A photograph of two men in business suits sitting in leather chairs in an office. The man on the left is holding a document and looking at it. The man on the right is also holding a document and looking at it. There are American flags in the background. The image is overlaid with a semi-transparent blue filter.

Phase 5: Confirmatory DD, Closing Discipline, and Day-1 Readiness

Part of the Buyer-Side Legal DD Series

Introduction: Where Diligence Becomes Operational

In the earlier phases of buyer-side legal due diligence, the work is largely analytical. Lawyers collect documents, analyse contracts, identify risks, and convert those risks into deal protections. By the time the transaction documents are negotiated, the legal team has usually built a reasonably clear map of the target's legal landscape.

❑ However, one of the most common mistakes—especially among younger lawyers—is assuming that once the SPA is signed, the real work is over.

In reality, **Phase 5 is where diligence becomes operational.**

This is the stage where the legal team ensures that the transaction that closes is actually the transaction that was analysed, negotiated, and approved. It is the moment where theory meets execution. Many deals that appear perfectly structured on paper still encounter serious problems at closing because the last-mile legal discipline was weak.

Phase 5 therefore focuses on three fundamental questions:

Question 1

Are the assumptions underlying the buyer's decision still true at closing?

Question 2

Have all contractual protections been properly implemented?

Question 3

Can the buyer legally and practically operate the business immediately after closing?

This phase combines confirmatory due diligence, covenant monitoring, closing mechanics, and Day-1 integration readiness. It is a phase that demands **precision, patience, and scepticism.**

Confirmatory Due Diligence: Checking That the Picture Has Not Changed

Once the main diligence is completed and the SPA is signed, the buyer's legal team must perform confirmatory due diligence. The purpose is not to repeat the entire diligence process, but to verify that the most important facts remain accurate.

A transaction can sometimes take weeks or months between signing and closing. During this period, the target continues to operate its business. Contracts may change, employees may leave, regulators may issue notices, or disputes may arise. Any of these developments can materially affect the risk profile of the deal.

Confirmatory diligence therefore focuses on the issues that mattered most in the earlier phases. The legal team should revisit the key red and amber issues identified in the Issue Register and confirm whether their status has changed.

Rather than asking vague questions such as "has anything changed?", the legal team should structure the inquiry around specific categories:

- Confirm whether any **material contracts** have been amended, terminated, or defaulted since the last diligence review.
- Ask whether **regulators** have issued any new inquiries or notices.
- Confirm whether any **senior employees** have resigned or been promised new compensation arrangements.
- Verify whether any **cyber incidents, operational disruptions, insurance claims, or litigation developments** have occurred during the interim period.

Confirmatory diligence should also include a review of new documents uploaded to the data room, because sellers sometimes add information quietly after signing.

The goal is simple: **ensure that the factual foundation on which the buyer made its decision remains intact.**

Certain developments should immediately raise concern. These include late disclosure of material issues shortly before closing, unexpected amendments to key customer contracts, new regulatory notices, departures of founders or senior management, or the discovery of new disputes or defaults. When such matters arise, the legal team must update the Issue Register and assess whether additional deal protections are required.

The output of confirmatory diligence should be a short update memo, an updated Issue Register reflecting post-signing developments, and a clear statement of whether any new risks require action.

Monitoring Signing-to-Closing Covenants

Once the SPA is signed, the contractual provisions governing the period between signing and closing become extremely important. These provisions—often called **pre-closing covenants**—are designed to prevent the seller from materially altering the business before the buyer takes control.

- ❑ Many junior lawyers treat these covenants as mere drafting language. In reality, they should be treated as **operational obligations that must be actively monitored.**

The legal team should extract each covenant from the signed agreement and track it in a dedicated covenant compliance schedule. Typical covenants include:

Ordinary Course

Obligation to operate the business in the ordinary course

Financial Restrictions

Restrictions on incurring new debt or granting security interests

Contracts

Limitations on entering unusual contracts

Insurance

Obligations to maintain insurance coverage

Employees

Commitments not to terminate key employees

Approvals

Undertakings to pursue required approvals or consents

Each covenant should be linked to clear evidence demonstrating compliance. The tracker should identify who is responsible for compliance, what proof is required, and whether the covenant remains satisfied.

