.” The CLS Blue Sky Blog. March 15, 2018. <http://clsbluesky.law.columbia.edu/2018/03/15/vuca-and-the-management-of-legal-risk/> and Bird, Robert C., VUCA (Feb. 4, 2018). University of Connecticut School of Business Research Paper No. 18-09. Available at SSRN: <https://ssrn.com/abstract=3117932> or <http://dx.doi.org/10.2139/ssrn.3117932>.

In a pre-VUCA world, political stability and global liberalization could be taken for granted, e.g., the 1998 currency crises or 2001 recession did not call into question the political-economic order. Fast-forward to 2018, and it is clear the plates have been shifting. New centers of power are emerging, political unpredictability has spread to Europe and the United States, and corporate leaders are wrestling with a wider range of new and fluctuating public concerns, e.g., protectionist sentiment, changing international relations, sanctions regimes, the ecological footprint, human rights standards, data privacy, respect for diversity, exposure to sexual harassment, etc.

Consider three realities one year apart:

Mid-2017	Mid-2018
The JCPOA agreement with Iran had opened the country to a period of receiving foreign investment.	U.S. government threatens prosecution of companies doing business in Iran.
U.S. trade relations with China and the EU, relatively stable for decades, generally continued to follow WTO protocols.	U.S. government engages in tit-for-tat trade restrictions with China and the EU, impacting companies in a range of industries and disrupting supply chains and markets globally.
The Weinstein Company was returning profits to shareholders.	The Weinstein Company filed bankruptcy and had its assets sold as a result of long-standing sexual harassment abuses.

VUCA conditions cause corporate leadership to rethink in categories of risk, such as below:

Areas of Emerging Legal Risk

Regulatory	<p>Whereas traditionally regulatory risk has meant exposure to investigations and enforcement in familiar areas of compliance, this risk would now encompass the way in which more governments and authorities are:</p> <ul style="list-style-type: none"> • active in more regulatory areas, e.g., human rights or climate change, and • more likely either to cue one another or to coordinate enforcement
Political	<p>Political risk is that of lurches in the broad policy direction of governments, often resulting from changes of power or in reaction to key events.</p> <p>Recent examples are:</p> <ul style="list-style-type: none"> • attitudes in emerging market countries toward bilateral investment treaties • international agreements such as the JCPOA with Iran or trade agreements • commitments for resolving sovereign debt crises • corporate tax regimes <p>Such lurches are familiar in places such as Latin America, Africa or Southeast Asia, but concern over the political direction in Western Europe and the United States was not extant even a few years ago. Now we speculate over the impact of Brexit and lurches rightward in a range of countries.</p>
Geopolitical	<p>Examples of interstate conflict are also on the rise, not only in purely military terms such as the nuclear bellicosity of North Korea or the devastating war in Syria, but also in the way that borders once agreed to be inviolable have become malleable and under greater stress, e.g., in the Middle East and around both the Chinese and Russian peripheries.</p> <p>More and more we are witnessing a return to old-time, big-power realpolitik.</p>
Social	<p>A consistent refrain heard from general counsel is that it is more important to focus on doing what is right rather than doing what is legal. Social attitudes change and drive political and regulatory behavior. The challenge is to take a longer-term view of how decisions made today will be treated by governmental authorities in the years to come.</p> <p>One prescient general counsel asked, “Will there be a human right to clean air?” Consider the corporate liabilities that would that give rise to. Will the food sector in the United States be exposed to political pressure and class actions a la the tobacco industry in the past?</p>

The litany of things to keep one up at night seems only to grow, and general counsel are challenged to have a well-coordinated, cross-jurisdictional approach that helps to draw upon deep knowledge of the local terrain in many places.

Doubling Down on Government Relations

One of the fundamental reactions to the challenge of navigating this “new normal” is for companies to turn more to government relations efforts, and yet doing so is nowadays fraught with more sensitivity than heretofore.

