

**C L I F F O R D  
C H A N C E**

**DUE DILIGENCE AND LEGAL REPORT WRITING**  
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14 SEPTEMBER 2023

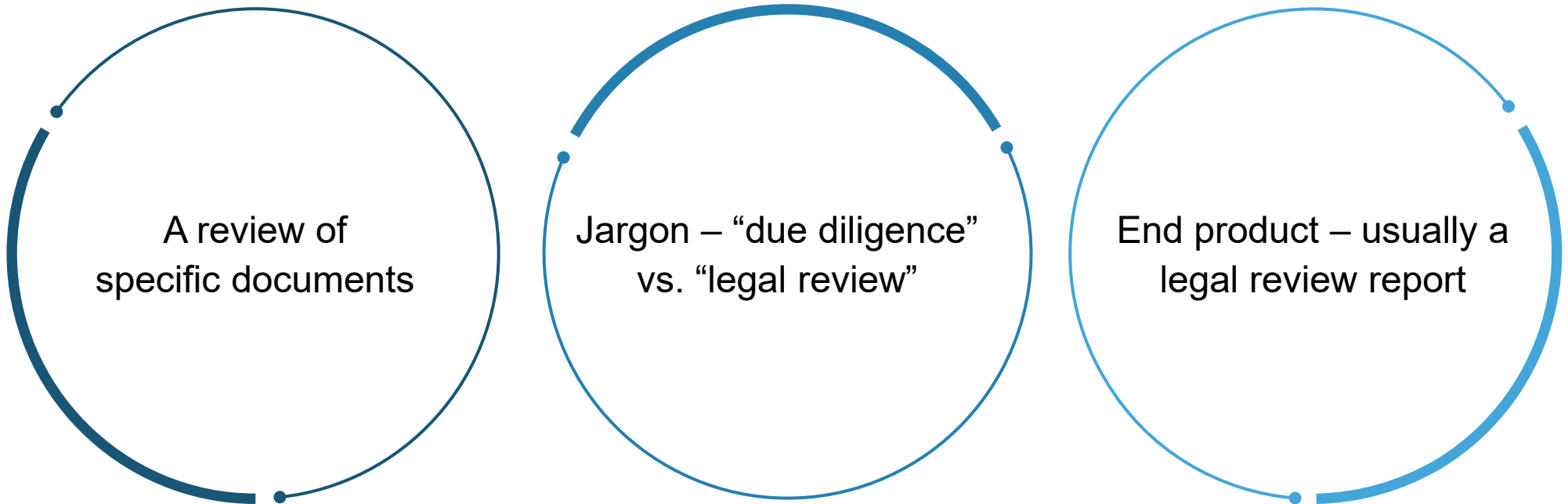
# AGENDA

- 1 Introduction
- 2 Legal review process in the context of an acquisition
- 3 Structuring a legal review report in the context of an acquisition
- 4 The “practical side” of legal review
- 5 Bridging the legal review report to the transaction document and post-completion
- 6 The art of “adding value” to the legal review report