Breaches can occur in subtle ways. A company might enter a new contract that falls outside its ordinary course of business. It might grant a retention bonus to a key employee without notifying the buyer. A permit might lapse because a renewal deadline was missed. A dispute might be settled without the buyer's knowledge.

These actions may appear minor, but they can materially affect the economics or risk profile of the deal.

If a covenant breach occurs, the legal team must decide whether it can be cured before closing, whether it should be waived with compensation or additional protection, or whether the closing should be delayed.

Conditions Precedent: The Control Panel of the Deal

The conditions precedent (CPs) represent the **legal gateway to closing**. They ensure that the buyer is not forced to complete the transaction unless critical legal requirements have been satisfied.

In practice, the CP list often includes:

Common Conditions Precedent

- Regulatory approvals
- Merger control clearance
- Foreign investment approval
- Third-party consents
- Lien releases
- Corporate authorisations
- Restructuring steps
- Confirmation that no material adverse event has occurred

A disciplined legal team treats the CP tracker as the control panel of the transaction.

Every CP should be extracted from the agreement and tracked in a central schedule. Each entry should identify the responsible party, the form of evidence required to prove satisfaction, and the status of completion.

The most common mistake at this stage is **prematurely assuming that a condition has been satisfied**. A CP should not be marked as completed merely because the seller expects approval or because a filing has been submitted. The condition should be considered satisfied only when the actual documentary evidence—such as a signed consent letter, regulatory approval notice, or lien release filing—is in hand.

Legal teams should also be alert to situations where approvals are issued but subject to conditions that affect the business or transaction economics.

At this stage, the legal team should maintain a **closing readiness summary** showing which conditions are satisfied, which remain pending, and which may require waiver or renegotiation.

Managing Third-Party Consents and Waivers

Many commercial contracts include clauses requiring consent from counterparties if control of the company changes. These clauses can create practical obstacles to closing.

The legal team must therefore track all required consents, waivers, and novations carefully. For each contract or license requiring consent, the tracker should record:

1

Counterparty

The relevant counterparty from whom consent is required

2

Reason

The reason consent is required under the contract

3

Timeline

The timeline for obtaining the consent

4

Form

The acceptable form of the consent

- Importantly, consent letters often include conditions that affect the commercial relationship. Counterparties may demand new guarantees, increased fees, shortened contract terms, or revised commercial arrangements.

These conditions must be analysed carefully. **A consent that materially weakens the buyer's commercial position should not automatically be accepted without discussion.**

In some cases, the legal team may conclude that a contract should be novated or reassigned rather than simply consented to. In other situations, the buyer may decide to proceed with closing but request additional protection through price adjustments, escrow arrangements, or indemnities.

Bring-Down of Representations and Warranties

Representations and warranties in the SPA are typically given at signing and again at closing. This "**bring-down**" **mechanism** ensures that the seller's statements remain accurate at the moment ownership transfers.

To verify this, the legal team should categorise the representations into risk levels:

High-Sensitivity Representations

Representations relating to cap table accuracy, ownership of assets, compliance with law, material contracts, litigation, tax matters, and data protection should be **actively tested through confirmatory diligence**. Evidence should be gathered to confirm that no developments have occurred that would make the representation inaccurate.

Lower-Risk Representations

These may rely more heavily on the seller's bring-down certificate, but even these should be reviewed if new information emerges.

Particular attention should be paid to **updated disclosure schedules**. Sellers sometimes add new disclosures shortly before closing. The legal team must compare these schedules against the versions delivered at signing and identify any newly disclosed issues.

If newly disclosed matters materially affect risk allocation, the buyer may need to request additional protection, renegotiate the purchase price, or seek specific indemnities.

Closing Deliverables and the Closing Set

As closing approaches, the legal team must assemble the **closing deliverables list**, which serves as the operational checklist for completion.