One participant highlighted the challenge that any meeting with government officials or political leaders can be misconstrued, making officials reluctant to meet and reducing the conversations that can be had. “It is not a good place to be when you can no longer have a dialogue” between business and government leaders. Yet if corporate leaders attempt to keep their discussions with government leaders discreet, they may be seen to engage in underhanded influence.

Key Techniques

Professor Bird offers an insight about the fundamental challenge of VUCA conditions and what makes some organizations more effective. Bird posits that “legal uncertainty is essentially a knowledge problem, and it can be managed through dismantling information barriers.” In other words, we don’t (and can’t) know the future. What drives an organization’s “propensity to respond effectively to legal volatility [is] ... the agility of the organization.” (Bird, 28) By agility, we mean increasing the flow of information about what is going on and the ideas about what to do about it in order to make smarter decisions and implement them.

What did the Summit reveal about breaking down information barriers and enhancing agility?

As one Summit participant noted, the focus on “specific risks blinds you from the biggest risk, which is a lack of agility and lack of flexibility to respond to the unknown unknowns.”

What did the Summit reveal about breaking down information barriers and enhancing agility?

1 Horizon Scanning: “Known Unknowns”

For organizations and general counsel wishing to horizon scan over the near term (say, the next three years) there can be significant operational challenges, such as:

- Where to focus as risks diversify and proliferate geographically.
- How to deal with interdependencies such as regulatory contagion or domino effects in the supply chain.
- What to do about your blind spots.

One type of scanning is to look for linkages between business results and downstream legal outcomes. One general counsel reported a pattern in her organization: When the retail customer numbers dropped, “wizard wheezes” were apt to begin as the sales side of the organization tried potentially more creative ways to make their targets.

Legal departments have a strength that is also a weakness for horizon scanning: They know their organization well, but that can come at the expense of knowing what is happening outside the figurative walls. External counsel work with multiple clients and have a broader set of experiences that may help to reveal hidden patterns but are harder pressed to know the client organization inside and out.

In the words of former U.S. Secretary of Defense Donald Rumsfeld, horizon scanning is best applied to “known unknowns.”³ That is, it makes sense to look ahead in areas, which you know you do not know, such as legislative or political risks.

These areas shift over time. One general counsel pointed out that it is one thing to be good at product liability, but what if the CEO is accused of sexual harassment or you experienced a cyber breach? You need a different mindset.

No general counsel felt they received strong help from external law firms when it comes to horizon scanning. One general counsel reported that he’d asked his panel firms to collaborate and inform him of what else is happening yet finds they obdurately work reactively and in silos.

³U.S. Secretary of Defense, Donald Rumsfeld. *NATO Press Conference*, June 2002. <https://www.nato.int/docu/speech/2002/s020606g.htm>.

2 Scenario Planning: “Unknown Unknowns”

The horizon scanning approach does not lend itself to understanding the risks hidden in the “unknown unknowns,” as it is based on a linear projection starting from the status quo. The further you go out in time, the greater the complexity of the systems (and interplay between the systems) that are involved. Signals of pending transformation tend to get lost in the noise of “wishful thinking” that things will continue much as they are.

Scenario planning is designed to better anticipate risks arising from the intersection of political, economic, social and technological change. One organization renowned for its sophistication in this technique is Royal Dutch Shell. Shell’s approach is to build multiple scenarios, each dramatically different and based on remote and unlikely events. These scenarios help an organization begin to identify the horizons they need to be scanning in the future.

As Donny Ching, Legal Director of Royal Dutch Shell, explained at the Summit, “Scenarios are not supposed to be practical; they are not forecasts nor predictions. They are alternative views of potential futures.” He continued, “building scenarios requires the same attention and scrutiny as one gives to day-to-day urgent matters.” The Shell Litigation team held an off-site meeting to do just that. (See Donny Ching’s full remarks at the end of the report.)

