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ALYIANT2YOU: Restructuring Brief

RESTRUCTURING – FINDING THE RIGHT BALANCE

Background: As the world grapples with a return to normalcy in the wake of the global pandemic, businesses big and small across the globe continue to face challenging economic times. For many, it will be a time for reflection to look at restructuring existing business structures and models, so as to be able to continue business operations and/or to fortify the foundations of their businesses for ongoing resilience. The rationale for such reflection is not only the consequences of the recent events, but a gradual build up over past years in changing economic trends and their impact on business. The focus of organisations will be on streamlining operations and managing cash flows and operating costs. Set forth below are some of the many factors which in concept may be considered by an organisation in the course of contemplating a restructure.

Business Plan: The current business plan of the organisation and its operations and the strategy adopted for achieving it would need to be reviewed and modified according to the final restructuring option to be implemented. The business plan would, amongst other matters, need to consider the organisation's business activities (as restructured) and the future forecast for the business activities over a given period of time. The business plan and strategy to be implemented would be arrived at after taking into account factors specific to the organisation and its business operations.

Corporate/Organisational Structures: Seek to consolidate and keep it simple. Organisations with diverse businesses often establish separate entities in the same or different jurisdictions for separate lines of businesses. This is done for various reasons, including liability and risk mitigation, compliance and regulatory requirements and legal enforceability of rights and obligations. In considering a reduction in and structural consolidation of the number of operating entities, an organisation may wish to consider analysing the following: (i) what are the business operations and assets of the entities and where are they located; (ii) which of the separate operating entities are required from a licensing and/or regulatory standpoint; (iii) which of the separate operating entities are required for the purposes of enforceability of any legal rights and obligations; (iv) what will be the cost saving in terms of licensing and operating costs; (v) the alternative(s) (including alternative jurisdictions) to locate the business operations and assets of any entity(ies); (vi) the proximity to where the shareholders/directors/management are located; (vii) tax considerations; and (viii) meeting the Economic Substance Test under Economic Substance Regulations (or their equivalent) in the relevant jurisdiction – it should be noted that Economic Substance Regulations have been introduced in multiple jurisdictions.

Corporate Governance: The governance structure of the organisation should be revisited in the context of the restructuring. A corporate governance framework comprising of policies, processes and controls advancing sound and prudent management of the organisation while at the same time protecting the interests of customers and stakeholders should, if not already in place, be considered for development and implementation. Towards that, a separation of the functions of the governing body (e.g. the board of directors) and management should, if not already in place, be considered for implementation. In essence, the governing body is responsible for setting and/or approving the business objectives of the organisation along with the strategies for achieving those objectives and for providing effective oversight of the management of the organisation. The management is responsible for the day-to-day management of the business of the organisation and implement the business objectives and strategies approved or set by the governing body. Whilst corporate governance related regulations and best practices specifically applicable to the particular businesses of the organisation in the jurisdiction in which it operates would need to be adhered to, even where an organisation is not obligated to follow prescribed corporate governance regulations of a jurisdiction because of the form of the entity or type of business undertaken by it, the organisation may nevertheless consider following best practices in corporate governance (e.g. perhaps similar to those enshrined in regulations in their jurisdiction). This not only gives clarity to the governance structure of the organisation, but prepares an organisation where it in the future looks to expanding into an area (e.g. financial services) the regulations of which would require an appropriate corporate governance framework or where a new investor looks to investing in the organisation or where the organisation may contemplate a future initial public offering (IPO). Good corporate governance not only results in defining clear roles, responsibilities, processes and controls across the organisation, but also in promoting sound business decisions, which may all contribute towards streamlined growth and financial savings as a result of avoiding adverse business decisions.

Employees: In the course of any restructuring, the continued wellbeing of employees will be a primary consideration. All employees (particularly those who have specific qualifications or specific skill sets) are the backbone of any organisation and accordingly, the focus should be on employee retention, including working with employees to explore relocation within the organisation and its operating entities, and for employees to explore utilizing their existing skills across other parts of the business.

