



# A Case Study on Legal Risk Management in ICT Outsourcing

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# Introduction

- How should lawyers calculate risk?
- Present methodology for legal risk management
- Evaluate this methodology in outsourcing case study
- Combine risk management with preventive law
  - Legal autopsy
  - Film rewinding
  - Applied to case study

# How should lawyers calculate risks?

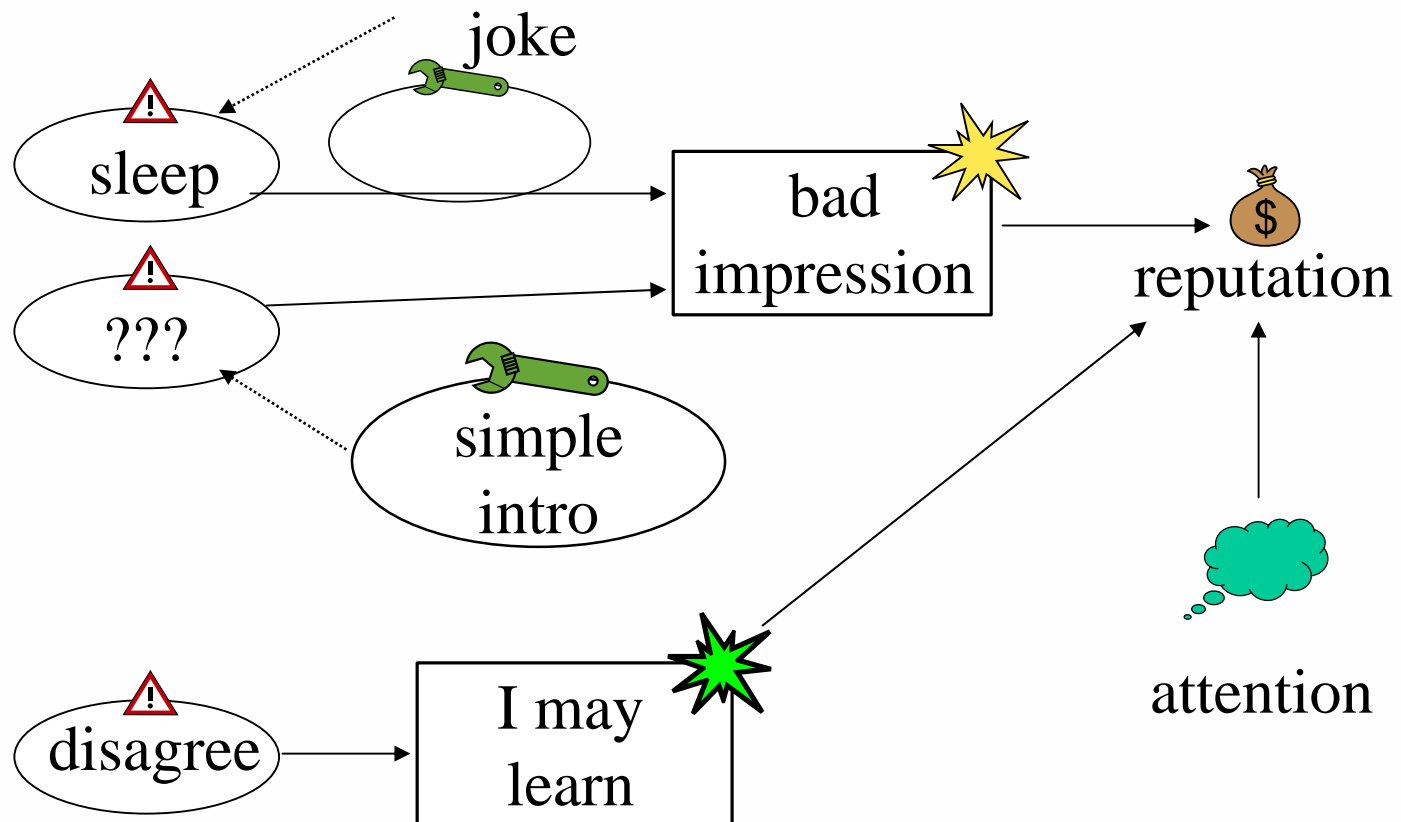
"Det burde være en selvfølge for alle advokatfirmaer å ha dyp og bred kunnskap om klientenes bransjer. Utfordringen består i å hjelpe dem med å ta vare på mulighetene og kalkulere risikoen."



“The challenge for a law firm is to assist its clients in safeguarding its opportunities and in calculating the risk.”

