

M & A

BUYING AND SELLING A BUSINESS LEGAL CONCERNS

[Private and non-listed companies]

Wichien Harnpraween

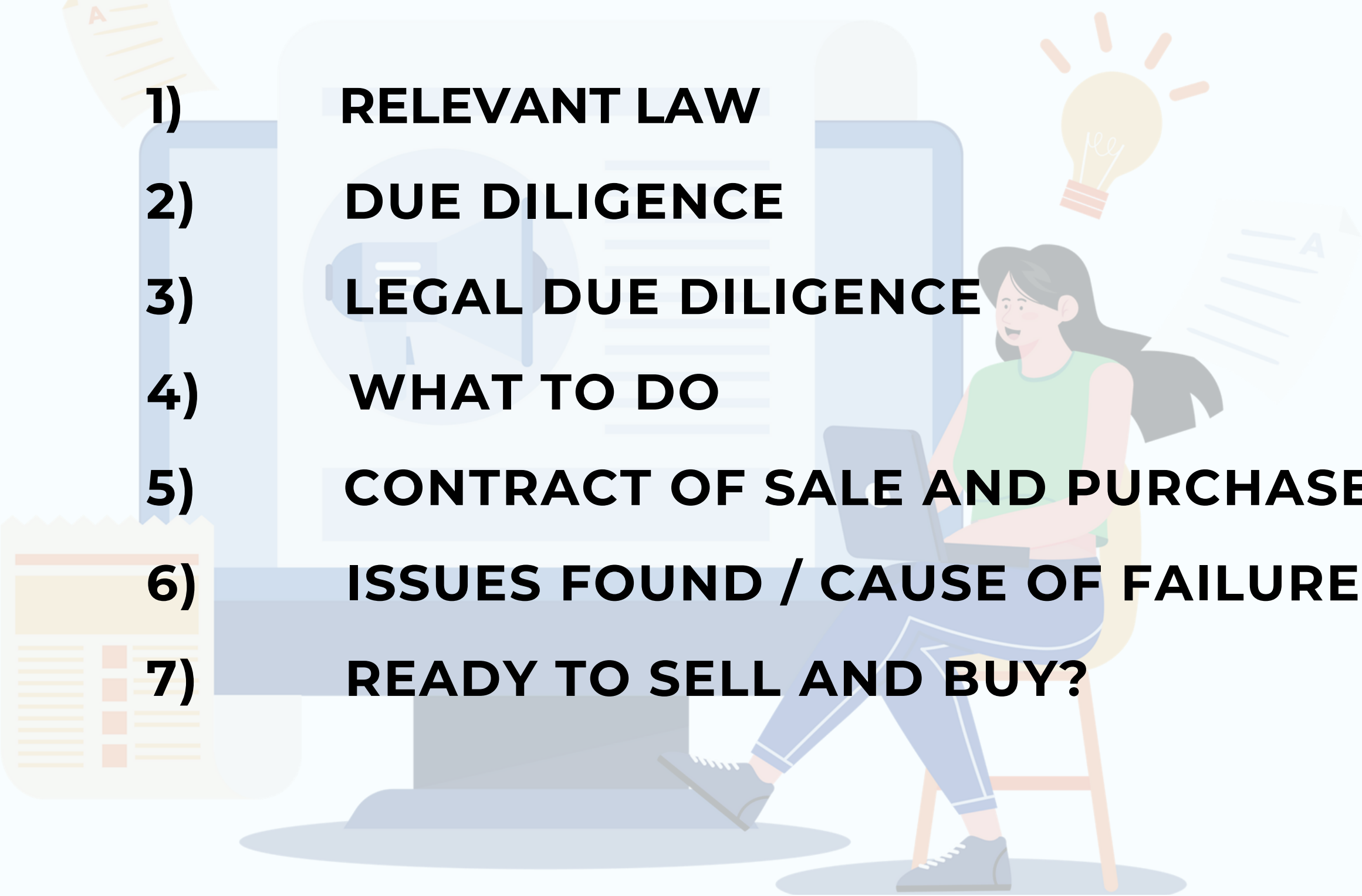


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CONTENTS

- 1) **RELEVANT LAW**
 - 2) **DUE DILIGENCE**
 - 3) **LEGAL DUE DILIGENCE**
 - 4) **WHAT TO DO**
 - 5) **CONTRACT OF SALE AND PURCHASE**
 - 6) **ISSUES FOUND / CAUSE OF FAILURE**
 - 7) **READY TO SELL AND BUY?**
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RELEVANT LAWS