Another participant, representing a global manufacturing company, emphasized scenario planning as critically important for assessing risk to the company’s product line long term, as well as for understanding trade barriers. They use scenario simulations to work through the impacts and build their response to address vulnerabilities in the business.

A key presenter at the Summit, Nick Allan, CEO, Europe & Africa, Control Risks, makes the point that “organizations that prosper in the long-term are ones that are able to spot the factors that are shaping their markets and to adapt and respond ... [they] use scenario planning to help them anticipate events, trends and other drivers that they then feed into their strategic planning.”

Using this approach to look far enough ahead, Donny Ching remarked at the Summit, “Shell has found a better way to work in volatile times and turn risk and threat into opportunity.”

3 Silo Busting: Legal as a Vertically Integrated Business Partner

A third set of techniques for overcoming barriers to information and agility has to do with dismantling the siloization that estranges the legal function from the business. As one general counsel of a financial institution put it, the perception the business sometimes has is: “I know a very good lawyer; he can find a problem for every solution.”

Managing perceptions is indeed a critical aspect of building trusted adviser relationships to the business that starts with the mindset of the legal team. Yet it is a fine line. On the one hand, there is a need to go from a “limit and deny” perception of legal to one of “enable and protect.” On the other hand, in-house lawyers “cannot go native” but must maintain independence and objectivity.

One general counsel calls the necessary approach “yes, and” thinking: “yes” part of the business “and” still aligned with legal. Many general counsel seemed to agree this balance is best struck when in-house lawyers have a “a solid-line reporting structure” to the senior-most general counsel, particularly when operating within the business units.

Beyond reporting lines, another general counsel pointed to creating a “culture of escalation,” implying a balance of having a backbone and yet keeping a seat at the decision-making table. He explained: “I don’t want people to feel lack of ownership with the business; I don’t want them to be outcasts.” Other general counsel concurred that “you are paid to take risk as opposed to just avoiding risk,” and exhorted “no crying wolf without identifying the solution.”

Money talks and focuses the attention of business leaders on the question of legal risks.

However, the onus is also on business leaders to recognize the value of giving the legal function a seat at the decision-making table to help steer the company. One general counsel borrowed from Winston Churchill: “I never let a good crisis go to waste.” He explained, “I keep a list of all the fines, outside legal costs and civil litigation costs over the years.” The dollar figure of legal costs and fines for violations quickly adds up and can include post-M&A write-downs for legal issues that could have been foreseen. Money talks and focuses the attention of business leaders on the question of legal risks.

“Scenarios are not supposed to be practical; they are not forecasts nor predictions. They are alternative views of potential futures.”

Another effective way to break down the barriers is to be more transparent rather than esoteric about legal analysis by training business colleagues. Changing behavior in the business presupposes that you demystify issues rather than hold the legal department out as the only ones who can assess a situation. However, it may run against the grain of trained professionals who associate their status in the organization with the privileged knowledge they earned during years of training and experience.

Participants agreed they'd had some measure of success with training on topics such as anti-trust and good faith, etc. Not only is the training preventive but can also contribute to horizon scanning, because there are more people who know what to look for. One general counsel uses multidisciplinary training that targets emerging business risk, e.g., on child slavery or GDPR, and rolls it out to supply chain partners.

4 Embedding Fast-Flow Learning in the Culture

Finally, a VUCA world requires that a legal department have fast-flow, information-sharing that leads to learning (and changing!). One general counsel asked theoretically: "If you have 1,000 lawyers, are you 1,000 years wiser every year?"

We know what it takes to support that fast-flow of information and learning. An assessment conducted by the Center for Evidence-based Management (CEBM) looked at 24 single studies and 35 meta-analyses⁴ to identify the most significant factors enhancing the performance of "knowledge workers" (of which lawyers are perhaps the pre-eminent example).