Advokatfirmaet Schjødt AS  
(2004)

# This presentation's risks (1)



# Risk management + contracting

## Australian Standard

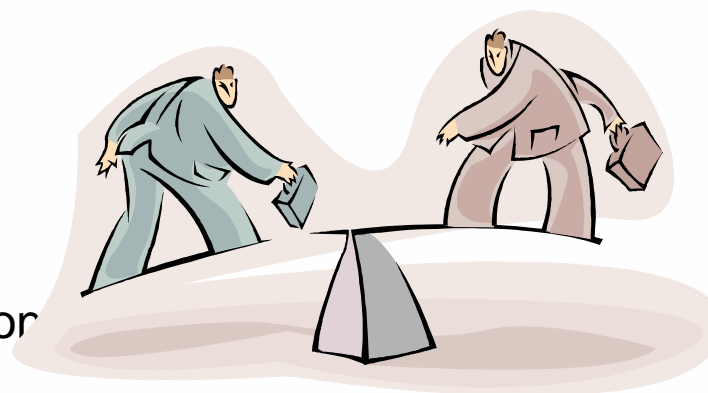
- Establish the context
  - Scope/target
  - Criteria
- Risk assessment
  - Identify risks: what can happen?
  - Analyze risks: Likelihood & consequences
  - Evaluate risks: compare against criteria
- Treat risks
  - Identify & assess options
  - Treatment plans
  - Analyze residual risk
- (Communicate and consult, monitor and review)

## Contracting steps (Lehrbuch Vertragsgestaltung)

- Retrieve information
- Draft contract (shell)
- Hypothetical application of law
- Shaping
  - Cautiousness
  - Avoiding/solving conflicts
  - Dealing with legal and factual insecurities
  - Dealing with conflicting objectives
- Negotiation
- Legal advice to customer
- Finalizing contract document

# Overview of legal risk management methodology

1. Characterize contractual relation and its context
2. Risk identification
  - Review contract draft to identify incident scenarios
3. Risk estimation
  - Consequences (including who is affected)
  - Likelihood (including impact of trust and legal aspects)
4. Risk evaluation
  - Compare against criteria
5. Risk treatment
  - Define requirements to contract
  - Contract negotiation and finalization