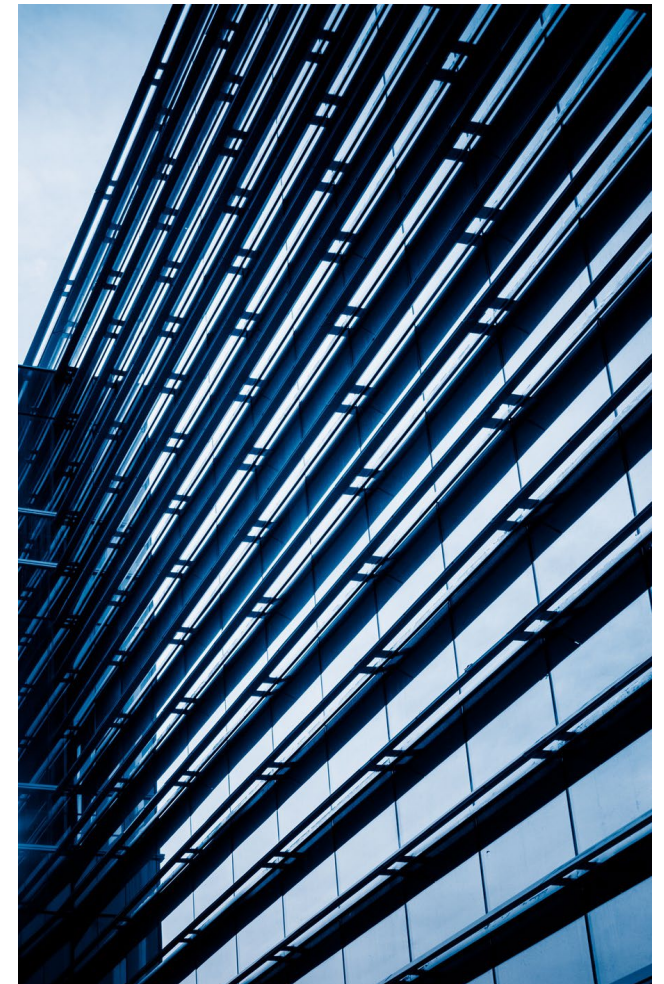
# **1. INTRODUCTION**

# WHAT IS LEGAL REVIEW?



# WHAT IS THE PURPOSE OF LEGAL REVIEW?

- Depend on the type of transaction in question.
- Acquisition – Buyer’s perspective
  - caveat emptor
  - assess the target/business in question
  - verify accuracy of Seller’s representations, warranties and disclosures.
- Acquisition – Seller’s perspective
  - facilitate disclosures (VDD).
- Issuance of public documents e.g. prospectus
  - ensure document complete, accurate and not misleading.



# WHY IS LEGAL REVIEW RELEVANT TO YOU?

Frequently carried out by trainees/ junior lawyers.

Crucial to client – must be done well.

Reliance placed on accuracy of reporting.

Professional negligence/civil liability contribution.



## **2. LEGAL REVIEW PROCESS IN THE CONTEXT OF AN ACQUISITION (A BUYER'S PERSPECTIVE)**



# WHAT IS THE DEAL?

**Ascertain client's commercial objectives with respect to the proposed acquisition, e.g.:**

- would the client acquire 100% of the target?
- does the client have any existing interest in the target?
- would the client rely on the existing management to continue the business operations of the target?
- PE investor?



