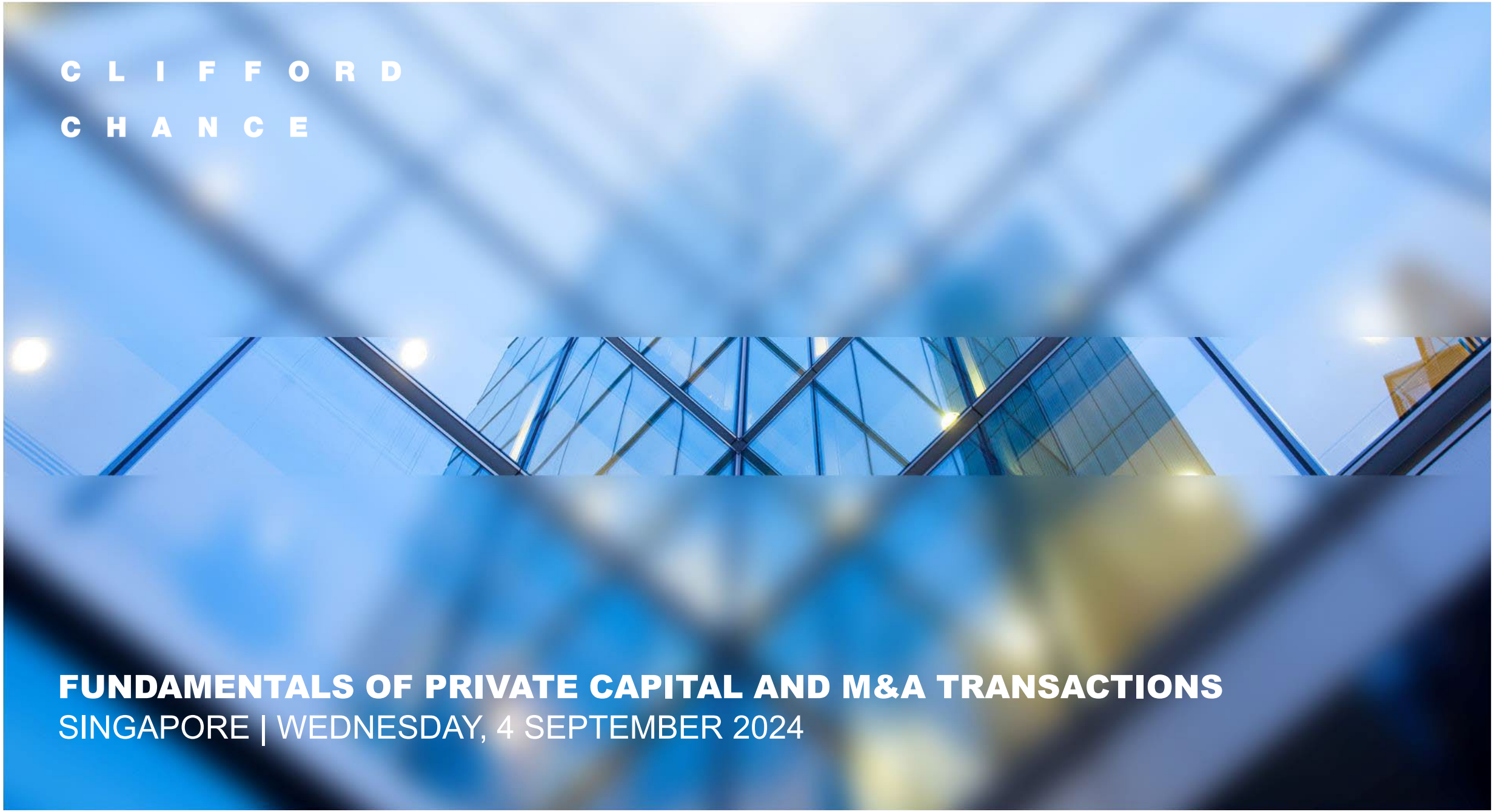

FUNDAMENTALS OF PRIVATE CAPITAL AND M&A TRANSACTIONS

SINGAPORE | WEDNESDAY, 4 SEPTEMBER 2024

CLIFFORD

CHANCE

GOOD DEALS GONE BAD

DEBORAH LOH AND VICTOR YAO

SINGAPORE | WEDNESDAY, 4 SEPTEMBER 2024

GOOD DEALS GONE BAD

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DISPUTE RESOLUTION MECHANISMS