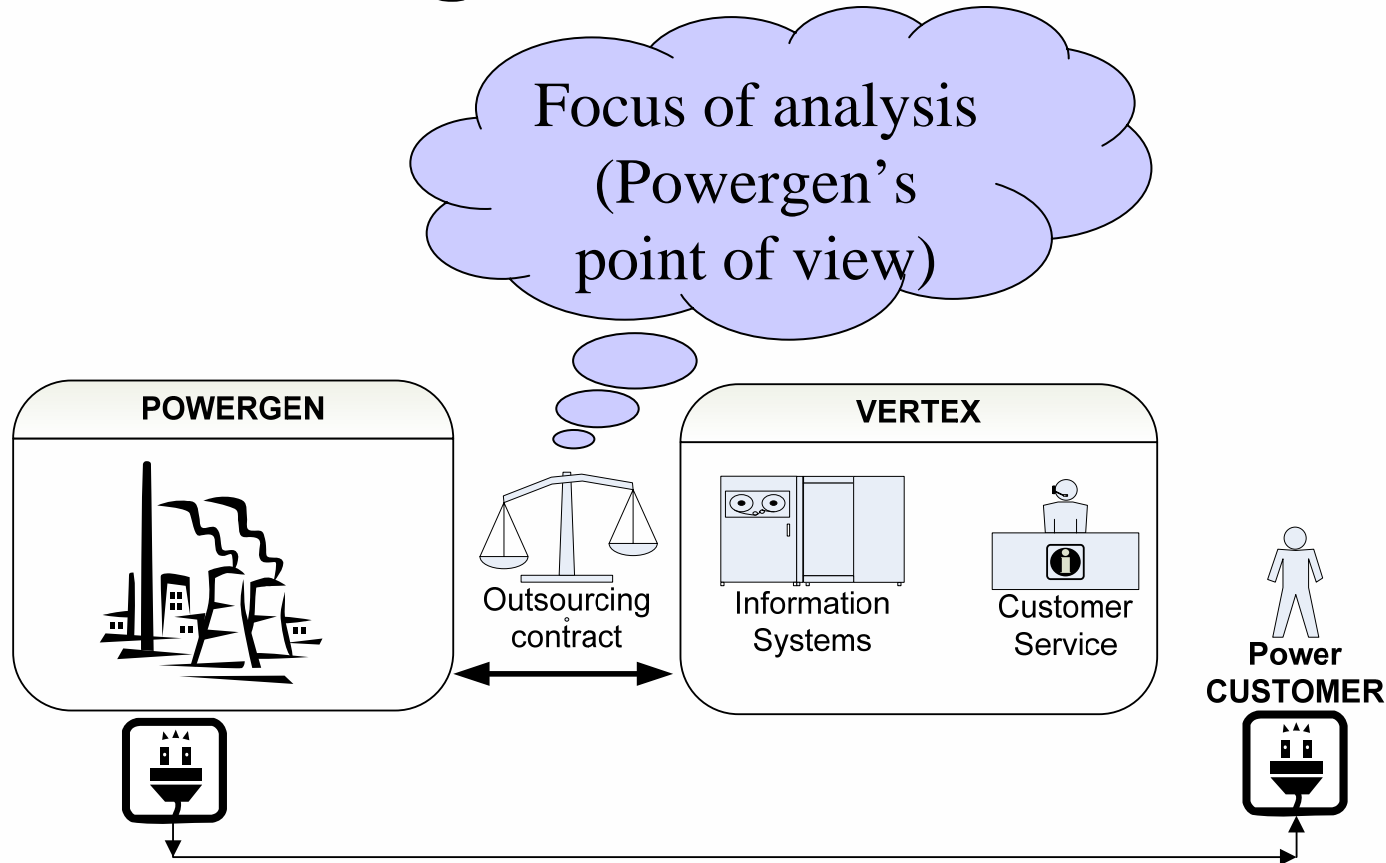




# Case study objectives

- Test usefulness of legal risk management methodology
- Identify limitations and shortcomings of methodology

# Outsourcing case







# Outsourcing services

60 % of cost:

- India Services
  - back-office
  - customer calls
- Staywarm
  - special type of customer accounts
  - for elderly people and vulnerable customers

# Outsourcing case study

Research method: preventive law + legal risk management

- Legal autopsy (L. Brown) of Vertex vs. Powergen case: What was the initial mistake that led into trouble?
- “Film rewinding”, back to a point where preventive action could have been taken.
- If Powergen had applied legal risk management methodology, could some of the problems have been avoided?

# Results of the legal autopsy

- “Agreement requires extensive mutual collaboration”
- “Breakdown in the relationship”
  - “Powergen has lost confidence in Vertex”
  - Several (disputed) details of material breach
  - Alleged non-compliance with data protection law
- “It is perfectly possible that the SLAs permit a level of performance which is, objectively, unsatisfactory”
  - “SLAs silent in relation to important aspects of the Staywarm function”
  - “India Services SLA fails to provide the yardstick against which [...] performance can be measured”
- Deficient exit strategy
  - Minimum term: 4 years before termination for convenience

# 1. The contractual relation and its context

- Retrieve information from stakeholder
  - Characterize the relation to be addressed by the contract
  - Identify scope and focus of risk analysis work
- Identify assets and their legal protection
  - Describe planned relation (model business processes), based on contract draft /business plan, etc.
  - List and value assets of stakeholder and his prospective contract partner
  - Describe their legal protection and identify vulnerabilities (shortcomings of legal protection)
  - Group assets with common legal protection
- Characterize objectives of stakeholder and prospective partner
- Identify possible conflicts of objectives and address incongruities amongst stakeholder's objectives
- How much do parties trust each other?

