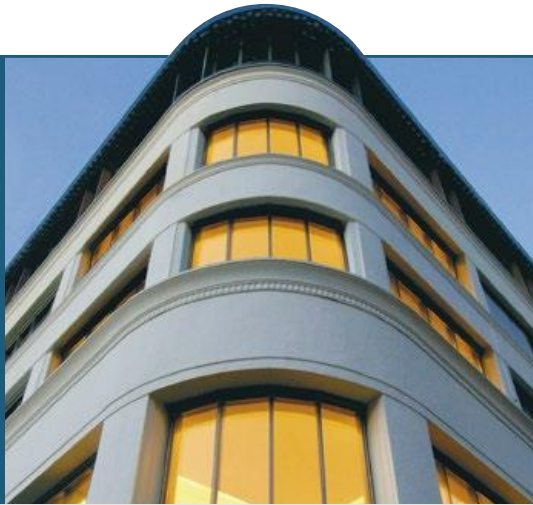


LALIVE



Issues of Documentary Evidence

2015 Dispute Resolution in M&A/JV
Transactions – Tactics, Challenges, Defences

Noradèle Radjai

Royal Castle, Warsaw, Poland, 28-29 May 2015

Different types of documents in M&A Disputes

Claims based on
flawed PPAs or
breach of financial
warranties

- Accounting records
- Transaction records

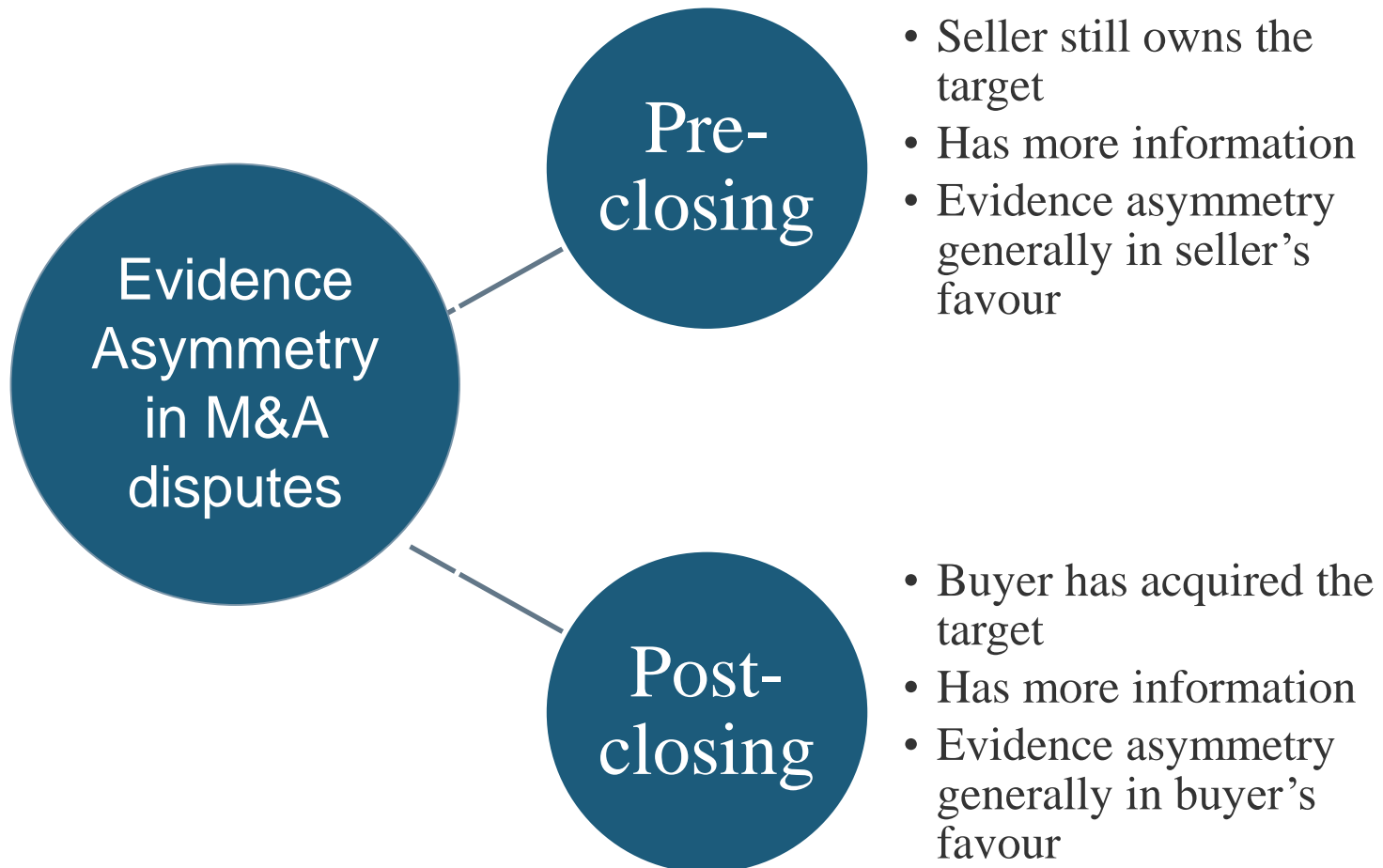
Claims based on
balance sheet
manipulation

