Overview of Employment Law & Cross Border Contract Pitfalls in the Asia Pacific Region

April 1-2, 2015

The American Club Singapore
10 Claymore Hill
Singapore 229573

Primerus
The World's Finest Law Firms

CanCham

Primerus
The World's Finest Law Firms

WHAT IS THE INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS?

Primerus is a society of the world's finest independent, boutique law firms. With nearly 200 member firms in more than 40 countries, Primerus provides clients easy access to the right lawyer, with the right skills, in the right location, and at the right cost.

Primerus has become the size of some of the world's largest law firms. However, unlike most large law firms, Primerus is growing at an unprecedented pace, and is expanding throughout Europe, Asia, and elsewhere around the globe. In every country, the top lawyers of Primerus have the skill and experience to advise clients on the international aspects of their transactions. Primerus lawyers deliver high quality legal services at reasonable fees; that's how Primerus lawyers work for you.

To learn more about the world's top lawyers at Primerus and the trusted legal services our law firm association provides, visit www.Primerus.com or call us at (800) 968-2211.

The International Society of Primerus Law Firms and The Canadian Chamber of Commerce in Singapore Jointly Present:

"Overview of Employment Law & Cross Border Contract Pitfalls in the Asia Pacific Region"

The American Club Singapore / 10 Claymore Hill /Singapore 229573

Wednesday, April 1, 2015

6:00 p.m. – 8:00 p.m. **Primerus Member Dinner (a la carte)**
PS Cafe at Ann Siang Hill Park / 45 Ann Siang Road, Singapore 069719 / Phone: +65 9797 0648

Thursday, April 2, 2015

9:00 a.m. – 11:00 a.m. **Primerus Members Only Meeting**

11:00 a.m. – 11:30 a.m. **Break**

11:30 a.m. – 12:30 p.m. **Welcome, Introductions and Networking Luncheon**
- Caroline Berube – HJM Asia Law & Co LLC (China/Singapore)
- Rohan Belliappa – Canadian Chamber of Commerce in Singapore

12:30 p.m. – 1:30 p.m. **Cross Border Contract Pitfalls: Management and Prevention**
- Moderator: Caroline Berube – HJM Asia Law & Co LLC (China /Singapore)
- Panelist: Yun-Jae Baek – Hanol Law Offices (Seoul, South Korea)
- Panelist: Selwyn Black – Carroll & O'Dea (Sydney, Australia)
- Panelist: Atul Dua – Seth Dua & Associates (New Delhi, India)
- Panelist: Yukako Wagatsuma – Hayabusa Asuka Law Offices (Tokyo, Japan)

1:30 p.m. – 2:30 p.m. **Overview of Employment Law in the Asia Pacific Region**
- Moderator: Caroline Berube – HJM Asia Law & Co LLC (China /Singapore)
- Panelist: Winnie Chiu – ONC Lawyers (Hong Kong)
- Panelist: Li-Pu Lee – Formosan Brothers (Taipei, Taiwan)
- Panelist: Murray Thornhill – HHG Legal Group (West Perth, Australia)
- Panelist: Eshwar Sabapathy – S Eshwar Consultants | House of Corporate & IPR Laws (Chennai, India)

2:30 p.m. **Wrap-up/Adjournment**

2:30 p.m. – 4:00 p.m. **Primerus Members Only Meeting**
- Seminar debriefing/future events

4:00 p.m. **Adjournment**

6:00 p.m. – 8:00 p.m. **Primerus Member Dinner (a la carte)**
JUMBO Seafood at Dempsey / 11 Dempsey Road #01-16, Dempsey Hill Singapore 249673
Phone: +65 6479 3435

Primerus
The World's Finest Law Firms

CanCham

Notes

Primerus Member Attendee Directory

April 1-2, 2015

The American Club Singapore
10 Claymore Hill
Singapore 229573

Primerus
The World's Finest Law Firms

CanCham

Yun-Jae Baek
yjbaek@hanollaw.com

Hanol Law Offices
17th and 19th Floor, City Air Tower
159-9 Samsung-Dong, Kangnam-Ku
Seoul, South Korea 135-973
Phone: +82 2 6004 2500