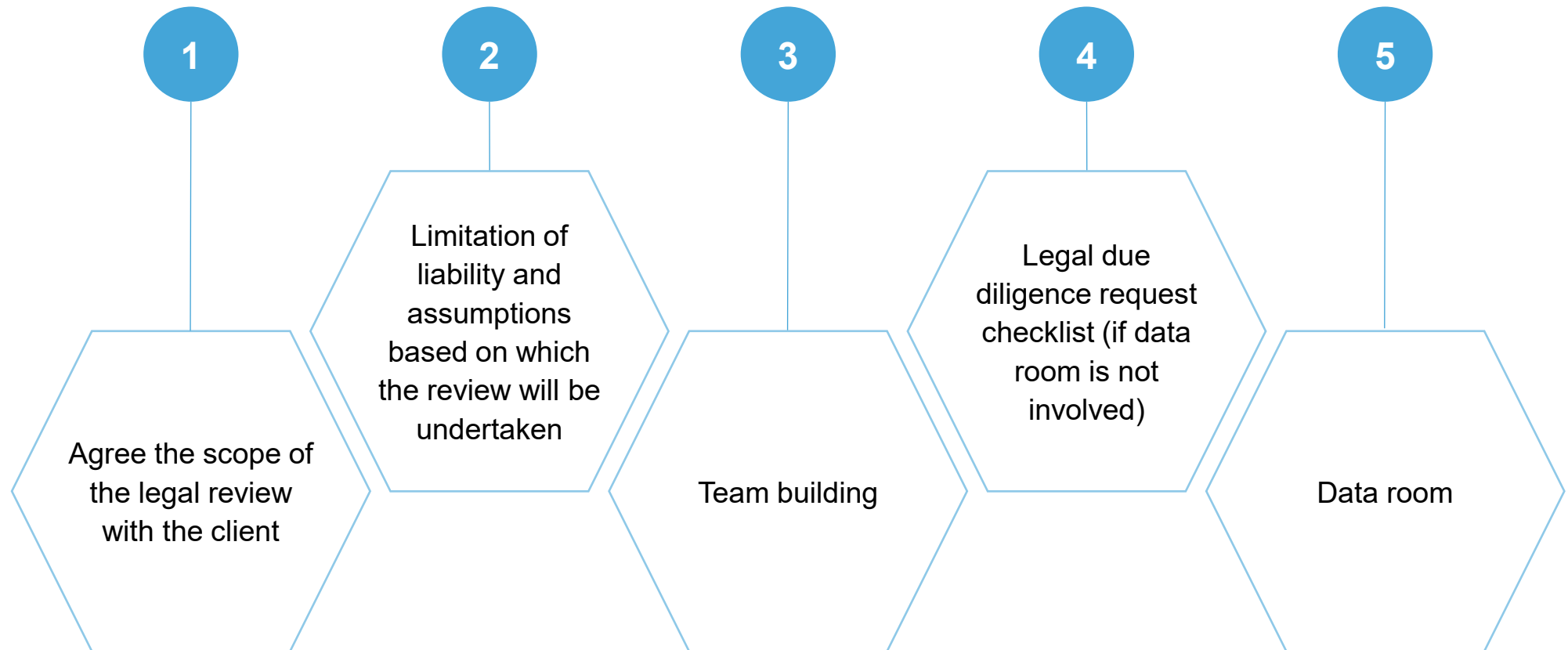
# WHAT SHOULD THE LEGAL REVIEW REVEAL?

**In general, we need to identify any (potential) problems/risks before the client is contractually committed to proceed:**

- any deal breakers?
- any issues affecting pricing?
- any conditions precedent to completion (e.g. regulatory approvals/third party consent)?
- any irregularities that need to be rectified, say, before completion?
- any matters that should be covered by a Seller's indemnity?
- any material or onerous contracts?
- any risks pertaining to the acquisition or the post-acquisition operation?

**AND, can the problem/risk be fixed/mitigated?**

# HOW A LEGAL REVIEW IS STRUCTURED?



# TYPICAL SCOPE OF LEGAL REVIEW

Covered areas	Excluded areas
<ul style="list-style-type: none"><li>• Corporate</li><li>• Regulatory and licences</li><li>• Material contracts</li><li>• Real estate</li><li>• IP</li><li>• IT</li><li>• Financial indebtedness</li><li>• Litigation</li></ul>	<ul style="list-style-type: none"><li>• Insurance</li><li>• Environmental</li><li>• Tax</li><li>• Anti bribery and anti corruption</li></ul>

# HOW TO IMPLEMENT THE LEGAL REVIEW?



1. Kick off meetings.
2. Reporting lines.
3. Meeting with the management of the target/business.
4. Further due diligence requests for documents.
5. Updating of documents/data room.
6. Conducting searches e.g. companies, land, IP, litigation and Official Receiver/winding-up.
7. Any industry specific regulatory aspects/background research needed?
8. Updating of documents/data room.
9. Closing down the report.



### **3. STRUCTURING A LEGAL REVIEW REPORT IN THE CONTEXT OF AN ACQUISITION (A BUYER'S PERSPECTIVE)**

## BASICALLY TWO METHODS OF REPORTING ...

### Full blown report vs. “By-exception” report

```
graph TD; A[Full blown report vs. "By-exception" report] --- B[Full blown report]; A --- C["By-exception" report];
```

- Full blown report

- Much more detailed.
- Contain document summaries.