There are really no surprises in CEBM's list, which essentially goes to the culture of an organization that comes from its leadership:

- **Social cohesion:** "A shared liking or attraction to the group, emotional bonds of friendship, caring and closeness among group members, and enjoyment of each other's company."
- **Strong supervisory support:** "How the workers feel the manager helps in times of need, praises the workers or the team for a task well done, or recognizes them for extra effort."
- **Information-sharing:** "The extent to which teams are utilizing the individual members' distinctive knowledge for the team's benefit."
- **Vision and goal clarity:** "An idea of a valued outcome that represents a higher order goal and motivating force at work."
- **External communication:** "The ability of teams to span boundaries (team and organizational) to seek information and resources from others."
- **Trust:** "A feeling one can have regarding another person or group of persons; created by the expectation that the actions of the other person(s) will be at one's benefit or at least not detrimental to him or her."

Anything a general counsel can do to strengthen these elements for his or her department or, indeed, for the organization as a whole is going to improve the flow of learning.

Some of the specific questions GCs need to ask themselves – and have all of their lawyers and staff ask – are:

- What is happening NOW!?
- How might that change what we are doing?
- What was working yesterday but doesn't work anymore?
- What was important yesterday that is not important for tomorrow?
- What did we learn over there that we could use right here?

Some of this learning work is actually *un*learning: being able to let go of something that helped you be successful previously but that now no longer works. That means that everyone must feel empowered to speak candidly to anyone, even to challenge more senior members of the organization, and to feel comfortable admitting to "mistakes." This open communication can be critical in mitigating compliance risk (moving from a "tick-box" mentality to a "find-fix" one).

The best way to foster this learning is to keep the focus on what is working well and the approach going forward.

⁴Barends, Eric, Cedric Velghe and Lien Vossaert. 2017. "The Added Value of Rapid Evidence Assessments." Center for Evidence-based Management. <https://www.cebm.org/wp-content/uploads/Barends-Plum-2017.pdf>.

Leading Change

The techniques mentioned earlier inevitably lead to making changes in your department or across the organization. For example, what happens when as a result of a scenario-planning exercise you have identified a new long-term direction. In Shell's case, the Sky scenario called for halving the company's carbon footprint by 2050.

Such an objective means building buy-in by stakeholders and senior leadership (or at least moving them to a position of neutrality) to get the decision made, and then shifting the behavior of stakeholders.

The first question is whether you need to go "with" the stakeholder or whether you should go around or through them.

If you need to go "with" them, the key to understanding them is David Rock's SCARF model,⁵ which holds that humans make their decisions – to agree to a proposal or to change their behavior – based on their emotional perception of a "social" threat (or, less so, attraction). The threat-attraction response is driven, in declining order of importance, by perceptions about the impact on a person's:

SCARF Model

Status

relative importance to others

Certainty

ability to know what is going to happen next

Autonomy

control over things that directly impact oneself

Relatedness

connections with "friends" and colleagues

Fairness

sameness in treatment

Once you understand what drives a person's or group's SCARF motives, you can think through how to modify proposals or messages to reduce the "threat" response.

For example, one participant undergoing a major legal department restructuring, which followed a large cross-border merger, related how he had stripped the names from a proposed new organization chart and used a data-based analysis to create a heat-map of demand. From a SCARF perspective, this effort to bring objectivity to personnel decisions reduced the "Relatedness" threat, as decision-makers looked at material without being reminded of their friends or colleagues.

Certainty is almost always triggered when there are changes. This is why so many change management efforts emphasize constant communication about the change (before, during, after). The key is to avoid triggering threats unnecessarily and to reduce "threats" perceptions by sharing the specifics about the change, e.g., answering questions like how much is actually changing for them and what supports are in place to assist in the transition.

One general counsel reported that his company uses a "change curve" to plot where different leaders are in terms of accepting the change and who is shifting. "Change champions" are appointed, i.e., senior people who are used to endorse the change. An important tactic is also to be honest and forthright in communications to avoid being seen to hide bad news.