Caroline Berube
cberube@hjmasialaw.com

HJM Asia Law & Co LLC
49, Kim Yam Road
Singapore 239353
**Additional office located in Guangzhou, China*
Phone: +65 6755 9019

Selwyn Black
sblack@codea.com.au

Carroll & O'Dea
Level 18, St James Centre
111 Elizabeth Street
Sydney, Australia 2000
Phone: +61 2 9291 7100

Raymond Cheung
raymond.cheung@onc.hk

ONC Lawyers
19th Floor, Three Exchange Square
8 Connaught Place, Central
Hong Kong
Phone: +852 2810 1212

Winnie Chiu

winnie.chiu@onc.hk

ONC Lawyers

19th Floor, Three Exchange Square
8 Connaught Place, Central
Hong Kong
Phone: +852 2810 1212

Atul Dua

atul.dua@sethdua.com

Seth Dua & Associates

601, DLF South Court, Saket
New Delhi, India 110017
Phone: +91 11 41644400

Tony Hogarth

thogarth@mullinslaw.com.au

Mullins Lawyers

Level 21
Riverside Centre
123 Eagle Street
Brisbane Qld, Australia 4000
Phone: +07 3224 0222

Li-Pu Lee

lipolee@mail.fblaw.com.tw

Formosan Brothers

8F, No. 376 Section 4, Jen-Ai Road
Taipei, Taiwan 10693
Phone: +886 2 2705 8086

Jeff Leong

jeff.leong@jlpw.com.my

Jeff Leong, Poon & Wong

B-11-8, Level 11, Megan Avenue II
Jalan Yap Kwan Seng
50450 Kuala Lumpur, Malaysia
Phone: +603 2166 3225

Prospective Member

Eshwar Sabapathy

seshwar@eshwars.com

S Eshwar Consultants | House of Corporate & IPR Laws

#4 6th Street Kumaran Colony, Vadapalani
Chennai, India 600026
Phone: +91 44 42048235

Chad Sluss

csluss@primerus.com

Primerus

171 Monroe NW, Suite 750
Grand Rapids, Michigan 49503
Phone: 616.454.9939

Edward Sun

edward.sun@hengtai-law.com

Hengtai Law Offices

1118 West Yan'An Road
Suites 1103-1105
Shanghai, China 200052
Phone: +86 21 6226 2625

Suwit Suwan

suwan@navinlaw.com

Navinlaw

Jasmine International Tower, 27th Floor
200 Chaengwattana Road,
Pakkred, Nontaburi 11120
Thailand
Phone: +66 2 100 3333

Prospective Member

Murray Thornhill

murray.thornhill@hhg.com.au

HHG Legal Group

Level 1
16 Parliament Place
West Perth, Australia 6005
Phone: +61 8 9322 1966

Yukako Wagatsuma

yukako.wagatsuma@halaw.jp

Hayabusa Asuka Law Offices

4th Floor, Kasumigaseki
Building 3-2-5
Kasumigaseki, Chiyoda-ku
Tokyo, Japan 100-6004
Phone: +81 3 3595 7070

Sherman Yan

sherman.yan@onc.hk

ONC Lawyers

19th Floor, Three Exchange Square
8 Connaught Place, Central
Hong Kong
Phone: +852 2810 1212

Supplemental Materials

April 1-2, 2015

The American Club Singapore
10 Claymore Hill
Singapore 229573

Primerus
The World's Finest Law Firms

CanCham

Employee Share Schemes in Australia Simplified

The Federal Government has recently released proposed changes to the tax treatment of Employee Share Schemes ("ESS") to make it easier for companies to set up an ESS. While some of the changes are aimed to assist start-up companies, other changes apply to all companies and will have a broader impact on how employers use an ESS as an incentive.