- “By-exception” report

- Highlight material issues to client.
- No summaries.

# STRUCTURE OF A LEGAL REVIEW REPORT

## 1 Framework of a typical M&A legal review report

- Overview.
- Report highlights.
- Executive summary.
- Body of report.
- Scope, exclusions, limitations, assumptions and addressees.
- Definitions.
- Schedules/annexures.

# STRUCTURE OF A LEGAL REVIEW REPORT

## (CONTINUED)

### 2 Body of a legal review report

- Where appropriate:
  - identify the issues/risks and explain
  - come up with a solution/recommendation
  - ideally should prioritize the issues
  - scope, exclusions, limitations, assumptions and addressees.
- Frequently used recommendations:
  - price adjustment
  - further due diligence
  - indemnity
  - specific warranties (note limitations)
  - conditions precedent
  - undertakings (post-closing)
  - completion audit
  - commercial/financial issues or deal structure.



# **STRUCTURE OF A LEGAL REVIEW REPORT**

## (CONTINUED)

**3 Contributors should use the same set of definitions**

**4 Consistent house style**

**5 One person to consolidate contributions and update the report**

**6 Incorporate overseas counsel's report**

- Depend on the scope of review covered by overseas counsel.
- Time available.
- Quality of overseas counsel's report.
- Any follow up questions for overseas counsel?

# **STRUCTURE OF A LEGAL REVIEW REPORT**

## (CONTINUED)

### **7 Some practical tips for writing the report**

- “Plain English”.
- What does the reader look for?
- The reader may not have the benefit of reading the underlying documents.
- Always bear in mind client’s commercial objectives.

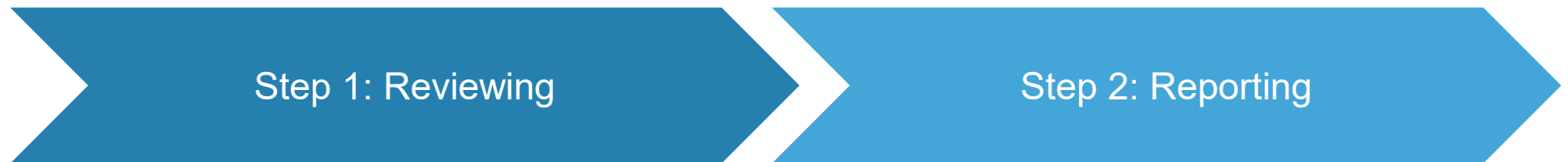


## **4. THE “PRACTICAL SIDE” OF LEGAL REVIEW**

# THE “PRACTICAL SIDE” OF LEGAL REVIEW

In the context of a share acquisition

A two-step process:



# THE “PRACTICAL SIDE” OF LEGAL REVIEW

## (CONTINUED)

### Step 1: Reviewing

#### 1. What to review?

- depends on target but invariably:
  - company documents/“constitutional” documents
  - contracts – commercial, employment, insurance, stock options, etc.
  - regulatory documents – licences, permits, government approvals, etc.
- Note sub-categories – IP, IT, real estate, insurance, pensions and tax etc.

#### 2. How to tackle company documents?

- Sort out the following issues before you start:
  - obtain structure chart
  - foreign counsel may need to be engaged
  - obtain client’s instructions.

# THE “PRACTICAL SIDE” OF LEGAL REVIEW

## (CONTINUED)

### Step 1: Reviewing (continued)

#### 3. Singapore companies – types of documents

- Register of members.
- Register of charges.
- Register of directors.
- Company search results
  - certificates of incorporation and, if appropriate, name change
  - constitution
  - registered charges.
- Minutes/resolutions.
- Licences and permits.