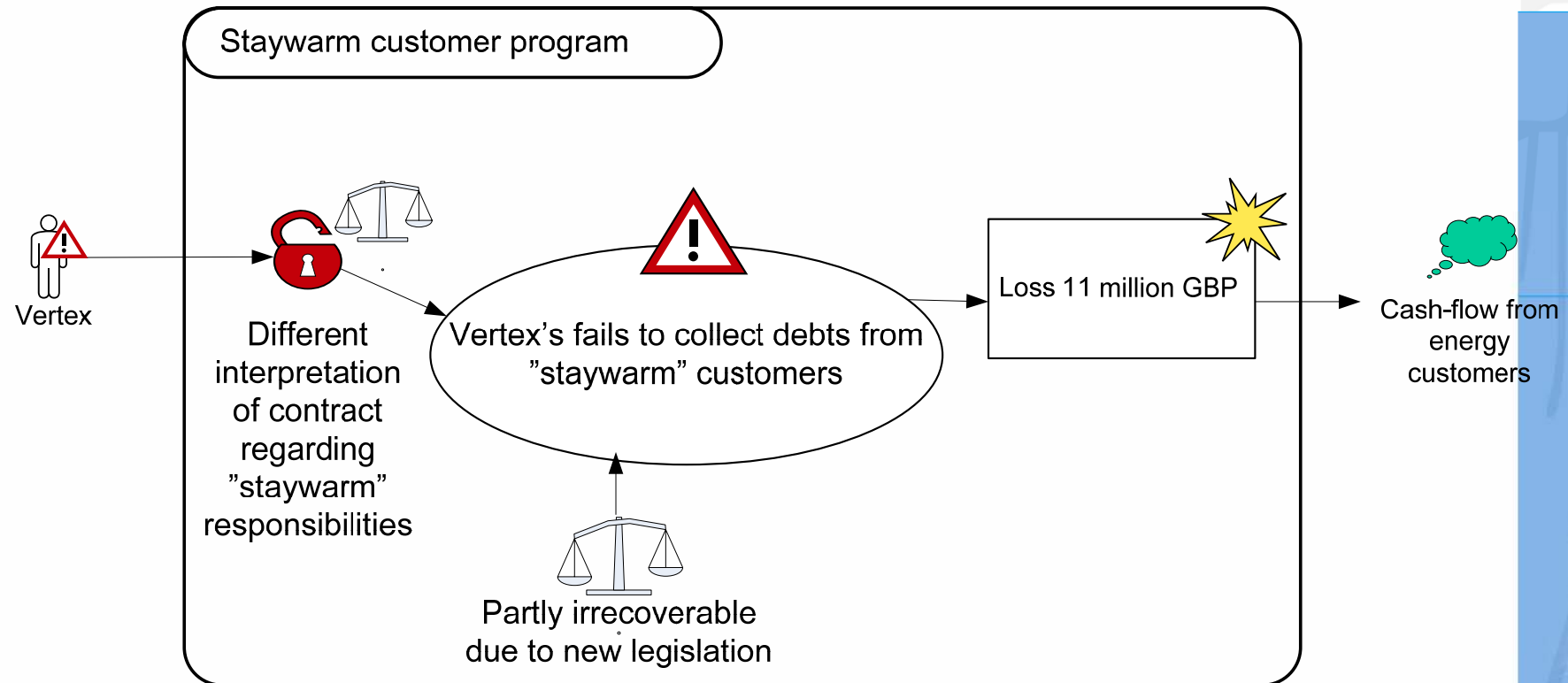


## 2. Risk identification

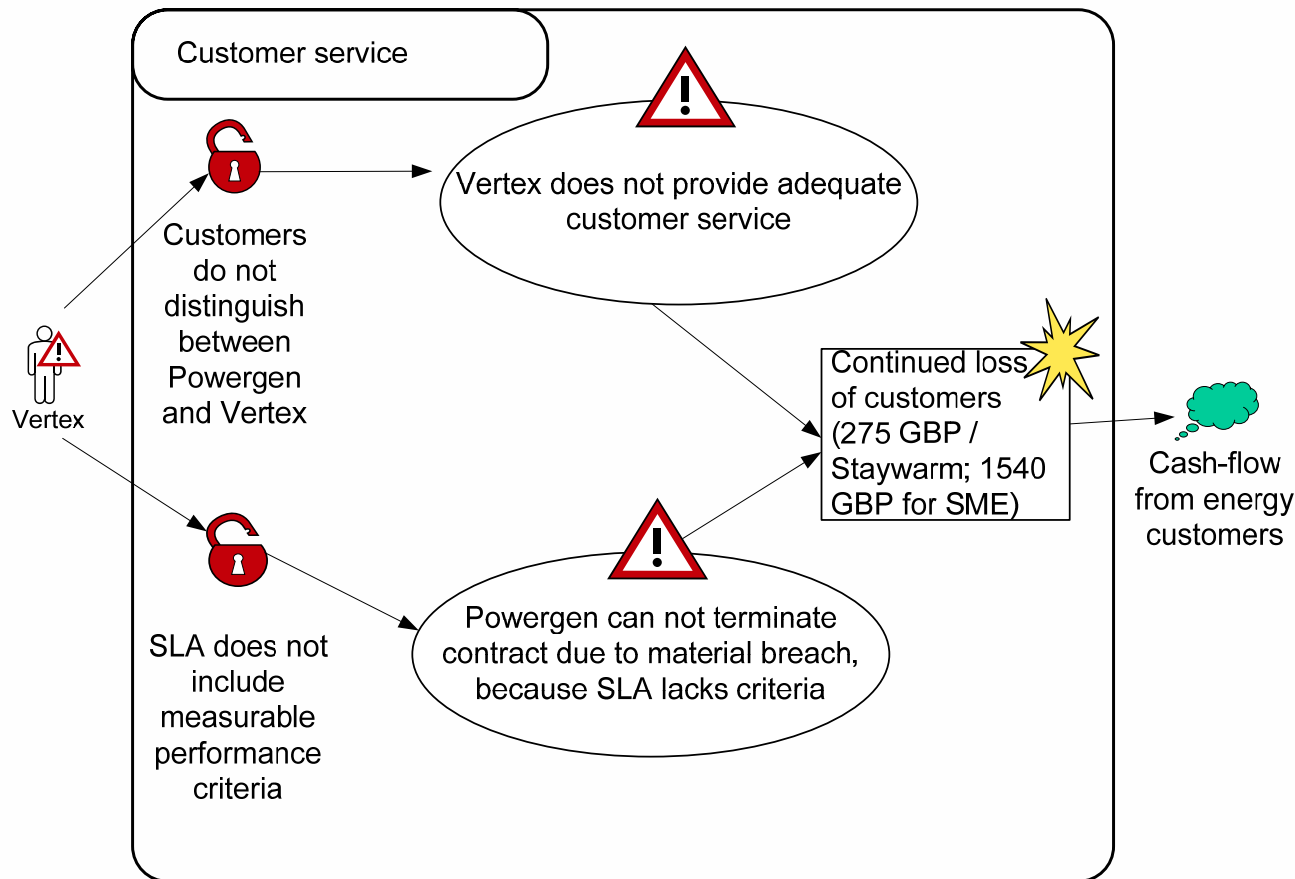


- What can happen, where and when?
  - Assess applicability of typical incident scenarios for relevant asset groups (if available)
  - Review contract draft and planned interaction to identify additional incident scenarios
- Why and how?
  - Factual causes
  - Relevance of legal norms: distinguish factual uncertainty and legal uncertainty
    - Uncertainty in contract draft
    - Background law (distinguish default and mandatory norms)