Civil and Commercial Code

- Buying and Selling Contract (Sections 453 to 517)
- Guarantees (Sections 680 to 701)
- Companies and Partnerships (Sections 1012 to 1273)

Revenue Code

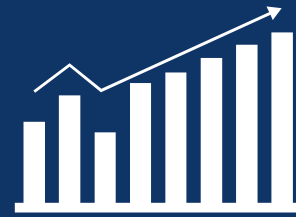
- Corporate Income Tax
- Personal Income Tax
- Stamp duty
- VAT



DUE DILIGENCE



Legal – lawyers



**Finance – accountants /
financial advisors**



**Products – Product
specialist / Engineer /
market experts**

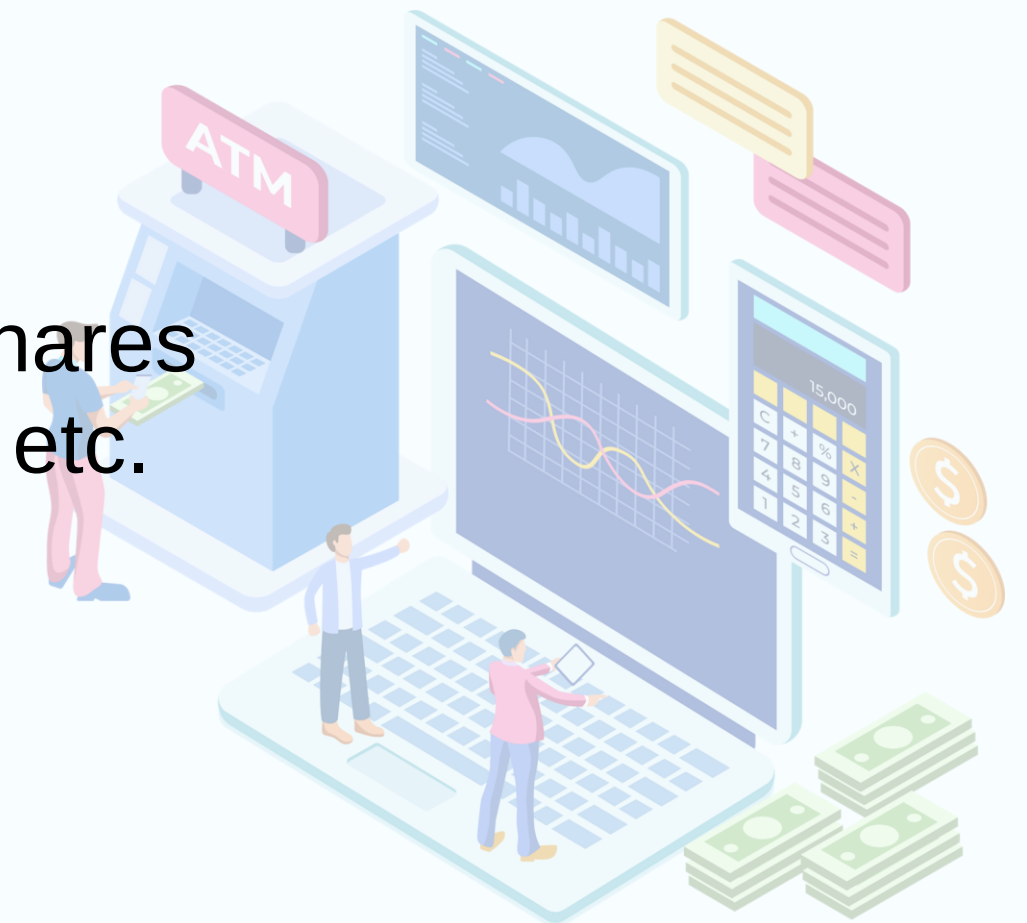
LEGAL DUE DELIGENCE

Business Transfer

- Transfer (Buy-Sell) of shares
- Transfer of assets e.g., land, buildings, licenses, employees, customers, stock, etc.