#### 4. Singapore companies – things to look for

- Ownership/Shareholding position.
- Power restrictions.
- Decision making – directors, quorum, voting and seal.
- Encumbrances.
- Irregularities and discrepancies.

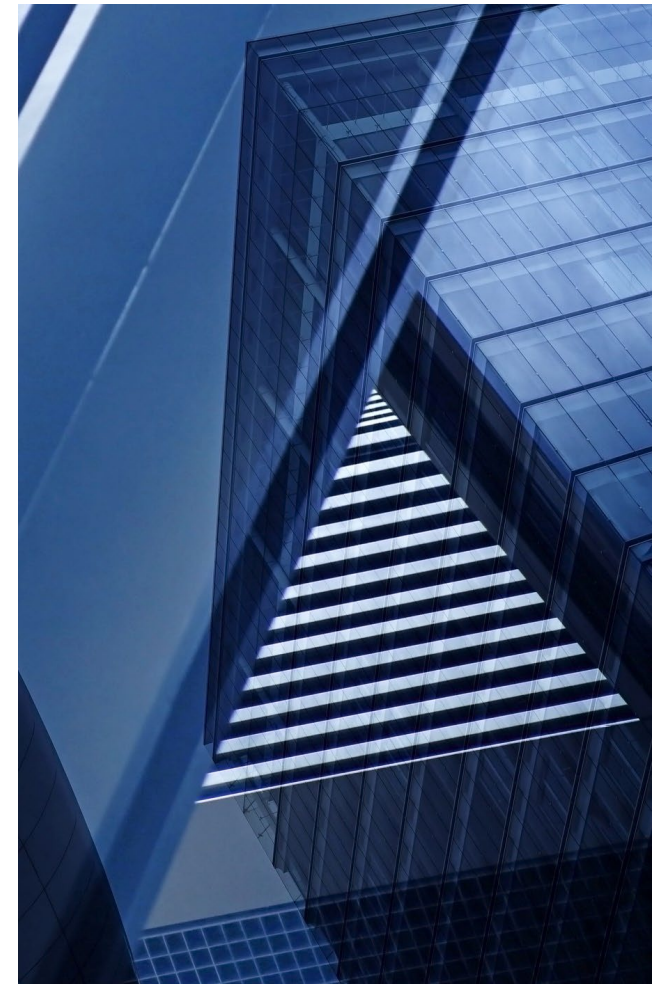
# THE “PRACTICAL SIDE” OF LEGAL REVIEW

## (CONTINUED)

### Step 1: Reviewing (continued)

#### 5. Commercial contracts – things to look for

- Parties.
- Intra-group contracts i.e. counterparty is a member of seller’s group.
- Execution.
- Governing law.
- Change of control vs. assignment.
- Term and termination.
- Events of default.
- Restrictive covenants/other unusual provisions.
- **Seemingly minor documents may be important!**
- **Consider using the LSC or processing documents in Kira to help with extraction.**