# Failure to collect “staywarm” debts

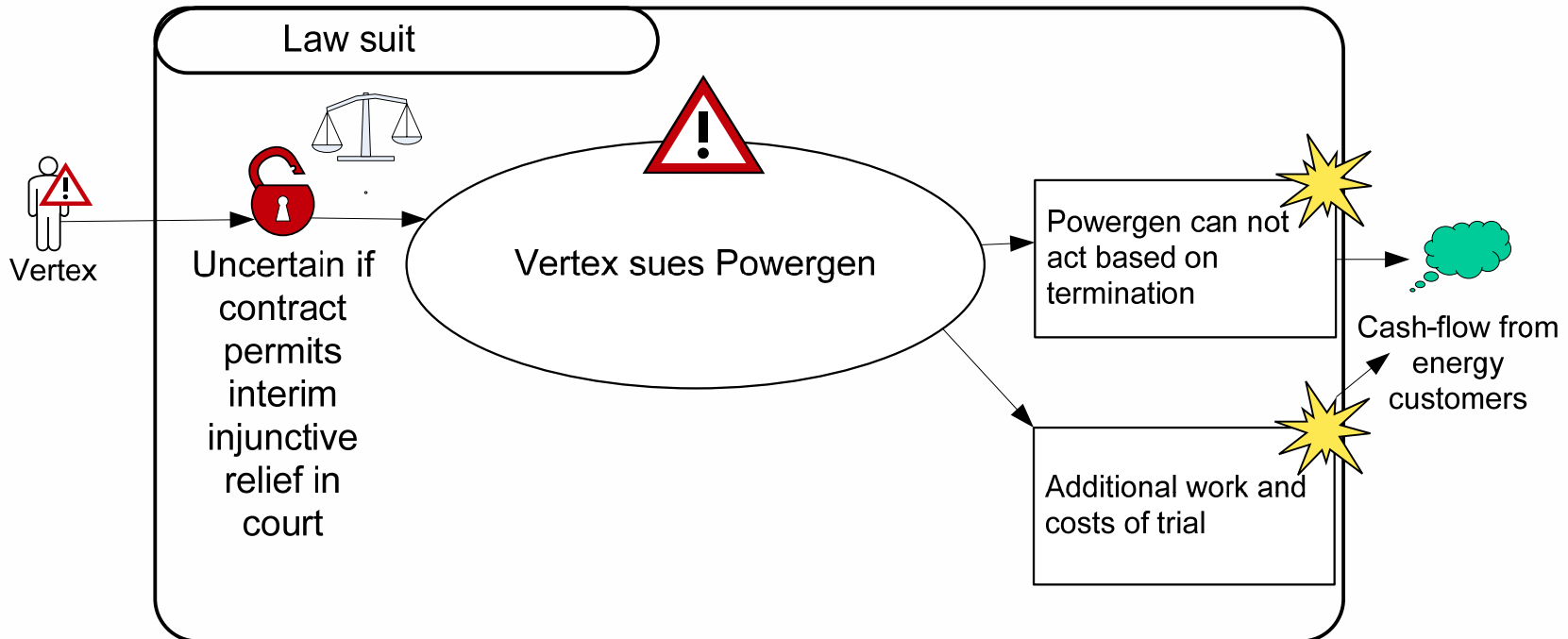


# Inadequate customer service and lack of documentation thereof

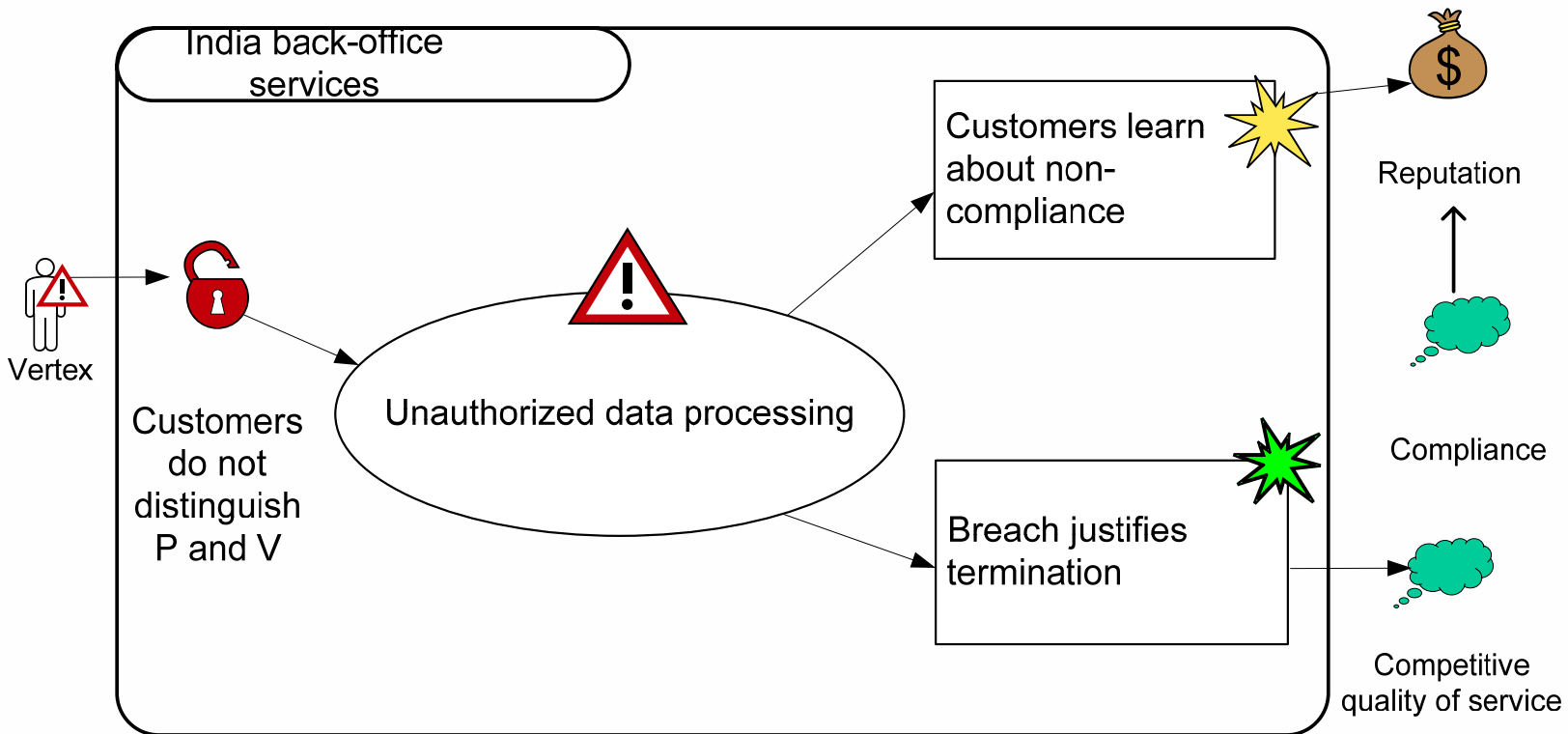




# Law suit



# Alleged unauthorized data processing in India

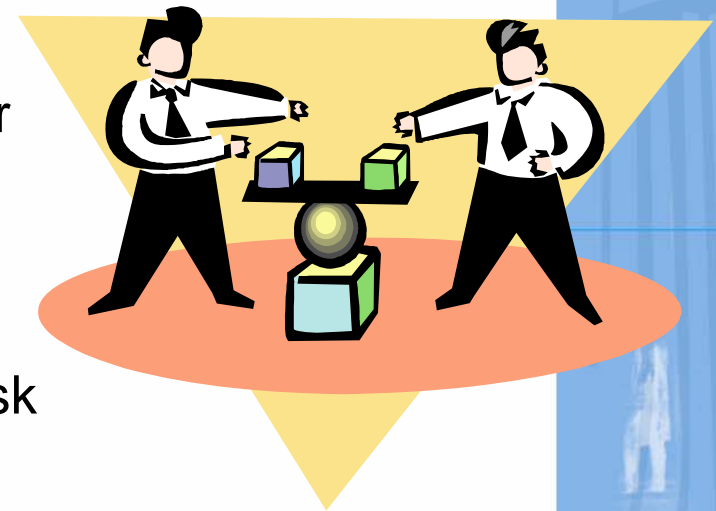


### 3. Risk estimation (overview)

- For each identified incident scenario, assign risk value by estimating
  - consequences
  - likelihood
- Result: List of risks which can be prioritized according to their value

# Risk estimation – Consequences

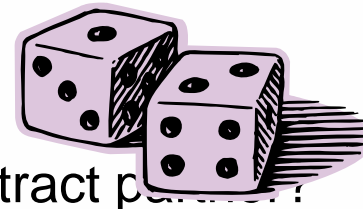
- Risk affects stakeholder for the benefit of contract partner
  - Estimate consequences for stakeholder
  - Estimate positive effects for contract partner
  - Contract partner will typically not be interested in the management of this risk
- Risk affects both partners
  - Estimate consequences for each party
  - Contract partner will typically be interested in the management of this risk



# Risk estimation – Likelihood

- Factual

- Estimate likelihood based on available data/experience
- Does stakeholder trust prospective contract p
- Assess likelihood of factual prerequisites (e.g. non-fulfillment of a particular duty) which trigger a norm



- Legal