To be checked

- Legal status of the companies shares
- Legal status of assets, licenses, etc.



LEGAL DUE DILIGENCE

What is Legal Due Diligence ?

Legal due diligence is the process of collecting and assessing all of the legal documents and information relating to the Target Company.

It gives both the buyer and seller the chance to scrutinize any legal risks, such as lawsuits or intellectual property details, before closing the deal.



WHAT TO DO

To identify potential risks on the legal status of the “Target Company”, including licenses, permits or registrations in case of machinery, intellectual property rights (e.g., trademark, patents), owners of shares (e.g., person, company, association).

To check legitimate or legal ownership of assets to be sold and encumbrances thereon, such as, title deeds, seizure orders, mortgages, leases, and financial lease contracts.



Company status

- Good standing, any foreign business license, BOI rights and obligations.
- No order of default (failing to file Financial Statements for 3 years or longer).
- No bankruptcy proceedings.
- No special arrangement between shareholders in addition to the Articles of Association, e.g., prevention from selling shares, veto right of other shareholders, etc.

History of shareholding structure from the first owner to the present owner, any transfer by inheritance, gift related document or contract. If by gift, the person or company who transferred the shares must be reviewed also. Bankrupt person cannot make a gift, for example.



Assets

- Ownership
- Associated licenses
- Associated warranties
- Related financial contracts
- Any guarantees by directors / shareholders
- Any related security interests, e.g., mortgage, charge, pledge
- Any encumbrances, e.g., servitude, usufruct, lease, etc.
- Any importation issues
- Any location / zoning issues

Contract

- Lease or leasing agreement, financial service, hire-purchase, supply contract with supplier, customers, novation agreement, loan agreement, sub ordination agreement, shareholders or joint venture agreement between Target Company and others, etc.

Licenses

- Foreign business license to operate the business
- Export / Import license
- IP (Trademarks (including G.I.), Patents, Copyright, etc.
 - Interesting case many years ago, lawyers from France sent a notice to a Thai operator that he cannot use the word “Champagne” in relation to his business.
- Factory / Environmental licenses
- Food and Drugs Administration Licenses (FDA)
- Building Construction Permits
- Others.

Report of legal due diligence is made for decision, subject to other types of due diligence i.e., taxation, finance and products.