⁵Rock, David. 2008. "SCARF: a brain-based model for collaborating with and influencing others," *NeuroLeadership Journal*, no. 1. <https://neuroleadership.com/portfolio-items/scarf-a-brain-based-model-for-collaborating-with-and-influencing-others/>

Conclusion

The impact of current VUCA conditions on corporate legal functions has been both transformational and profound, resulting in the legal team becoming a vital part of strategic risk management.

The Lex Mundi Summit, and this report, examined key techniques general counsel are using to be more agile and effective in contributing to organizational leadership.

- 1 Horizon Scanning
- 2 Scenario Planning
- 3 Silo Busting
- 4 Embedding Fast-Flow Learning in the Culture

Each technique can be rewarding in terms of converting adverse circumstances into opportunities. Inevitably the general counsel has to lead change within his/her department and across the business. The SCARF model is a helpful starting point for approaching stakeholders.

The impact of VUCA on the legal function is a topic worthy of much deeper exploration and, indeed, there is a growing literature on the subject. The Summit provided an opportunity for leaders to understand the broader dimensions of the challenge and to share practical experience. This report is an attempt to capture, at the highest level, the richness of the discussion and make it available to a larger audience.





The Next Black Swan: The Current Global Risk Landscape

Contributed by: **Charles Hecker**, Senior Partner, Control Risks
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It is perfectly natural to worry about the unknown. Doing something about it might be more difficult.

Ever since former U.S. Secretary of Defense Donald Rumsfeld in 2002 popularized the expression “unknown unknowns” (a phrase already used in intelligence circles), the business community has been pondering the imponderable.

Things did not get much easier when Professor Nicholas Nassim Taleb wrote the seminal (and more-than-slightly controversial) *The Black Swan: The Impact of the Highly Improbable*. Black swans, we were told, were catastrophic events that were impossible to predict. The 2007 book prompted yet another spasm of executive horizon-scanning in search of the invisible.

And so we have been conditioned to think about what the unknown could do to our organizations, our clients, our suppliers and our markets. Woe to the company and its risk committees that didn’t look hard enough for things that were supposedly impossible to see. Not an easy place to be.

We are now in the middle of 2018. The likelihood of nuclear Armageddon features in casual cocktail conversation, Singapore summits notwithstanding. (Just ask the people of Hawaii.) Malevolent cyber actors can destroy – or worse

yet, copy – your identity without your knowing. Pandemics cause national lockdowns. Natural disasters spark highly unnatural chain reactions. Insurgent political forces are destabilizing the bedrock of enduring political institutions around the world.

The net effect? What was once dramatic has become commonplace. And we’re still expected to know the unknowable.

But what’s left to spot? *Short of planets colliding, what could the next mutant breed of catastrophe possibly be?* Perhaps we are entering an era where the black swan is fading to gray.

Put differently, is there something else we could more profitably spend our time worrying about? Rather than looking for black swans, might we more productively focus on what we can control, and ensure we have adequate responses to the known spectrum of risks?

In a time of great uncertainty, this may be the best course of action. The imperative to work in the realm of the knowable is growing stronger than the drive to uncover the unknown. This trend has one primary driver and one critical outcome.



The primary driver is big data. Increasingly, we live in a time when the likelihood of events in the future is meant to be predictable, based on their occurrence in the past. The advent of algorithms fed by big data should predict the next time you will need to buy light bulbs. But forecasting is infinitely more powerful than that. This is driving the expectation that we are all only a click away from becoming omniscient, artificially or otherwise.

So far, so modern.

But here's the outcome, and it's not an easy one. For anyone charged with keeping his or her company safe, the so-called black swan defense – *"I didn't see that coming"* – will no longer work. Boards, committees, shareholders, employees, regulators – in short, the widest array of stakeholders – are now holding company executives to a higher standard. The burden on all of us to be clairvoyant is more onerous than ever before.

Doing nothing is not an option. That's the ostrich approach, and now we're using too many bird analogies.