- Impact of norms on likelihood of incident scenario (hypothetical application of law)
- Assess impact of background law on the likelihood of incident scenario

# Risk estimation (2004 perspective)

## High-medium risk

- Continued loss of customers (inadequate service quality). C: high  
L: medium

## Medium risks

- Loss “staywarm” debts. C: medium L: medium

## Medium-low risks

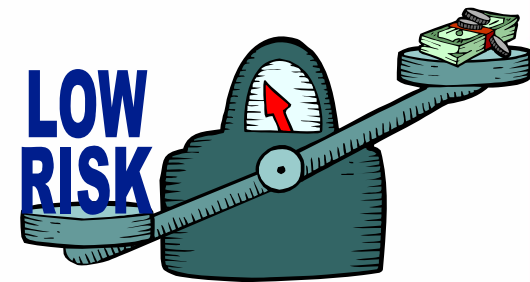
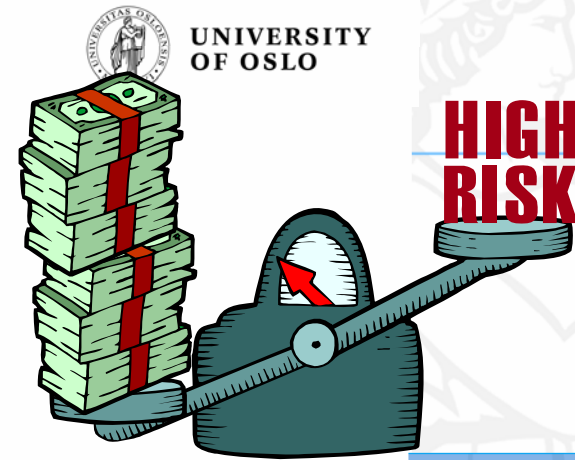
- P can not go through with termination due to law suit. C: medium.  
L: low
- Law suit causes additional costs/work. C: low. L: medium
- Unauthorised data processing damages reputation. C: medium. L: low

## Opportunity:

- Unauthorized processing justifies termination. C: medium. L: low

## 4. Risk evaluation

- Compare identified risks with risk acceptance criteria
  - General criteria, e.g. treat all major risks, monitor medium risks
  - Protection of certain assets, e.g. key IP
  - Legal requirements (compliance with existing other contracts or mandatory law)
- Balancing risks with benefits in contract





# 5. Treatment

- Define requirements to contract
- Contract negotiaion and finalisation



# Define requirements to contract

## Functional requirements

- Achieve **goal** (e.g. receive payment for item)
- Avoid **risks** (e.g. liability):