What is an Employee Share Scheme?

An ESS is a scheme where shares or rights in a company are provided to an employee in relation to their employment. Put simply, an ESS gives employees a financial share of the company's potential success and therefore, provides a financial incentive for employees in the development and success of a company.

Often companies will encourage employees to participate in an ESS by offering shares, stapled securities or rights to acquire shares (including options) in the company ("ESS interests") to the employee at a discounted price. This is where the tax rules kick in. Where an employee acquires an ESS interest at a discount under an ESS, that discount will be taxed.

Key changes specific to start-up companies

The below tax concessions will apply to certain start-up companies. To be eligible, the company must be unlisted, have an aggregate turnover of $50 million or less, and be incorporated for less than 10 years.

- Shares offered under an ESS will not be taxed where the discount is less than 15% of the market value and the share is held by the employee for at least 3 years.
- Tax can be deferred on rights issued under an ESS until the sale of option or underlying share, where the exercise price is at least the market value of an ordinary share.

Other key changes

- Tax can be deferred on rights and options where there is no "real risk of forfeiture".
- Shares, rights and options subject to deferred taxation (including the concessions offered to start-up companies) will be taxed at the earliest of:
  - when there is no real risk of forfeiture of the share or right and any sale restriction is lifted;
  - when the employee ceases employment;
  - 15 years (extended from 7 years) after acquiring the share or right; or
  - (specifically for options) when the employee exercises the option (i.e. converted to shares).

Australasian Solicitors Pty Ltd
trading as
HHG Legal Group,
HHG Essentials,
Hudson Henning & Goodman
and Wheatleys Legal
ACN 602 177 891
ABN 43 602 177 891

www.hhg.com.au
reception@hhg.com.au

HHG LEGAL GROUP®
TRUSTED SINCE 1919®

- A tax refund will be available where a right or option lapses, so long as the ESS has not been setup in a way that protects the employee from market risk.

These changes are intended to apply from 1 July 2015, but the legislation may be altered after the Government's consultation with industry and its passage through the Senate. In the meantime, HHG Legal Group will provide rolling updates of important developments and will be pleased to advise you about setting up an ESS.

This is general information only, and does not constitute specific legal advice. If you would like further information in relation to this matter or other legal matters please contact our office on **+61 8 9322 1966** or email us now at reception@hhg.com.au.

HHG LEGAL GROUP®
TRUSTED SINCE 1919®

Distribution, Consignment and the Operation of the Personal Property Securities Act 2009 in Australia

If you are in the business of selling consumer goods, you may have storage or consignment arrangements with distributors. If so, you need to be aware of what would happen to your goods if one of your distributors or the provider of a storage facility became insolvent.

Let us start by considering the provisions of the *Personal Property Securities Act* 2009 (PPSA), which the WA Supreme Court considered in the recent case of *Re Arcabi Pty Ltd*. The case involved priority disputes between the Bank, Receivers, and bailors and consignors relating to goods held on the premises of an insolvent company. The Receiver appointed under the *Corporations Act 2001* asked the Court to clarify what its rights and powers were under the PPSA.

The company under receivership, Arcabi Pty Ltd (Arcabi), stored and sold rare coins and bank notes for its customers. However, much of the property stored on the premises belonged to Investors who had an arrangement with Arcabi to store their goods or sell them on consignment. The premises were owned by the directors of Arcabi rather than Arcabi itself. The Bank had security over the premises and sought to enforce its security and take possession of the premises.

The Receivers were concerned that if the Investors' security interests in the collateral (i.e. the stored and consigned goods) were not perfected or registered under the PPSA, these interests would vest in Arcabi upon its liquidation. This would mean that the goods would be available to the Receivers and Liquidators free of any security interests. The Receivers would, in that case, give the coins and notes to the Bank pursuant to its security while the Investors would be left with nothing.

In addressing the competing priorities, the Court clarified the following important concepts under the PPSA.