- Emails
- SMS
- Meeting minutes

Breach of
exclusivity /
confidentiality

- Emails
- Instant messaging services
- Internal communication

Asymmetry of information



Cases of asymmetry favouring the seller

Post-closing claim that the seller intentionally breached its representations / warranties

Post or pre-closing claim that the seller inflated the target company's past performance

Cases of asymmetry favouring the buyer

Post-closing claim to increase the purchase price in light of the target company's positive performance

Post-closing claim due to the target company's hidden liabilities

Steps to take during the deal to secure documents



Seller

Negotiate temporary, partial and reasonable access rights to the target company's information after the closing

Document the status quo of the target company at key dates to "crystallise" the situation

Negotiate a document retention policy

Redact confidential business information

Strictly limit the seller's access right to documents for the purpose of the dispute
Limit the scope and length of access right

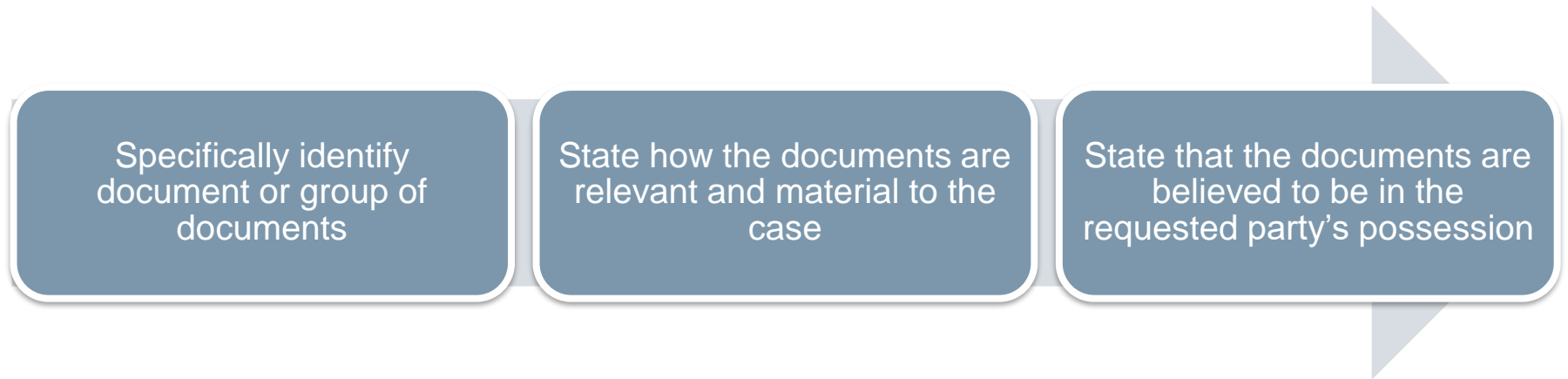
Document the status quo of the target company at key dates to "crystallise" the situation



Buyer

How best to use document production requests

- Document production request under IBA Rules Article 3(3)



- Specificity – identify document, format, subject matter, location, identity of author
- Relevant and material – make reference to the written submission

Document production: issues of confidentiality

- IBA Rules Article 3(13) protects confidentiality erga omnes
- However if the dispute involves direct competitors, as in the M&A field, no guaranteed protection of confidentiality
 - Confidential documents could be disclosed to opposing counsel alone and not its client
 - Appoint an independent expert bound by confidentiality to review confidential documents and report to the tribunal