Typical deliverables include:

- Corporate resolutions
- Officer certificates
- Bring-down certificates
- Regulatory approvals
- Consent letters
- Lien releases
- Share transfer instruments
- IP assignments
- Escrow agreements
- Resignation letters
- Updated disclosure schedules
- Evidence of good standing

Each deliverable must be tied to a specific authorised signatory, and the legal team must verify that each signatory has proper authority under the company's governance documents.

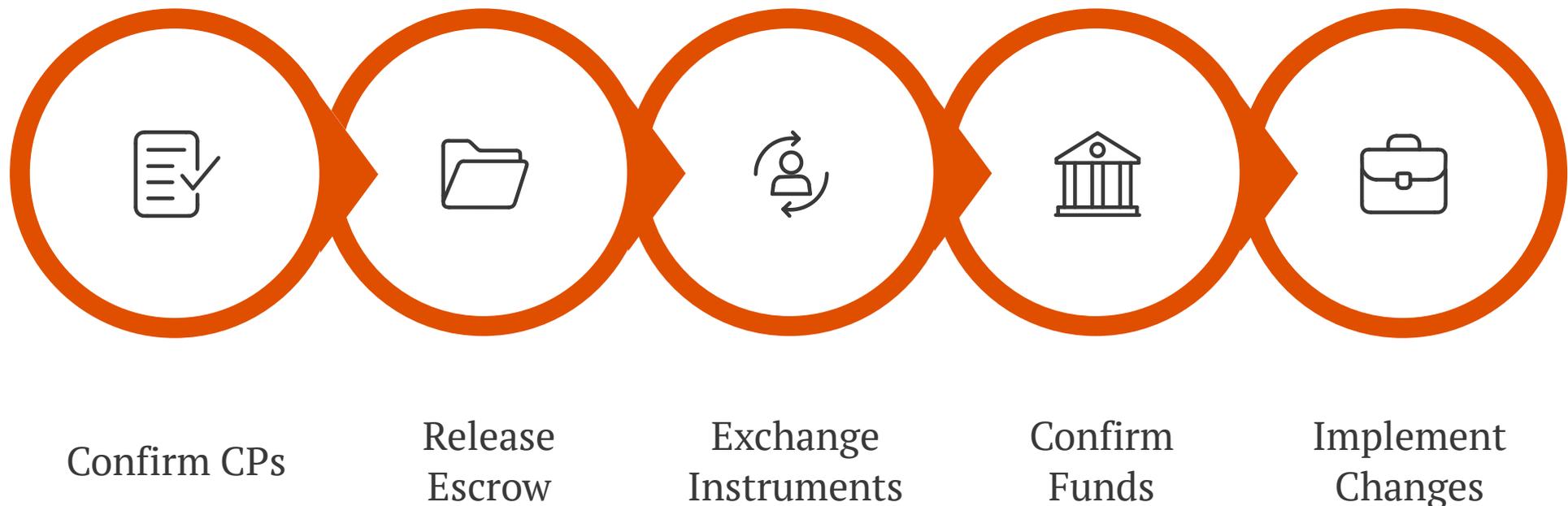
📌 Seemingly small details—such as a missing board approval or incorrect signatory title—can delay closing.

To avoid this, the legal team should maintain a **closing bundle index** and verify that each document is final, correctly executed, and consistent with the SPA.

The Closing Mechanics

Closing should never be an improvised exchange of documents. It should follow a clearly defined sequence.

Before closing day, the legal team should confirm that all conditions precedent are satisfied or waived, that final document forms have been agreed, and that the funds flow aligns with the transaction structure.



The closing sequence itself should be documented step by step. This sequence typically includes releasing escrow documents, exchanging signed transfer instruments, confirming receipt of funds, implementing board and management changes, and issuing a closing confirmation.

Dependencies between steps should be clearly identified. For example, the share transfer may only become effective after payment is confirmed, and certain resignations may only be released after ownership transfer occurs.