Compliance Framework: It is critical to ensure that the organisation and its operations are compliant with all applicable laws and regulations in the jurisdiction(s) in which it/they operate(s). In this regard, appropriate compliance policies and procedures should, if not already in place, be considered by the organisation and its operations, and periodically reviewed and updated. Where an organisation and its operations are being restructured, its existing policies and processes should be reviewed to ensure that they are uptodate taking in to account the different elements of the restructuring. Prior to finalizing and implementing any restructuring, it should be ensured that all aspects (e.g. such as those considered herein) which may form a part of the elements of the restructuring of the organisation and its operations are in compliance with all applicable laws and regulations in the jurisdiction(s) in which the organisation and its operations operate.

Risk Management Framework: If not already in place, establishing and maintaining risk management systems, controls and policies should be considered for being put in place to enable the organisation to identify, assess, mitigate, control and monitor the applicable risks to which the organisation and its customers are exposed to.

Business Continuity and Disaster Recovery Planning: If not already in place, the organisation should consider putting in place arrangements for the management of risks to the information systems and business operations of the organisation for business continuity and disaster recovery purposes in the event of an interruption or event that impact on its operations, including infrastructure for alternative data centres and business operations. Having in place business continuity plans would be invaluable during events such as the pandemic where employees across the globe have had to work from home.

Contractual Rights and Obligations: The organisation should consider its rights and obligations under various contracts to which it is a party and the impact on these in the context of the restructuring. Accordingly, the organisation may consider: (i) whether the terms and conditions of any relevant contracts (including those with creditors and landlords) need to redefined and if so, will renegotiation be possible with the counterparty; (ii) whether the assets of the business are secured in favour of creditors and can the terms of such security be renegotiated; (iii) whether if any contracts are being transferred to another entity as part of the restructuring, can the contracts be easily transferred to the other entity and if so, what will be the costs involved (e.g. stamp duty and/or registration charges); (iv) whether there are any restrictions such as exclusivity rights under any of the contracts; (v) the termination rights under the contracts; (vi) the force majeure provisions under the contracts; and (vii) the governing law and dispute resolution mechanisms and enforceability of the contracts in the context of restructuring.

Supply Chains and Service Providers: The organisation should consider assessing the impact of disruptions to its supply chains and/or services provided to it by its service providers. Consideration may be given to the following: (i) the need for streamlining or changing any supply chain and/or service provider services; (ii) the alternatives available; (iii) the time required and logistics involved in changing any suppliers and/or service providers; and (iv) the cost-benefit of changing suppliers and/or service providers.

Data Protection: The landscape on data protection and privacy considerations has evolved in recent years in various jurisdictions and accordingly, the data protection and privacy laws and regulations of each jurisdiction which applies to the organisation and its operations will need to be considered in the course of considering and implementing any restructuring. For example, in the Dubai International Financial Centre ("DIFC"), the Data Protection Law DIFC Law No.5 of 2020 and Data Protection Regulations thereunder came in to force on 1st July 2020, repealing and replacing the earlier Data Protection Law DIFC Law No.1 of 2007 and regulations thereunder.

Intellectual Property: The impact of any restructuring on the organisation and its operations in the ownership and/or licensing rights in any intellectual property in the form of registered trademarks, copyrights, designs and patents and how these will be dealt in the course of the restructuring should be considered.

Changes to Business Processes and Training: The business processes and procedures of an organisation will likely change in the course of implementing any restructure of the organisation and its operations. Whilst documenting the changes will be important, equally so is the continuous education and training of employees in respect of such changes towards a seamless implementation of any restructuring.

Conclusion: The extent of restructuring required to an organisation and its operations will involve the consideration of multiple factors depending on the particular circumstances of each organisation and its operations. There is no one size fits all solution and indeed it is not feasible for there to be one as the objective is to find the right balance and arrive at a restructuring solution which is robust in the long term.

We at Alyiant Consultancy Limited provide a broad range of corporate services, including compliance, risk management, corporate governance, structuring and restructuring services. We assist entrepreneurs, multi-national businesses and family offices with putting structures, processes and systems in place, enabling alignment not only with the requirements of today, but also with creating a value based vision and map, aligned with requirements for the future. For further details on any of the matters contained in this paper, please contact us at aly@alyiantconsultancy.com

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