CONTRACT OF SALE AND PURCHASE

Shares

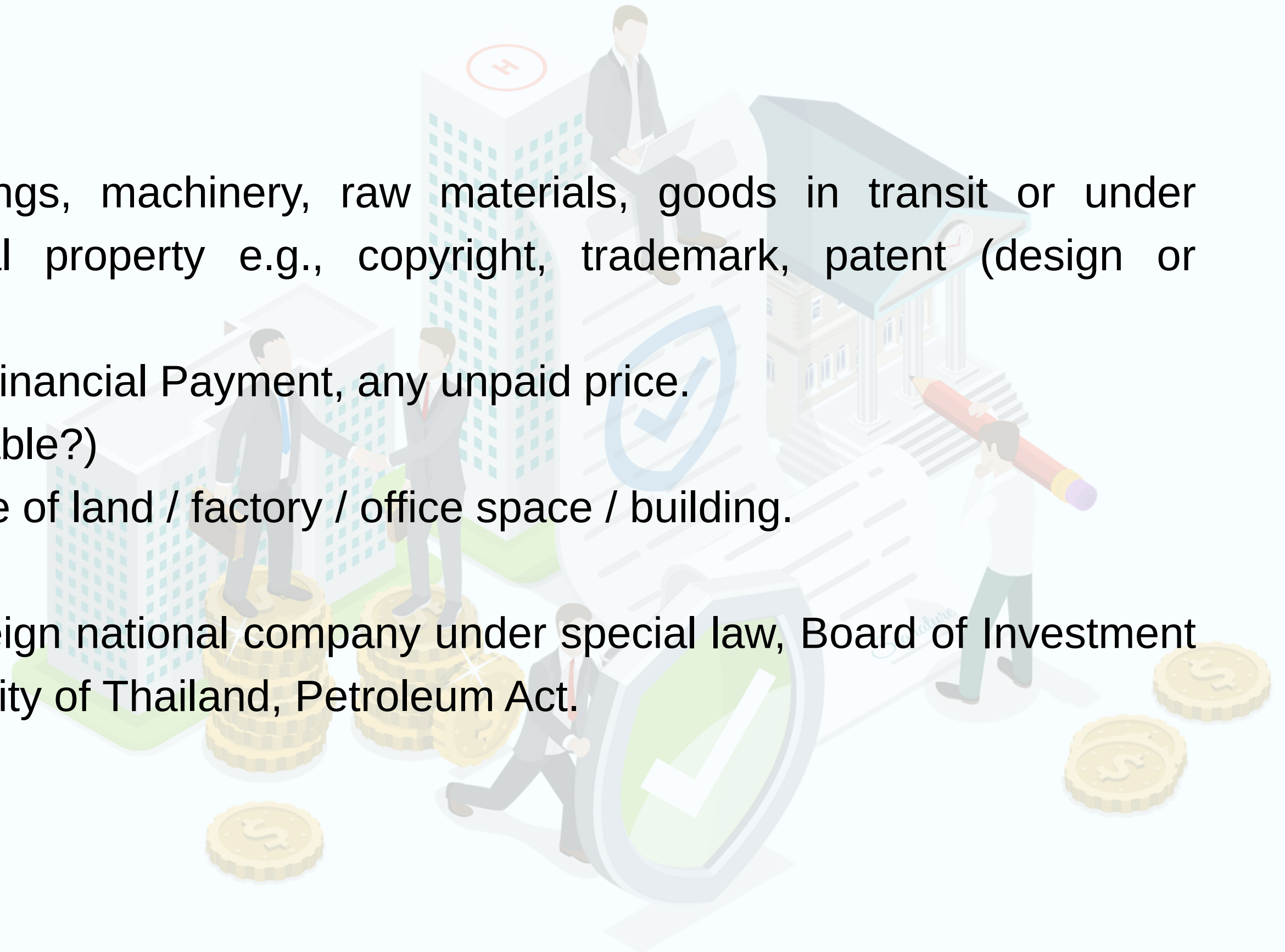
- Ordinary / Preference Shares, any associated rights and obligations, such as consent of the shareholders for transfer.
- Shareholders' agreement between shareholders of the Target Company, to confirm the rightful ownership of the shares or assets to be sold.
- Share price or assets price (to be determined and agreed by the parties).
- Deposit / Finance Payment on Closing Date. (Final day to complete transfer of business)



CONTRACT OF SALE AND PURCHASE

Assets

- List of assets, land / buildings, machinery, raw materials, goods in transit or under production, stock, intellectual property e.g., copyright, trademark, patent (design or invention).
- Pricing / Payment / Deposit / Financial Payment, any unpaid price.
- Associated warranty (transferable?)
- Assignment / Novation of lease of land / factory / office space / building.
- Buy / Sale of land.
- Permission to own land to foreign national company under special law, Board of Investment Office, Industrial Estate Authority of Thailand, Petroleum Act.



CONTRACT OF SALE AND PURCHASE

In case of Acquisition Sale of shares

A new Joint Venture or Shareholders' Agreement should be made between the seller(s) and ensure the cancellation of any previous one.