- ❑ Without a clearly defined closing sequence, parties may mistakenly believe that the transaction has closed even though some legal steps remain incomplete.

Day-1 Legal Readiness

Completing a transaction legally does not guarantee that the buyer can operate the business effectively the next day.

Day-1 readiness requires careful preparation across several legal and operational areas.



Corporate Governance

Corporate governance changes must take effect, including new board appointments and updated signatory authority. Statutory registers and corporate filings must be prepared. Banking arrangements must be ready so that the new owners can authorise payments.



People & Communications

Key counterparties may need to be notified of the ownership change. Employee communications must be prepared so that staff understand reporting lines and employment continuity. Payroll systems and benefit arrangements must continue uninterrupted.



Regulatory & Compliance

Regulatory notifications must be filed where required, and licenses may need to be updated with new ownership information. Data access controls must be reviewed to ensure compliance with privacy law and cybersecurity policies. Insurance coverage must remain continuous.

Failure in any of these areas can disrupt the business immediately after closing.

Post-Closing Action Plan

Even after closing, the legal team's work is not finished. Many obligations arise after completion.

These may include:

Corporate & Statutory Filings

Corporate filings to record ownership changes, updates to statutory registers, IP assignment recordals, property filings, tax registrations, and regulatory notifications.

Transitional Arrangements

Completing transitional arrangements, implementing compliance improvements promised in the SPA, or monitoring escrow release milestones.

To ensure nothing is overlooked, the legal team should maintain a **structured post-closing action tracker**, with deadlines, responsible parties, and evidence of completion.

📅 This tracker often extends into a **30-, 60-, or 90-day legal integration plan**.

Managing Information Gaps at Closing

In practice, not every issue identified during diligence can be fully resolved before closing. Sometimes information remains incomplete, or certain risks remain uncertain.

When this occurs, the legal team must ensure that the gap is properly documented and linked to a specific protection mechanism.

A short "**information gap note**" should explain:

01

What is missing

What information is missing

03

The assumption

What assumption the buyer is making

02

Why it matters

Why it matters to the transaction

04

The protection

What contractual protection addresses the risk

These protections may include special indemnities, escrow arrangements, post-closing covenants, or price adjustments.

- ❏ **The most dangerous scenario is when a risk is informally acknowledged but never formally recorded.** If it is not documented, it effectively disappears from the legal protection framework.

Reporting to the Client at the Final Stage

At this stage of the transaction, the client does not need long theoretical memoranda. **The client needs clear decision-oriented updates.**

The legal team should provide concise status reports covering:



Closing Readiness

Current status of all closing conditions and deliverables



Outstanding Blockers

Any unresolved issues that could prevent or delay closing



Updated Risks

New or changed risks identified since signing



Day-1 Readiness

Operational preparedness for the first day under new ownership



Post-Closing Tasks

Key obligations and filings required after completion

Each update should conclude with a clear decision point: whether the deal is ready to close, whether additional protections are required, or whether the closing timeline should be adjusted.

The Discipline of the Last Mile

Phase 5 requires a different mindset from earlier stages of diligence.

Earlier Phases

Reward **analytical depth** and legal interpretation.

Phase 5

Rewards **discipline, verification, and operational awareness.**

The lawyer's role here is not simply to interpret documents but to ensure that the transaction actually works in practice.

The legal team must verify that all conditions are satisfied, that risks have been properly allocated, that closing mechanics are precise, and that the business will function from the first day under new ownership.

When Phase 5 is handled properly

Closing becomes a **controlled and predictable process.**

When it is handled casually

Even a well-structured deal can encounter **avoidable surprises.**

In many respects, this final stage reveals the maturity of the legal team. It is where careful lawyers distinguish themselves—not by identifying risks, but by ensuring that those risks are fully understood, properly allocated, and operationally controlled before the buyer takes ownership.

ABOUT US



Herman, Henry & Dominic is an experienced team of legal experts, based in Saigon and Hanoi. The firm believes in building strong relationship with clients based on trust and respect.

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