Smart companies are focusing on approaches that preserve their ability to meet strategic priorities – and to anticipate when those priorities may need to change. They are integrating and streamlining governance plans and tools within areas called the "disruptive disciplines" – crisis management, business continuity, disaster recovery, cyber resilience – and making them more realistic. Beyond that, they are using sophisticated scenario planning approaches to identify and anticipate the external forces that may change the course of their company's development.

Think technology. Forward-thinking companies are exploring technology-enabled predictive intelligence that use

quantitative and qualitative data sets (local incident history, company incident history, political risk, sector risk, etc.) to enable them to better predict the likelihood and impact of future incidents. As incidents and environments continue to evolve, so do the data that companies can plug into forecast models, allowing teams to capitalize on machine learning and be better prepared when disaster strikes.

For example, an oil and gas company with pipelines crossing high-security-risk areas, across multiple geographies, is using predictive intelligence, fed by historical and emerging data sources, to better analyze and identify the portions of the pipeline with the highest likelihood of a security incident. This company is taking proactive steps to help avoid an incident altogether.

Beyond that, nothing beats a well-structured brainstorming session. Looking at where your company sits now, looking at the forces looming in the future (threats and opportunities) and looking at how your company may have to adapt, is invaluable in anticipating change.

To be fair, companies cannot avoid every single development in the future – whether it is an acute crisis or stealthier, evolutionary change. Data and analytics are powerful tools, but their predictive powers are not yet perfect. Even the support of the human element – something we quaintly refer to as experience – does not provide blanket protection.

But we are no longer allowed to take refuge in old-fashioned approaches to future-proofing our businesses. We can no longer remain rooted in processes and procedures that fail to embrace a rapidly changing risk environment.



Seven Things You Need to Think About When Using Scenarios

- 1 Spend some time up front analyzing your business. What is it that makes it successful and what are the key areas of differentiation?
- 2 A STEEPLE or PESTLE analysis is a useful tool to look at the environmental factors that affect the business.
- 3 Choosing the right time scale is important. If it is too long term, it makes it hard to derive any practical decisions and the ownership of the scenarios will not take root in the business.
- 4 A five to ten-year scenario planning horizon is often about right. Shorter than that and you are really into forecasting.
- 5 With a solid understanding of the business and what makes it successful, move on to look at the critical uncertainties. What are the factors that could really impact the business and make the next decade a great one or a bad one? These might be political factors or they could be societal – and in today's age, technology is often the key disruptor.
- 6 Think about your competitors or those in adjacent sectors. Are any of them implementing strategies that could point to the fact that they have spotted something you might have missed?
- 7 Don't forget to include in any scenario those business drivers that we can be very confident will happen and that will have an impact on the business. These might be demographic shifts or environmental factors.

Source: **Nick Allan**, CEO, Europe & Africa, Control Risks

Scenario Planning: Preparing for the Next Black Swan

Contributed by: **Nick Allan**, CEO, Europe & Africa, Control Risks

No business can be certain what the future will hold, and there are numerous examples of businesses that have gone from household name to historical footnote in rapid time. Many firms decline into irrelevance or succumb to competitive forces. Those that survive and prosper in the long-term are the ones that are able to spot the factors that are shaping their markets and to adapt and respond.

Some of the biggest names in business use scenario planning to help them anticipate events, trends and other drivers that they then feed into their strategic planning and make them both more successful and more resilient. Some people make the mistake of thinking that scenario planning is really just a longer-horizon version of business continuity planning. Done properly, a business should be able to map out potential futures and then determine what needs to change to drive success, not merely to avert disaster.

Royal Dutch Shell is probably the most feted of the firms that use this methodology, and this is with good reason. Not only have they published their scenarios on a regular basis, but they have also helped develop the methodology that surrounds it. Although many firms will not be able to devote the resources and time that Shell does to scenario planning, it can still be a useful tool in any corporate planning exercise.