1

The parties shall initially seek to resolve any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination ("**Dispute**") through negotiations. A party shall provide notice of its request for such negotiations. In the event that negotiations fail for any reason to resolve such Dispute within thirty (30) calendar days after a party provides notice requesting such negotiations under this clause, senior management of the Founding Shareholders shall seek to resolve the Dispute through further negotiations within a further ten (10) calendar days.

2

Any Dispute which remains unresolved forty (40) calendar days after a party provides a notice requesting negotiations under clause 1 shall be referred by any of the parties to, and finally resolved by, arbitration administered by the Singapore International Arbitration Centre ("**SIAC**") in accordance with the Arbitration Rules of SIAC for the time being in force, which rules are deemed to be incorporated by reference in this clause. The seat of the arbitration shall be Singapore. The language of the arbitration shall be English. The law of this arbitration clause shall be the law of the Republic of Singapore. The arbitration tribunal shall consist of a sole arbitrator.

IMPORTANCE OF EXPRESS TERMS IN THE CONTRACT

ENTIRE AGREEMENT CLAUSE

The Transaction Documents contain the whole agreement between the Parties relating to the subject matter thereof at the date thereof to the exclusion of any terms implied by Applicable Law which may be excluded by contract and supersedes any previous agreement between the Parties (whether made orally, in Writing or otherwise) in relation to the matters dealt with in the Transaction Documents.

NON-RELIANCE CLAUSE

*Each Party acknowledges that it has not been induced to enter into any Transaction Document by, or relied upon, any Representation, warranty or undertaking not expressly set out in such Transaction Document. Each of the Parties confirms (the "**Confirming Party**") that: (i) neither the other Party nor its Affiliates, nor its advisers, has made any Representation that the Confirming Party considers material which is not set out in the Transaction Documents; (ii) it has not relied on the other Party or any of its Affiliates for any legal, Tax, business, financial or accounting advice relating to any of the matters provided for in the Transaction Documents; and (iii) it has made an independent assessment of the legal, Tax, business, financial, accounting and other consequences of entering into the Transaction Documents and completing the Transaction, or any part of it.*

IMPORTANCE OF EXPRESS TERMS IN THE CONTRACT

Example 1: Material *anticipated* agreements

- Commonly, an SPA would include provisions relating to material contracts or agreements, with the purpose of ensuring that the target company does not experience any significant loss of business between signing and completion, which could affect the value of the company.
- Representations may be made as regards material anticipated agreements, e.g. that it is a “done deal”. If this is factored into the purchase price, and the material anticipated agreement does not materialise, it would be more difficult for the purchaser to get recourse in the absence of relevant provisions in the SPA.

Example 2: Incidence of taxes arising from the transaction

- The economic incidence of the taxes may be shifted by agreement (ie. the law says the seller is to pay taxes, but the parties may agree that the purchaser will reimburse the seller).
- Where the expected taxes arising from the transaction are significant, this may be a heavily negotiated point. Both parties are likely to have sought their own tax advice on the expected taxes charged.
- This is unlikely to be an issue post signing in most cases, but in more unique transactions, there is a possibility that the amount of taxes determined by the tax authority deviates from the amount assessed by the parties’ respective tax advisers. In the absence of relevant provisions in the agreement (e.g. caps on the amount of taxes to be paid by each party, or that the agreed tax incidence is based on certain assumptions), the party who has contractually agreed to bear that category of taxes may find itself saddled with a significantly larger tax bill.