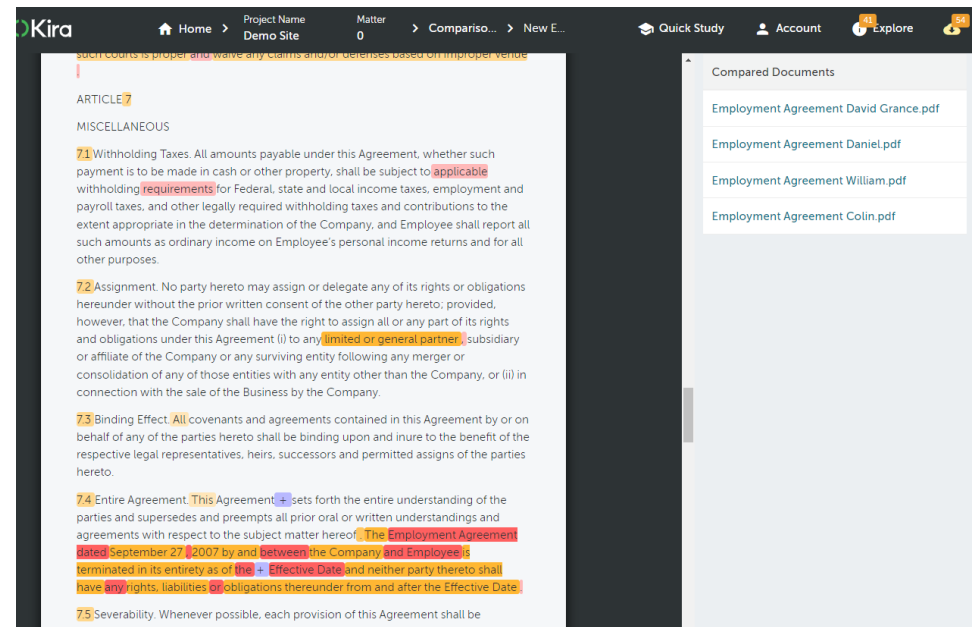
# THE “PRACTICAL SIDE” OF LEGAL REVIEW

## (CONTINUED)

### Step 1: Reviewing (continued)

#### 6. Speed up review

- Template documents (e.g. Employment contracts, [SPAs], Leases)
  - Upload to **Kira** and run comparison against a base template.
  - Identify where the terms differ and what to focus on.
- Extract governing law, language, OCR quality
  - If able to download documents, upload and process in **Kira**.





# THE “PRACTICAL SIDE” OF LEGAL REVIEW

## (CONTINUED)

### Step 1: Reviewing (continued)

#### 7. Allocate documents

- Set-up a VDR Index allocation tracker on **CC Connect** to assign documents and/or collate Q&As.

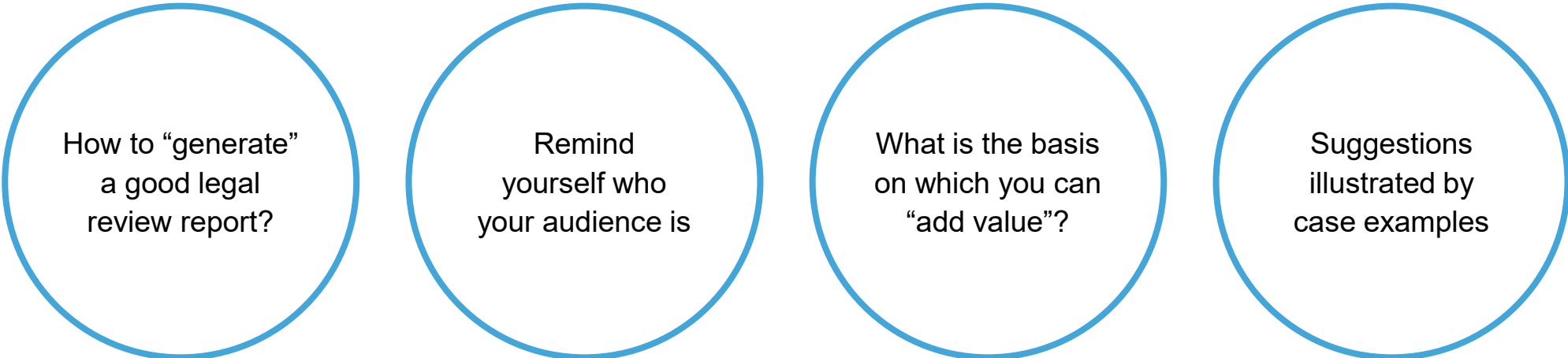


Engage Best Delivery team  
early to assist with set-up!

# THE “PRACTICAL SIDE” OF LEGAL REVIEW

(CONTINUED)

## Step 2: Reporting



How to “generate”  
a good legal  
review report?

Remind  
yourself who  
your audience is

What is the basis  
on which you can  
“add value”?

