The Importance of Legal Feasibility Assessments in IBR projects

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Introduction

We assist our clients with International Business Reorganisation ("**IBR**") projects that vary from the comparatively simple to the extremely complex. At the simpler end of the spectrum an IBR project may involve a handful of jurisdictions, entities and/or steps. At the other end of the spectrum a large IBR project may involve dozens or even hundreds of jurisdictions, entities and/or steps.

I. Achieving an integrated restructuring steps plan

Tax input is usually a key (if not *the* key) structuring consideration and driver for an IBR project, however tax input always needs to be underpinned by relevant legal advice and input to ensure that the restructuring can be properly implemented, such that the planned restructuring addresses both tax and legal considerations.

Invariably, in the course of an IBR project, the tax advisory team will carry out a feasibility and advisory exercise and assist clients in drawing up a restructuring steps plan setting out:

a) the current structure

b) the final intended tax-efficient holding structure

c) the proposed restructuring steps to move from (a) to (b) in a tax-efficient manner.

II. How is legal feasibility different from tax feasibility?

A legal feasibility assessment is the process of checking an intended restructuring / steps plan for potential issues from a legal perspective, and preparing a plan to be implemented during the implementation phase of the restructuring, such that the intended restructuring entails a consolidated and integrated tax and legal assessment.

From a legal perspective, each step of the restructuring represents a standalone transaction to be effected (such as a contribution of shares of one company to another company), that therefore requires a discrete set of documents on a per-step basis, and each step is likely to involve entities incorporated in several different jurisdictions. For example, in the case of a contribution of shares, the legal/corporate mechanics will need to take into consideration the legal requirements in the jurisdiction of incorporation of the seller entity, the purchaser entity and the target entity (including suitable corporate authority documents for each step).

It is unwise to see the legal components of an IBR project as no more than the implementation of a tax and legal integrated step plan. Just as the tax advisory team need to carry out a detailed assessment of the tax and structural feasibility of a restructuring, so too do the legal advisors. The legal input will then be fed back into the master steps plan prior to its finalisation, potentially leading to tweaks and changes to the detail of certain restructuring steps such that the final steps plan covers both tax and legal considerations.

The core legal team will check the restructuring steps plan from a general legal perspective, and will involve lawyers in each relevant territory. This can potentially entail seeking legal input from lawyers in quite a number of jurisdictions across the globe. PwC's legal network spans 90+ territories and is ideally suited, in most instances, to receiving input of this kind under one engagement letter and with a single point of contact from the client's perspective.

III. Red flag legal feasibility analysis

Once the steps plan is in an advanced state of drafting, we suggest that the legal team review the steps plan to check for any likely "red flag" issues which might mean the intended restructuring is not possible from a legal perspective or needs to be modified. The findings of a red flag review are fed back into the evolving steps plan prior to its finalisation.

Examples of issues that we look for during legal red flag feasibility (and which might have a structural impact on the steps) include:

- laws that may restrict foreign investment in a jurisdiction
- any requirements that transactions are to be carried out at fair market value
- any valuations required as a matter of law or prudent practice
- maintenance of share capital rules that may apply, and/or whether any capital reduction may need to be carried out
- constitutional documents of an entity that may need to be amended to allow for the intended transactions
- whether registers of shareholders are up to date and properly reflect the current shareholding structure
- any restrictions in shareholders' agreements in respect of entities with third party shareholders
- whether any preliminary steps need to be carried out
- issues that may affect timeline (for example where filings or notarisations/apostilles are required prior to a subsequent step)

Our overriding objective in carrying out a red flag legal feasibility assessment is to assess whether the structure works (and is optimal) from a legal perspective, and whether any changes are necessary or advisable (in conjunction with input from the tax team).

IV. Particular due diligence issues

Depending on the transaction, the legal team may also assist with more traditional legal due diligence as part of a feasibility exercise. Examples of this could potentially include:

- **Change of control clauses in contracts** – particularly if there are key contracts with suppliers, customers, landlords or lenders. Some change of control clauses can be triggered by changes of shareholding inherent in a restructuring (even if ultimate control does not change). Legal review of the relevant contractual provisions can be carried out to assess this risk.
- **Encumbrance checking** – whether any assets intended to be transferred are encumbered with security that needs to be released prior to transfer (whether shares of companies or other assets).
- **Verification of intellectual property (IP)** – this can be in respect of registered IP such as trademarks, or of licensed rights under license agreements. This kind of due diligence would be common whether IP is being transferred to a new holding entity.
- **Structural verification** – in some complex group structures or where entities have been recently acquired or have been long-held without strong corporate governance, work may need to be carried out to verify the ownership and/or loan structure in a group to ensure the structure is as the client believes it to be.
- **Exotic asset analysis** – in some cases due diligence may need to be undertaken to assess the mechanics for transfer of an exotic asset class. A good example of this would be crypto assets.

V. Detailed legal feasibility and implementation planning

Once a red flag analysis has been carried out and the findings of such are fed back into the structural steps plan, it is usually helpful (and, in a large restructuring, effectively a necessity), to prepare a legal action plan (LAP).

A legal action plan is like a master document list, used to manage the IBR project during implementation. IBR projects are by nature highly cross-jurisdictional. It is therefore important to have a master list of:

- every document that needs to be produced and details of that document (such as who will draft and review it, its intended governing law, parties to it and any special requirements such as wet ink signatures); and

- every step that needs to be taken (including any notarisations/apostilles, governmental authority filings, tax assessments or relief applications and updates to corporate registers).

Our experience is that projects in which legal feasibility is rushed or carried out during implementation can result in problems, particularly timeline and cost issues. It is important not to underestimate the workload involved in carrying out legal feasibility and implementation for IBR projects.

All things considered, a legal feasibility review should be considered a vital workflow in an IBR project to ensure the project achieves its underlying goals in a timely, efficient and smooth manner, minimising the likelihood of unpleasant surprises during implementation (or even worse, surprises which only emerge after the restructuring completes).

The PwC network offers integrated solutions that cover both tax and legal. We also involve other relevant disciplines that may be required to achieve our client’s goals, such as assurance/accounting treatment advisory, valuation services, corporate secretarial services, and consulting services.

Let's talk

For a deeper discussion of how this impacts your business, please contact us.

Tiang & Partners

Martin Robertson
Partner
+852 2833 4948
martin.robertson@tiangandpartners.com

Nicholas Cook
Counsel
+852 2833 4906
nicholas.cook@tiangandpartners.com

www.tiangandpartners.com