1. Bailment

Bailment is where physical possession of personal property is transferred from the 'bailor' to another person (the 'bailee'). The issue before the Court was whether the storage arrangement between Arcabi and its customers was a bailment that required registration under the PPSA. The Court held that the storage arrangements fell outside the scope of the PPSA because the bailment did not secure payment or performance of an obligation.

However, the bailment arrangements could still have been subject to the PPSA if those arrangements were classified as 'PPS leases'. A PPS lease is a lease or bailment that is treated as creating a 'security interest' in the relevant property. If the interest of a bailor of goods under a PPS lease is a 'security interest' it will fall within the scope of the PPSA.

The Court found that the bailments were not PPS leases because one of the elements of a PPS lease was missing. Specifically, Arcabi and its customers were not 'regularly engaged in the business of bailing goods'. As a result, the Court found that the Investors did not have a security interest in the goods that was capable of being perfected or registered. Consequently, there was

Australasian Solicitors Pty Ltd trading as HHG Legal Group, HHG Essentials, Hudson Henning & Goodman and Wheatleys Legal
ACN 602 177 891
ABN 43 602 177 891

www.hhg.com.au
reception@hhg.com.au

no priority dispute with the secured creditor (i.e. the Bank) so the goods could be returned to the respective Investors.

2. Consignment

Consignment is an arrangement whereby an owner places goods in the possession of another person to be sold, but the owner retains ownership of the goods until they are sold. The PPSA applies where a consignment agreement either secures payment or performance of an obligation or is a "commercial consignment" for the purposes of the PPSA.

The Court found that the consignment was not intended to secure a debt due by Arcabi, and therefore did not constitute security for a payment or for performance of any legal obligation. Accordingly, it was not a security interest for the purposes of the PPSA. The consignment arrangements were found not to be 'commercial consignments' under the PPSA because neither Arcabi nor its customers dealt in rare coins and notes in the ordinary course of their respective businesses. Consequently, the consigned goods could be returned to their Investors.

3. Indemnity and lien

It is a well recognised principle of receivership that a receiver is entitled to be indemnified in respect of their costs, expenses and remuneration out of the assets in their hands as receiver. In order to satisfy their right to indemnity, the receiver has an equitable lien over those assets. An equitable lien is a right against property which is held as security for payment of a debt or performance of an obligation. However, a receiver's lien may compete in a priority dispute in the same way as other interests.

The Court held that the Receivers were entitled to an equitable lien over the goods stored with Arcabi to cover their costs and expenses in investigating and preserving the goods. This is despite those goods not necessarily being subject to the Bank's security. The Court held that the receivers' equitable lien included the costs incurred for the care, preservation and realisation of the property and their reasonable remuneration.

This is general information only, and does not constitute specific legal advice. If you would like further information in relation to this matter or other legal matters please contact our office on **Freecall 1800 609 945** or email us now at reception@hhg.com.au.

What to Include in a Shareholders' Agreement

A standard company constitution will not always protect shareholders in the event of a dispute between members. This is where a shareholders' agreement, regulating the rights and obligations of shareholders, can help avoid the uncertainty of costly court litigation. A considered and properly formulated shareholders' agreement is highly recommended for all private proprietary corporations.

So, what should you include in a shareholders' agreement?

Every shareholders' agreement should be individually tailored because every company is different. The specific provisions of each shareholder agreement should take into account the number of shareholders, the objectives of the shareholders, the funding arrangements, and the nature of the business or industry in which the company operates. However, there are also some basic clauses that every shareholder agreement should have.

1. Alternative Dispute Resolution

As a pre-requisite to any court proceedings, it is advisable for all parties to try resolve their disputes through an alternative dispute resolution (ADR) process stipulated in the shareholders' agreement. These processes generally take less time and cost less money than proceedings in a court. ADR may include mediation, arbitration or conciliation. Note that a provision in a shareholders' agreement to resolve disputes through an ADR process will not preclude a court from hearing the dispute at a later date, but can be drafted to prevent any party using the Public Court process to air the dispute as a first step.