## Non-functional requirements (risks related to contract itself)

- **Usability** (risk: only lawyer can read contract)
- **Reliability** (risk: the contract does not allow to determination of rights and obligations)
- **Validity** (risk: contract invalid)
- **Enforceability** (one or more clauses not enforceable)
- **Performance** (risk: contract much too long, no contractor reads it)
- **Supportability** (risk: contract not amendable, despite changes in circumstances)

Based on categorization of quality requirements (Grandy 1992)



# Treatments

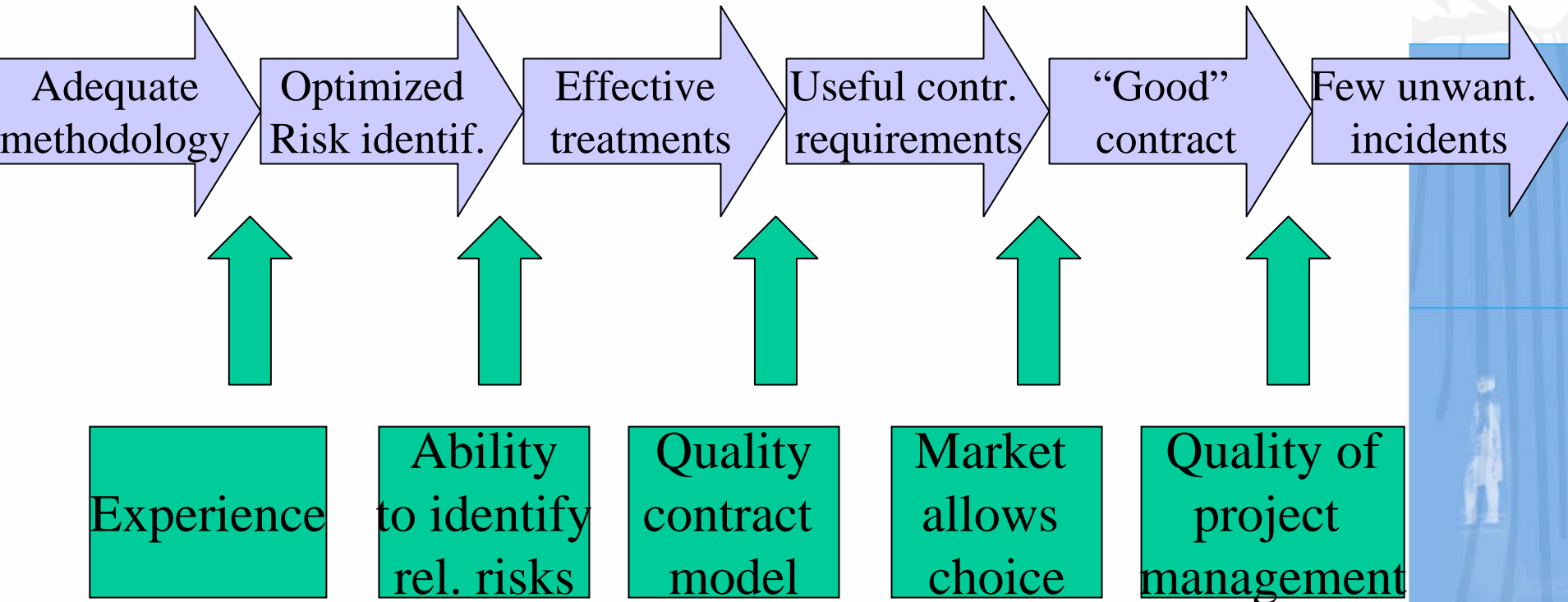
1. Continued loss of customers (inadequate service quality):
  - *Improve exit strategy and India SLA*
2. Loss “staywarm” debts:
  - *Clarify Staywarm responsibilities*
3. P can not go through with termination due to law suit.
  - *Accept (low likelihood) or remove authority to seek interim relief in court.*
4. Law suit causes additional costs/work. (= 3.)
5. Unauthorised data processing damages reputation.
  - *Monitor, document and notify*
6. Unauthorized processing justifies termination.
  - *Monitor & document*

# Contract negotiation and finalization



- Suggest amendments to contract text in order to reduce likelihood or consequence value of incident scenario
- Effect analysis
  - Is text valid according to applicable background law?
- Cost-benefit analysis
- Negotiation
  - Make amendment suggestions available to the other party and negotiate based on the prioritized risks and the cost-benefit analysis
  - Apply Harvard negotiation method
- Agree on final clauses
- Monitor identified risks

# Chain of causality?



# Concluding remarks

The improved contract will manage the stakeholder's risks

The quality of the contract will be improved through risk and treatment identification

The use of the methodology will guide the identification of most relevant risks

The results of the methodology are useful and relevant

The steps described in methodology are feasible