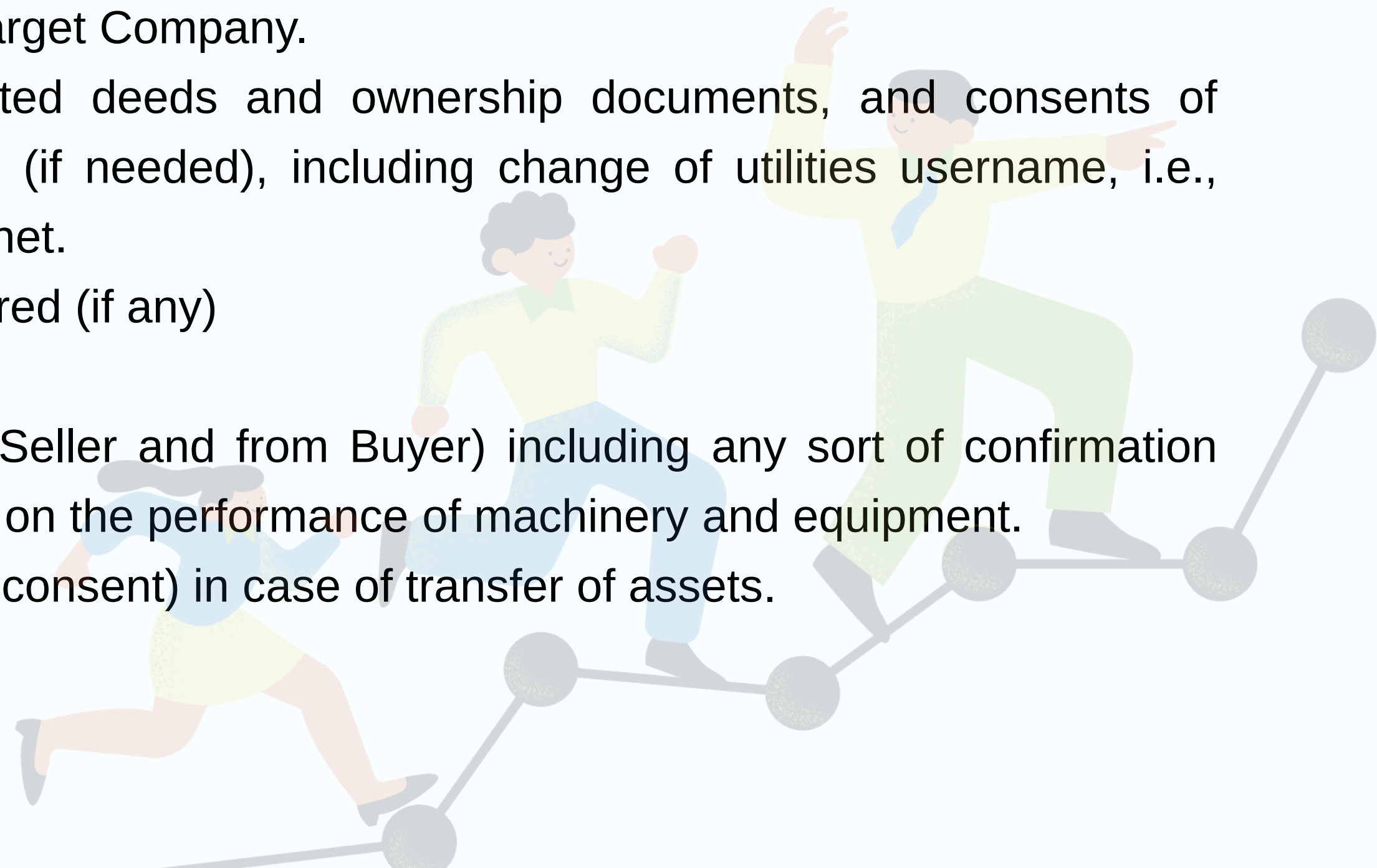


CONTRACT OF SALE AND PURCHASE



Closing Date

- Share Transfer Instrument / Stamp duty Due to be paid by Seller.
- Clearance of tax liability (if any) of the Target Company.
- Delivery of shares or assets, associated deeds and ownership documents, and consents of landlord, lenders or any license owner (if needed), including change of utilities username, i.e., electricity, water supply, telephone, internet.
- Warranty for machinery / assets transferred (if any)
- Insurance coverage transfer (if needed)
- Representations and Warranties (from Seller and from Buyer) including any sort of confirmation from experts e.g., engineer confirmation on the performance of machinery and equipment.
- Transfer of employees (with employees' consent) in case of transfer of assets.