MATERIAL ADVERSE CHANGE / MATERIAL ADVERSE EFFECT

Used quite widely in M&A transactions with a variety of consequences – e.g. buyer gets to walk away, or is entitled to compensation

Generally, there is no single meaning of “material”.

However, an MAC involves a change – which means looking at the same set of criteria across different dates

- Not a concept that has received much attention under Singapore or even English law.
- Decide whether to use objective criteria (e.g. revenue figures) or subjective standards – e.g. “in the Buyer’s reasonable belief”
- Identify the relevant criteria which will show a “material” change – e.g. provide certain examples
- If the clause operates by comparing the impact compared to industry peers, would save time down the road to identify who these peers are.
- Identify the relevant dates on which the criteria are to be compared – materiality may not be found if the adverse effect is too short as compared to the lifespan of the contract

EXITING A JOINT VENTURE: EFFECTIVE EXIT MECHANISMS

General rules – contracts can be discharged by completion, agreement, or termination at common law for repudiatory breach.

The contract may include contractual exit mechanisms, commonly in the event of a deadlock (which can be defined by the parties).

- Where cooperation is needed, it should be noted that this may not be forthcoming if the relationship between the parties has already broken down.
- Common exit mechanisms provide each party a right to purchase the shares of the other, failing which the company will be liquidated.

EXITING A JOINT VENTURE: VALUERS AND VALUATION

- Parties frequently provide that a neutral third-party valuer will value the exiting party's shares.
- Care must be taken in the design of this mechanism because the threshold to set aside a valuation is **very** high – e.g. "manifest error" or "patent error".
- A common pitfall is vagueness/lack of precision in identifying the relevant valuation standards by which the assets are to be valued
  - E.g. a clause specifying that the valuation will be "based on generally accepted international standards for valuation".
  - Two problems with the clause.
  - Problem 1: there is no single "generally accepted international standards for valuation". There are established standards such as the International Valuation Standards (IVS), but there are also "regional" standards, such as standards set by the Institute of Chartered Accountants of India (ICAI).
  - The standards use different terminology:
    - E.g. IVS uses "market value", whereas ICAI uses "fair value".
- No problems arise if the term carries the same meaning across the different standards. But sometimes they do not.
  - Problem 2: the clause said it could be "based on", which arguably is wider than "complies with". It arguably allows the valuer to create his own standards that are similar to and therefore arguably "based on" the standards; or to mix and match between different standards.

DOCUMENT PRESERVATION IN AID OF LITIGATION

If documents are held by a third party (e.g. the JVCo), important to secure access to such documents before the dispute becomes too acrimonious. Otherwise, will have to wait until document production orders are made against the 3P, assuming the 3P is joined to the dispute, to obtain such documents.

Documents are not confined only to emails. Whatsapp/Telegram chats can contain extremely valuable information. Also important to export a copy of these chats before the relationship becomes too acrimonious – possible for one party to delete messages unilaterally.

PRIVILEGE

Privilege

essentially prevents documents from being disclosed to the other side – under Singapore law, communications with in-house counsel can become privileged but are not automatically so. It is not sufficient simply to copy in-house legal on the communications. The communications have to be for the purpose ultimately of obtaining legal advice.