Suggestions  
illustrated by  
case examples

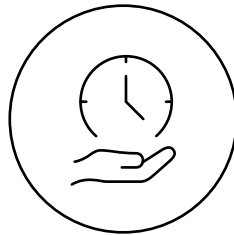
# THE “PRACTICAL SIDE” OF LEGAL REVIEW

(CONTINUED)

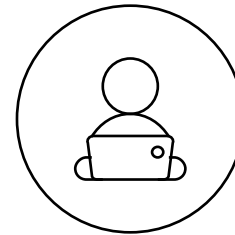
Ensure that the following “interim steps” are taken properly:



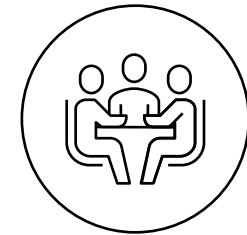
Gather queries



Control timing



Consider materiality  
and inform client  
if necessary



Consult experts if  
necessary (after taking  
instructions from client)

# THE “PRACTICAL SIDE” OF LEGAL REVIEW

## (CONTINUED)

### Case Example 1

*“According to the list of material contracts provided by the management of the Target, the Target was stated to have 8 material contracts, the details of which are set out below. However, we have only located 7 of the material contracts in the virtual data room.*

*We had raised a verbal enquiry with management and was subsequently informed that the Target in fact had 9 material contracts.”*

**What should your next step be?**



**5. BRIDGING THE LEGAL REVIEW REPORT TO THE TRANSACTION DOCUMENT AND POST-COMPLETION**



Deal Certainty	Value	Integration/Separation
<p>Identify issues that go to the heart of whether to do the deal. e.g.:</p> <ul style="list-style-type: none"><li>• [Contract [•] is fundamental to the Business and contains a change of control provision.]</li><li>• [Regulatory approval is required in [•] and [•].]</li></ul>	<p>Identify issues that go to the price as opposed to whether to do the deal – i.e. price reduction issues. e.g.:</p> <ul style="list-style-type: none"><li>• [Project [M&amp;A]: The Group must pay deferred consideration of EUR [•] on [•].]</li><li>• [Dispute [•]: Management has decided not to appeal the court decision and will pay damages of EUR [•] (EUR [•] in excess of the provision in the accounts).]</li></ul>	<p>Identify issues which will need to be considered for integration/separation post completion. e.g:</p> <ul style="list-style-type: none"><li>• The procurement agreement between the Seller Group and ITco will not apply after Completion. [As such, a transitional services agreement is recommended/a new procurement agreement between ITco and a new procurer is recommended, prior to Completion.]</li><li>• [The template employment agreement should be updated post-Completion to comply with the latest regulations prescribed by the Indonesian authorities.]</li></ul>

## SPA Bridge

### Recommended conditions precedent

- [e.g. change of control consent from [counterparty] under the [contract]]
- [e.g. approval from the [authority]]

### Recommended specific indemnities

- [e.g. indemnity in respect of [contingent liability item]]

### Recommended specific undertakings

- [e.g. [target] to renew the [related party lease agreement] on terms acceptable to the [buyer] prior to completion]

### Recommended specific warranties

- [e.g. the template customer contract terms and conditions disclosed in the VDR as VDR Document [ ] are used in substantially all customer transactions, with no material deviations as to commercial terms]

### Others

- [e.g. to include specific provisioning policies in the specific accounting policies of the completion adjustment schedule.]