CONTRACT OF SALE AND PURCHASE

Seller's side (representations)

- No other liability to the Target Company / shares or assets acquired, tax liability apart from what is disclosed and accepted by the Buyer.
- Any assessment or claims of any debts and assets to the Target Company before the Closing Date will be the liability of the Seller (Perpetual guarantee).
- Assets Clean and clear of encumbrances and ownership rights (e.g., mortgage discharged) or continuing security interest.
- Contracts with suppliers and customers are true and legal binding.
- No other pending claims from anyone.
- No labour disputes, or pending employment issues.

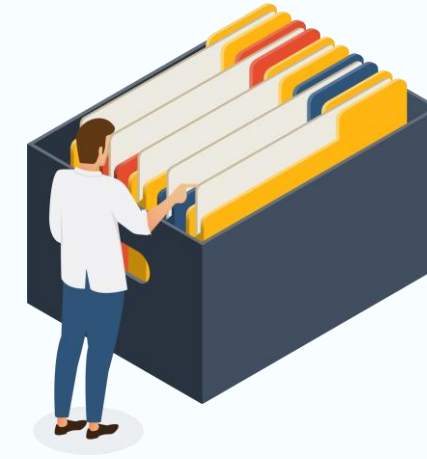


CONTRACT OF SALE AND PURCHASE

Buyer's side

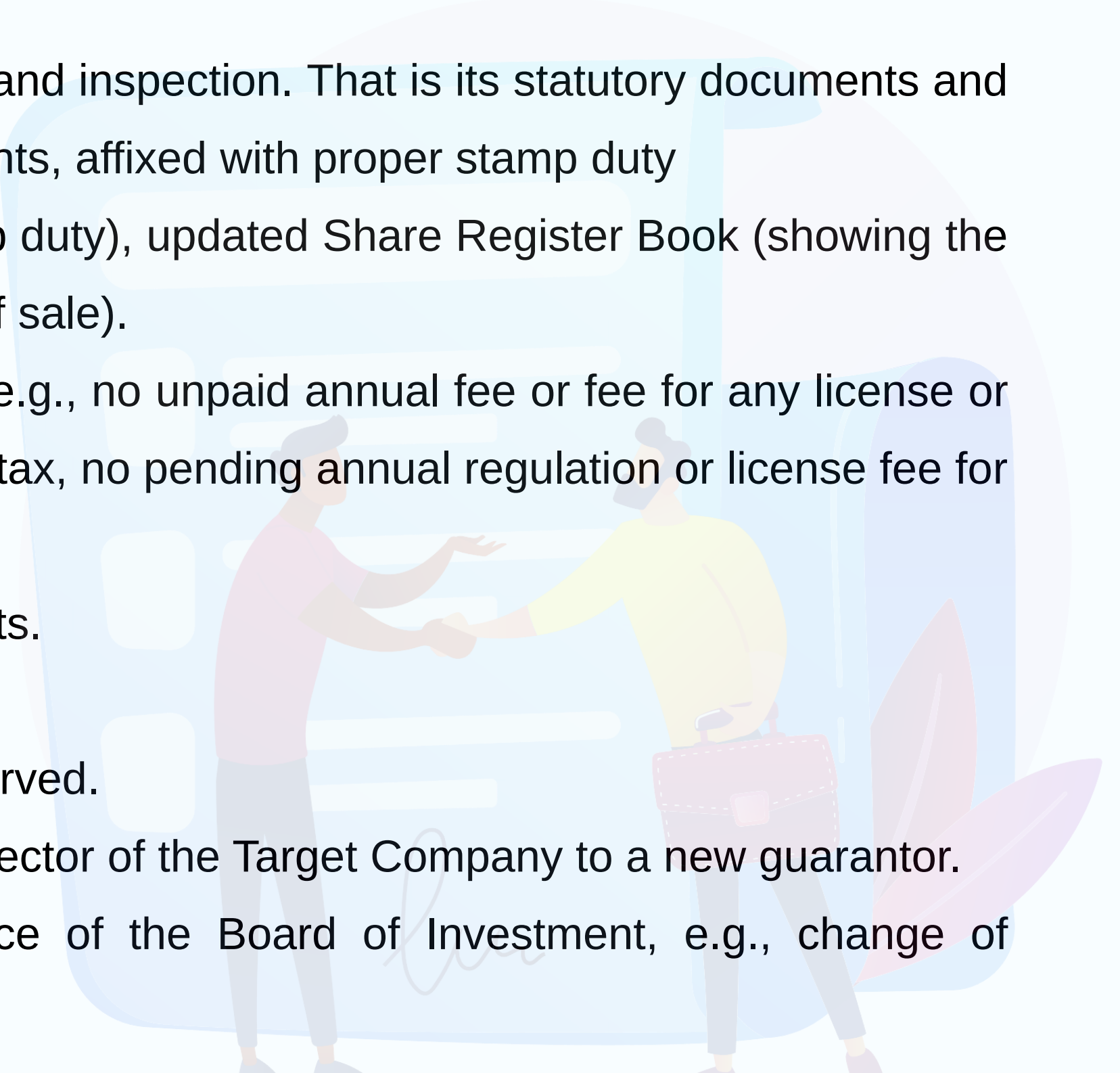
- Sound and legal status to be able to acquire shares or assets.
- Entitlement to hold shares and run the company, e.g., foreign national restrictions under Foreign Business Act.