Litigation Privilege

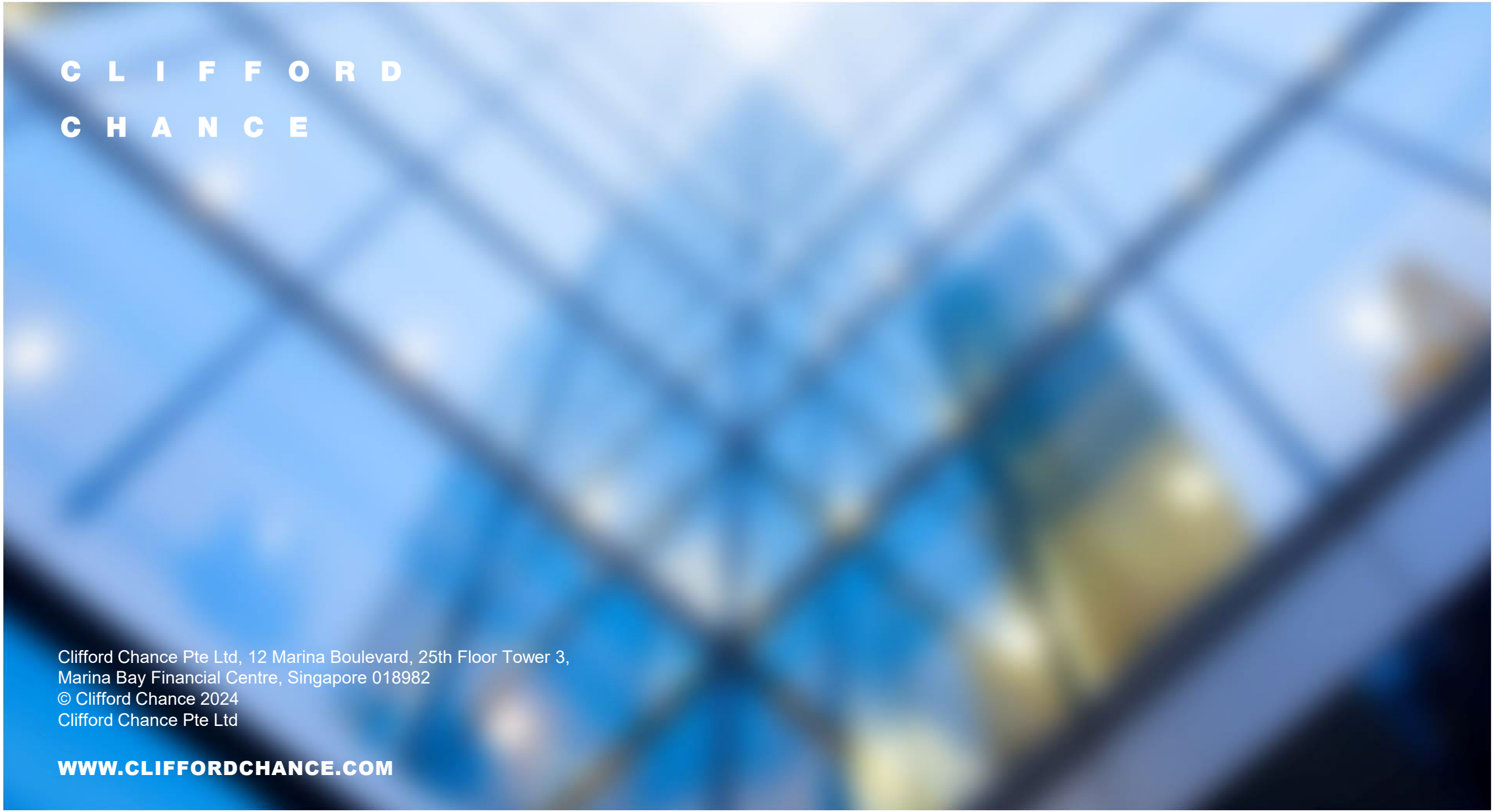
a different kind of privilege, which arises when litigation is reasonably in prospect. This is a question of fact that varies from case to case.

- Indicia of litigation being reasonably in prospect include demand letters; formal letters reserving rights; engaging external counsel.
- However, not all documents/communications generated after a dispute has arisen will be covered by litigation privilege. The communications must be for the dominant purpose of the litigation.

PLEASE GET IN TOUCH AND CONTINUE THE CONVERSATION

Feedback Survey

Client Portal Subscription



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