2. Deadlock Provisions

Deadlock provisions deal with circumstances where shareholders cannot agree on the management of the company. The shareholders' agreement should set out a procedure to resolve a deadlock if one arises. There are a number of procedures that can be used to resolve deadlocks, including (but not limited to):

- Shotgun clause – enables a shareholder to serve notice on another shareholder requiring the receiving shareholder to buy his/her shares at a nominated price. If the receiving shareholder chooses not to buy those shares, he/she must sell his/her shares to the initiating party at the same nominated price.
- Chairman clause – enables one of the shareholders to become the Chairman in the event of a deadlock and have the casting vote on the dispute.
- Liquidation clause – if the deadlock continues for a set period of time, all the company's assets will be sold and the company will be wound up voluntarily. The shareholders equally share in the expenses of liquidating the business. This solution is generally a last resort where there is no alternative other than to liquidate.

Australasian Solicitors Pty Ltd trading as HHG Legal Group, HHG Essentials, Hudson Henning & Goodman and Wheatleys Legal
ACN 602 177 891
ABN 43 602 177 891

www.hhg.com.au
reception@hhg.com.au

3. Pre-Emptive Rights

Pre-emptive rights impose certain restrictions on the transfer of shares. Pre-emptive rights may include:

- Right of first refusal – provides existing shareholders the first opportunity to purchase the shares from another shareholder of the same company before the shares can be offered to parties outside the company.
- Right to refuse transfer – the Board will have the discretion to refuse to register a transfer of shares to prevent unwanted parties from joining the company.
- Board consent to transfer – a shareholder wishing to transfer his/her shares will have to obtain the consent of the Board to transfer shares or transfer shares to certain parties.

4. Mandatory Sale Events

The shareholders' agreement should specify certain fundamental changes in circumstance which will trigger a mandatory sale of that member's shares. Examples of such events include:

- A shareholder's death
- A shareholder's insolvency / bankruptcy
- Certain fundamental breaches of shareholders' agreement
- Temporary or permanent disability
- Cessation of employment
- Loss of professional certification (where this is required because the company trades, for example, as a doctor's surgery or a law practice)
- Criminal charges or investigations
- Divorce or the commencement of matrimonial or family court proceedings

5. Share Valuation Methods

The shareholders' agreement must stipulate a method for determining the value of shares in relation to pre-emptive rights and mandatory sale events. Typical share valuation methods include:

- Fixed price – price agreed by the shareholders.
- Assets based – the value of the net assets divided by the current number of shares.
- Expert valuation – usually, valuation by an accountant
- Board valuation – those directors who are not directly involved in the transaction value the shares.

This is general information only, and does not constitute specific legal advice. If you would like further information in relation to this matter or other legal matters please contact our office on **+61 8 9322 1966** or email us now at reception@hhg.com.au.

Virtual Damage & Real Life Loss - Social Media and the Workplace

In this digital age when an employee has had a bad day at work it can be tempting for them to shout "Unfair" over a highly visible social network. An impulsive social media outburst can have dire consequences for the reputation of both the employee and the employer.

Even when an employee isn't disgruntled, social media can cause loss. For example, an unauthorised announcement or opinion piece by an employee could be damaging, or a business may lose clients due to LinkedIn notifications that advise when an employee has moved to a new company.

An employee who causes their employer damage misusing social media will more than likely lose their job – however in some circumstances they may also be liable for financial losses their employer incurs as a result of their actions.

Playing fair and seeking good legal advice can assist all involved to minimise the risks of a social media hijack.

Expected and Rejected Online Activities

Employees often complain about their workplaces to their friends. However, posting opinions online has the potential to do damage that cannot easily be undone. Facebook, LinkedIn, Twitter etc.. are open networks where information can be easily accessed, promoted and spread in seconds to thousands (even millions) of people. It isn't hard to see that unauthorised posts by employees about any aspect of their work have the potential to do real damage to an employer's business.