## **6. THE ART OF “ADDING VALUE” TO THE REPORT**

# THE ART OF “ADDING VALUE” TO THE REPORT

## Case Example 1 (extension)

*“We understand from management that there are in fact 9 material contracts, and would highlight that:*

- i. the material contract entered into between the Target and ABC Company was not signed by ABC Company; and*
- ii. the term of the material contract entered into between the Target and XYZ Company will expire on 30 September 2023.”*

**Why is this not good enough? What will be the client’s reaction upon reading this? How can we further add value?**



# THE ART OF “ADDING VALUE” TO THE REPORT

## (CONTINUED)

### Case Example 2

*“With regard to the portfolio licence agreement between Company M and the Target dated 30 April 2018, Company M grants the Target a non-exclusive licence to make, use, offer for sale, sell and lease products and methods under all patents and patent applications set out in Schedule 1 to this Report (the “**Company M Licence**”).*

*However, the Company M Licence will terminate upon a “change of control” which will be triggered by the Purchaser’s acquisition of the issued share capital of the Target.”*

# THE ART OF “ADDING VALUE” TO THE REPORT

## (CONTINUED)

### Case Example 3

*“Company X is the “surviving entity” created upon a legal merger of Company A and Company B (a merger under California law) which took place on 31 December 2020.*

*Among the 65 key commercial contracts (all governed by Singapore law) reviewed by us, 45 were entered into by Company X. The remaining 20 were entered into by either Company A or Company B prior to 31 December 2020.*

*We have obtained verbal assurance from the Target’s management that the said 20 contracts remained effective after the merger as if Company X was the original contracting party.”*

# THE ART OF “ADDING VALUE” TO THE REPORT

## (CONTINUED)

### Case Example 4

*“We note that the target company, Company F entered into Credit Agreement No. 6 entered into with Bank XXX dated 9 October 2020 (the “Credit Agreement No. 6”). Based on Credit Agreement No. 6, we also note that Company F is bound by several covenants, among others... (b) Company F has to ensure that its shareholders increase the paid-up capital of Company F to at least IDR45,000,000,000, or equal to USD3,000,000, at the latest on 30 September 2023.*

*Based on Company F’s articles of association, the current paid-up capital of Company F remains at IDR15,000,000,000, or equal to USD1,000,000.*

*We further understand that the purchaser is contemplating whether to refinance all the facility agreements entered into by Company F.”*

# THE ART OF “ADDING VALUE” TO THE REPORT

## (CONTINUED)

### Case Example 5

*“We understand from the Management Discussion that the Company has not entered into any employment agreements with the senior management of the Company.*

*We further understand from the Management Discussion that the terms of remuneration to such senior management have always been decided by the board of directors of the Company. We have requested but, as at the Cut-off Date, have not been provided with any documents relating to such decisions.”*

**What should you recommend if the client wishes that the senior management of the Company will continue to be employed by the Company for a period of two years after completion of the proposed transaction?**

# THE ART OF “ADDING VALUE” TO THE REPORT

## (CONTINUED)

### Case Example 6

*“We note that the Group enters into customer contracts with its customers, and under such contracts, the Group administers and processes medical claims for individual employees of such customers.*

*We would highlight that a few of the key customers contracts of the Group contain restrictions on the use of data collected. Many of the key customer contracts of the Group also require the Group to comply with applicable data privacy and protection laws and regulations (including the Personal Data Protection Act).”*

**The client informs you that it wishes to purchase the Group and “monetise” the valuable personal data collected by the Group via the key customer contracts (e.g., for marketing of health products). What would be your recommendation?**

# THE ART OF “ADDING VALUE” TO THE REPORT

## (CONTINUED)

### Case Example 7 – assuming a business acquisition

*“We have reviewed copies of 4 waste disposal licences issued by the National Environmental Agency (“NEA”) which, according to management of the Target, are essential to the Target’s operation.*

*Three of these licences are not transferable and the remaining one is transferable if consent of the Director of the NEA is obtained.”*

**Also, what if this were a share acquisition instead?**

# WHY CLIFFORD CHANCE

OUR INTERNATIONAL NETWORK

# 33 OFFICES

# 22 COUNTRIES

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CASABLANCA

HOUSTON

MUNICH

RIYADH<sup>1</sup>

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SINGAPORE

KYIV<sup>2</sup>

BUCHAREST

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1. AS&H Clifford Chance, a joint venture entered into by Clifford Chance LLP.

2. Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

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