Most of us look at the future with our feet firmly based in the here and now, and our sense of possible futures is shaped by our immediate perspectives. In the geopolitical context, we often ascribe rational decision-making to state actors with their rationality based on what a stable and prosperous world would mean for their own businesses. Since the end of the Cold War, the prevailing business culture has been one forged in a western, capitalist, liberal democratic tradition. As James Carville famously said with regards to Bill Clinton's 1992 presidential campaign, "It's the economy, stupid." And this maxim is one that many business people assume still holds true in the geopolitical context.

The effects of the global financial crisis are still being felt some 10 years on and recent events and most notably the rise of populist policies and a move away from global free trade show us that new forces are shaping both the political and economic. Whilst scenario planning has always had its benefits, it is probably fair to say that in an environment now sometimes characterized as volatile, uncertain, complex and ambiguous (VUCA), it is even more relevant.



Scenario planning follows a structure and process that will enable a business not only to understand the principal forces and drivers that shape success but also those key uncertainties that could have a major impact in the future. As mentioned, scenarios are not intended to predict the future but rather to demonstrate possible futures that are realistic and will require action. The exercise will also test the breadth of strategic thinking in an organization and illuminate both possible weaknesses and possible opportunities.

"Resilience" has become one of the buzz words of modern-day business and scenario planning is an excellent way to ask the question: "Just how resilient we will be if the future looks very different from the present?"



Scenario Planning: Royal Dutch Shell

Donny Ching, Legal Director, Royal Dutch Shell

Source: *Remarks – 2018 Lex Mundi Summit* (reprinted with permission)

Today, we are in a period of change and uncertainty as never before.

Law has always been about precedent. Lessons from yesterday, guiding actions today.

But how does a legal team address the risks of the future, the risks of a world in flux?

At Shell, we approached this by bringing together two very different teams for one very different session.

It was 2016. In the UK, there was the Brexit referendum. In the Philippines, Rodrigo Duterte took on the establishment and won. In the U.S., Donald Trump was on the rise.

It was time to reset the way our legal teams looked at the world.

At Shell, we are lucky to have a talented bunch of thinkers and strategists we call the scenarios team. This team studies the bigger picture. For instance, their recent publication, *Sky*, shows a technically possible pathway towards limiting the rise of average global temperatures to well below 2 degrees. The team works across disciplines, they apply a robust methodology and they partner with institutions such as the Massachusetts Institute of Technology.

The litigation team invited the scenarios team for a two-day workshop to help them to take a step back and look at the horizon. It was the start of a process that continues to this day in every legal team in Shell. We need not only a firm grasp of detail, we need to see the bigger picture too.

Scenarios

Shell scenarios are just this. They are not intended to be practical, rather they help to inform company strategy and guide decisions by examining remote events. They are not forecasts nor predictions. They are a set of interconnected factors and trends that lead to alternative views of potential energy landscapes.

Our Mountains scenario, for example, is one of stasis, where world trends continue, such as the concentration of power among elites. Our Oceans scenario is one of change, one of people-power and individualism.

The Sky scenario is the latest one, and it is one in which society achieves the goal of reducing carbon emissions as outlined by the Paris agreement. This requires unprecedented and sustained collaboration between not just individuals and teams, but society, markets and governments.

The three scenarios represent dramatically different worlds.

This is the bigger picture.

We wanted our legal teams to take a step back from the pressing issues of the present and apply the same scrutiny – with the same urgency – to the future. Not only did they need to look at the horizon, and search it hard, they needed to be open to different possibilities, in potentially different worlds, against different time frames.

The Benefits of Change

Just ask Londoners what happens when you stick doggedly to your preferred route.

A paper by Oxford University showed that when industrial action forced commuters onto different routes, a significant fraction changed their daily journeys and improved their commute.

They literally found a better way. Disruption became an opportunity.

And so it proved with our exercise. By changing our approach, we found better ways to work in this complex, volatile time.