What Seller should prepare in order not to fail

- All corporate registration documents to be ready for review and inspection. That is its statutory documents and Articles of Association, any previous share transfer documents, affixed with proper stamp duty (if unpaid, penalty is 6 times of the amount of required stamp duty), updated Share Register Book (showing the share holding record from the setting up time until the time of sale).
- All obligations to government authorities should be fulfilled e.g., no unpaid annual fee or fee for any license or permit, no expired licenses or permits, no pending property tax, no pending annual regulation or license fee for any of the assets.
- Check all licenses and permits and intellectual property rights.
- All due and audited financial statements must be up to date.
- Any conditions of loan or borrowing must be fulfilled or observed.
- Check any possibility to change personal guarantor from director of the Target Company to a new guarantor.
- Check conditions of investment promotion from the Office of the Board of Investment, e.g., change of nationality of shareholders.



ISSUES FOUND / CAUSE OF FAILURE

Sometimes, the acquisition deal fails due to legal status and concerns. Here are some examples:

Insufficient proof of share ownership

- No document confirms the rightful owner of the company's shares between the 2nd and 3rd shareholders before the last shareholder and any person cannot be found.

Note: Some buyers will agree to take the risk by having the seller represent and warrant that the shares to be sold are legitimately owned by the seller and there shall be no claim by any persons.



ISSUES FOUND / CAUSE OF FAILURE

Intellectual property rights

- License agreement is not exclusive to the Target Company.
- No license or franchise agreement has been granted by the owner of the trademark or franchise to the Target Company or has expired without renewal.

Expiry

- Licenses to do business have expired.

Zoning restricted

- Location of seller located in restricted area such as forest, residential zoning under Town Planning Law, etc.

Pending Claims or Court Cases

- It is not possible to settle any disputed or litigation involving the Target Company settled before the Closing Date.

READY TO SELL AND BUY?

01

Clear and make inspect corporate document properly. Check history of shareholding, any change of shareholders, supporting documents.

02

Check all licenses and permits.

03

Check all contract obligations / debts including any restriction on change of owner / shareholder.

04

Check ownership documents for all assets, shares, IP rights.

05

Check tax liabilities including customs duty pending unpaid / claims and any of the same settlement.

THANK YOU



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