A clear social media policy is an important risk management tool for employers. Employees should be aware of exactly what online activities are expected and permissible. Courts and Tribunals have been clear that employers are reasonable to expect their employees will not cause their business damage using social media even where their activities are undertaken outside of work hours. The policy should:

- state what (if any) business development activities are expected and allowed using social networks, and
- outline any procedure to be followed when posting information about or on behalf of the employer,
- consider appropriate online communications with other employees who could feel harassed or bullied by their colleagues' use of social media, and
- require the employee not to post any derogatory or damaging comments about their workplace, colleagues, clients or customers

Discipline and Dismissal

If an employee breaches a social media policy normal disciplinary procedures should be followed. These should include notifying the employee of the concerns held, providing an opportunity for the employee to explain their actions and (if necessary) offering a support person to be present where

Australasian Solicitors Pty Ltd trading as HHG Legal Group, HHG Essentials, Hudson Henning & Goodman and Wheatleys Legal
ACN 602 177 891
ABN 43 602 177 891

www.hhg.com.au
reception@hhg.com.au

PERTH Lvl 1, 16 Parliament Place, West Perth WA 6005 PO Box 1363, West Perth WA 6872 DX 60706 T (08) 9322 1966 F (08) 9322 2727
ALBANY 49 Peels Place, Albany WA 6330 PO Box 5084, Albany WA 6332 DX 60806 T (08) 9841 2322 F (08) 9841 2489
DENMARK (All mail to Albany office) By Appointment Only T (08) 9848 2848 F (08) 9841 2489
MT BARKER (All mail to Albany office) Mt Barker Resource Centre, Suite 5, 1 Lowood Road, Mt Barker WA 6324 T (08) 9851 1113 F (08) 9851 1100

termination of employment is a possibility. It is also important that any social media policy is monitored and enforced. An employer may be considered to be acting in a discriminatory manner if some but not other employees are disciplined for similar online activities.

Even in the absence of a social media policy employees are expected to refrain from deliberately or recklessly damaging their employer's business. All employment contracts have an implied term to act in good faith. This term applies to the employee and the employer equally. If an employee posts information or comments online with the intent of causing harm to their employer's reputation they will have breached their contract of employment in a way that could warrant immediate dismissal.

Claiming Damages from Employees

Generally, employees cannot be held liable for negligence or carelessness that causes their employer loss. Similarly, a breach of a policy is unlikely to be sufficient for an employer to successfully make out a claim for damages against an employee. However, where an employee has deliberately breached an explicit term of their employment contract and losses result the employee could be held personally liable.

Court action can be taken even where the employee had already resigned or been terminated when they posted damaging information on social networks. An employer may rely on clauses in the employment contract that survive termination (such as confidentiality or restraint of trade) to prove a breach of contract. The implied term of good faith may also survive beyond the period of employment.

Senior employees have a greater potential to do damage to their employer, and will be more readily held to account for breaches of their employment contract. Courts recognise that senior executives receive high remuneration for their services to an employer and are intrinsically involved in maintaining their employer's reputation. Employers will find it easier to enforce contractual limitations on the online activities of senior employees – both during their employment and for a reasonable period after it ends.

Tips for Employers

- Publish a clear social media policy for your employees to follow.
- Enforce disciplinary action where social media is misused – a policy that is not enforced loses currency and clout.
- Include explicit terms in employment contracts regarding the use of social media and any expectations that extend beyond the period of employment.
- Where an employee is being terminated or resigning consider whether a Deed of Release can be negotiated, and if so include:
    - requirements for mutual non-disparagement,
    - specific restraints of trade, and
    - agreement in relation to what announcements regarding their departure from the company can be made on social media and when.

This is general information only, and does not constitute specific legal advice. If you would like further information in relation to this matter or other legal matters please contact our office on **+61 8 9322 1966** or email us now at reception@hhg.com.au.