By understanding future risk, and by doing it early and holistically, it gave us a chance to turn a threat into opportunity.

Three Areas of Risk

We identified three areas of potential legal risk.

The first is the rule of law. We felt that we had to do more in this space to promote laws that are equally enforced, justice that is accessible to all and legal certainty. This informed our new External Focus strategy for Shell Legal.

The second area focuses on human rights. The impact of Shell's operations on the communities in which we work is of huge importance. The third area is climate change – and I will expand on this, because it is the most pressing global challenge.

I have a daughter who is very, very environmentally aware. Nicole is also a formidable advocate.

She is studying to be a chemical engineer at one of the leading engineering universities in the UK and she wants to help to solve the climate change challenge. Even at home, I find myself defending Shell.

I explain that Shell intends to play an important role in the transition to a lower-carbon world. That we are changing at every level, even in our legal thinking.

Her answer is simple. It's not what you say that matters, it's what you do.

And she is right. This, for me, is the "Nicole" test.

We may we have identified three significant areas of risk, but unless we do something about them, society has every right to turn to us and say: "So what?"

The Challenge

When it comes to climate change, the courts have certainly become very active. There are now many cases that raise climate issues pending worldwide, the majority in the U.S.. We, at Shell, believe that climate change is a complex challenge that should be addressed through sound policy and cultural change, not through the courts, but we must be prepared for this continuing shift.

So, what are we doing as a legal team?

Take the possible consequences of a social media campaign such as #shellknew. It is based on the notion that Shell was aware of climate change risks but failed to disclose what we knew or somehow tried to discredit the science. We can use the facts to contest this claim, we can challenge the strength of the argument, but we need to do more than this.

We need to see the bigger picture.

There is no safety in precedent in an era of disruption and discontinuity. In this instance, it is a campaign that seeks to

mobilize disparate groups with one emotive idea. A notion of negative behavior that can grow far beyond the initial claims and take on a life of its own in public discourse. The legal team's role is vital in identifying such areas of risk, because we need to create a bridge between the legal arguments and what Shell is actually doing. Words and actions.

It is about how we as a company perform, how we behave and how we communicate. It is about winning in the court of public opinion as well as the court of law.

So, what are we doing as a company?

We are taking actions big and small. From the fundamentals of restructuring our portfolio, to the step, last month, of appointing our first lawyer dedicated to energy transition issues.

Shell takes climate change seriously, and supports the goals set by the Paris agreement. We are taking significant steps now and in the long term. In 2016, we set up our New Energies business, which concentrates on new fuels and electricity, and we will invest up to \$2 billion a year in it until 2020.

Last year, we announced our ambition to halve the net carbon footprint of our energy products by 2050 – including emissions caused by the consumption of our products. No other company in our industry is doing this.

This is what we are doing at Shell – and what we all do now matters.

Just ask Nicole.

The Present

This brings me back to where I started: the present. Our uncertain time.

Just think of those commuters, and how disruption became an opportunity.

The global legal team has a new discipline. A way of thinking more broadly, more creatively.

Where once detail and precedent were our guides, now we look into the future too.

The micro view and the macro. Risks – and opportunities.

We must learn to absorb different perspectives within our companies ... our industries ... from other industries... and in the wider world. This uncertain time is our time to learn, to change and to find a better way.

We can and should learn from each other to deal better with a VUCA world.

To view complete remarks: <https://www.shell.com/media/speeches-and-articles/2018/opportunity-in-an-uncertain-time.html>.

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Lex Mundi has developed a custom horizon scanning tool for organizations to stay abreast of their exposure to regulatory risk developments.

Upon request for a regulatory risk Horizon Scan (some conditions apply), you will be provided with a report matched to your organization's geographical footprint. The report provides a snapshot of the areas of regulatory risk to which your company is most exposed, including a prioritization of areas of highest risk along with an accompanying summary tailored to your organization and industry.

For further information on the Lex Mundi Horizon Scanning Tool, contact:

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