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FOREIGN INVESTMENT

BNA Insights: The Rise in ASEAN — Expected Litigation Outflow



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The Association of Southeast Asian Nations (“ASEAN”) encompasses the countries of Brunei Darussalam, Cambodia, Indonesia, Lao (PDR), Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. [ASEAN Member States, Association of Southeast Asian Nations, www.asean.org (Jan. 28, 2016, 6:14pm).] This area within Asia has become home to a wave of new economic and commercial initiatives, which are set to firmly place Asia at the epicenter of cross-border trade and economic growth. [Kanishk Verghese, *Opportunity Beckons*, Asian Legal Business, January 28, 2016, at www.legalbusinessonline.com.] M&A activity in the Asia-Pacific region reached new heights in 2015, with numerous multibillion dollar deals

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keeping businesses, bankers, and lawyers on their toes. [Id.] According to Thomson Reuters' data, M&A volume in Asia (excluding Japan) in 2015 hit the trillion dollar mark for the first time in history, within US\$1.165 trillion, a whopping 59 percent increase from the US\$731.3 billion recorded in 2014. [Id.] This boom can be attributed to “the strong cash positions held by Asian companies, cheaper asset valuations in overseas markets, and a ravenous appetite for expansion.” [Id.]

Inevitably, this increase in commercial activity and economic expansion will lead to a rise in cross-border disputes and an increased demand for international arbitration. The global economic expansion of the ASEAN countries will be accompanied by a variety of international deals and corporate contracts, which more than likely, will lead to disputes across international lines. The need for enforcement and recognition of jurisdictional judgments will also become more and more significant as these cross-border relationships develop.

By way of example, in *Giro, Inc. v. Malaysian Airline Sys. Berhad*, [10 Civ. 5550, 2011 BL 147646, at *1-*2 (S.D.N.Y. 2011),] the defendant, a foreign corporation, entered into an agreement with the plaintiffs. The agreement provided that the plaintiffs would identify and prepare warranty claims on behalf of the defendant, and that, in return, the plaintiffs would collect a fee of 35% of any recovery received by defendants as a result of plaintiffs' work. [Id.] The plaintiffs sued the defendant for breach of contract. The defendant brought a motion to dismiss based on improper venue pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure, or in the alternative, on the grounds of *forum non conveniens*. Alternatively, the defendant also moved to dismiss the causes of action for oral contract, fraud, and unjust enrichment for failure to state a claim pursuant to Rule 12(b)(6). [Id.] Ultimately, the Court granted the defendant's motion to dismiss based on *forum non conveniens*, but only after the Court analyzed the terms of the contract and the relevant facts of the case. [Id.] Cases similar to this one are bound to arise more and more as economic development in the ASEAN region continues to grow.

Not surprisingly, because of this increase in economic activity, ASEAN GDP in 2014 almost doubled

from what it was in 2007, jumping from US\$1.33 trillion to US\$2.57 trillion; there was also a 76% increase in GDP per capita to over US\$4,000. [The ASEAN Secretariat, *A Blueprint for Growth, ASEAN Economic Community 2015: Progress and Key Achievements*, November 2015.] Particularly noteworthy has been the cumulative effect of intra-regional trade and investment. The region has become one of the world's fastest growing investment destinations, accounting for 11% of total global foreign direct investment (FDI) inflows in 2014 as compared with 5% in 2007. [Id.] The "development of an 'ASEAN investment strategy' is increasingly common for existing and would-be investors, facilitated—among other factors—by the region's framework for enticing investors and helping businesses operate in the region." Entered into force in 2012, the ASEAN Comprehensive Investment Agreement (ACIA) contains commitments to liberalize, facilitate, promote, and protect cross-border investment, based on international best practices. [Id.]

And, with over 600 million inhabitants, ASEAN's potential market is larger than the European Union (EU) or North America. Next to People's Republic of China and India, ASEAN has the world's third-largest labor force that remains relatively young. [Asian Development Bank, *ASEAN Economic Community: 12 Things to Know*, December 29, 2015.] More than 50% of ASEAN's population is under 30 years old, making up a large part of both the current and future workforce. [The ASEAN Secretariat, *A Blueprint for Growth, ASEAN Economic Community 2015: Progress and Key Achievements*, November 2015.] Interestingly, ASEAN is one of the most open economic regions in the world, with total merchandise exports of over US\$1.2 trillion—nearly 54% of total ASEAN GDP and 7% of global exports. [Asian Development Bank, *ASEAN Economic Community: 12 Things to Know*, December 29, 2015.]

"With GDP growth rates that are threatening to overtake China's, and a youthful, growing and increasingly educated population, the allure of the ASEAN market is obvious," according to prominent accounting group PricewaterhouseCoopers (PwC). [Anthony Fensom, *ASEAN: Asia's Hottest Investment?*, *The Diplomat*, April 23, 2015.] Since its formation in 1967, the ASEAN region has grown to account for 8.8 percent of the world's population and with an economy that combined would represent the world's sixth-largest. [Id.] The 10-nation bloc is expected to post average annual GDP growth of 5.6 percent through to 2019, with Indonesia, Malaysia, and the Philippines being the three biggest economies. [Id.]

Indeed, a prime example of the economic development in the region can be seen with Malaysia. The country has taken large strides not only in its economy, but also in its technological sector, putting itself on par with some of the biggest players on the map. For instance, the Multimedia Development Corporation (MDeC) has become a leader in forming entrepreneurial ties between Malaysian natives and foreign investors. The organization has helped spur technological and economic advancement in the region and abroad. And, it is as a *direct result* of MDeC's efforts that Malaysia has experienced this surge in economic activity and prosperity.

The Asian Economic Community

At the end of December 2015, alongside this economic growth and expansion, ASEAN realized its long-held aim of creating a formal community to liberalize the movement of trade, capital and skilled labor, creating the beginnings of a single market encompassing 625 million people and economies producing US\$2.6 trillion annually. [Chris Punch, *ASEAN Moves Towards Single Market*, Global Government Forum, January 1, 2016.] The formation of the ASEAN Economic Community (AEC) was agreed to by the leaders of the 10 ASEAN nations at a conference hosted in Kuala Lumpur, Malaysia on November 22, 2015. [Id.] Fundamentally, AEC is founded on four initiatives: creating a single market and production base; increasing competitiveness; promoting equitable economic development; and further integrating ASEAN with the global economy. [Asian Development Bank, *ASEAN Economic Community: 12 Things to Know*, December 29, 2015.] ASEAN's physical infrastructure is critical to AEC's goal of establishing a single market and production base. [Id.]

Its "creation can be regarded as a game changer for East Asia," according to Tan Sri Rastam Mohd Isa, a former Malaysian diplomat who now chairs the country's Institute of Strategic and International Studies. [Chris Punch, *ASEAN Moves Towards Single Market*, Global Government Forum, January 1, 2016.] "It opens up the real possibility of a single ASEAN market allowing for the free flow of goods and services, better trade and investment opportunities, freer transfer of capital and easier flow of skilled labour." [Id.] Rastam also adds, "the commitment given by the ASEAN countries to the AEC will over time help transform the region's way of doing business, offering better conditions for businesses and investors to operate through coordination and application of common and uniform regulations and standards." [Id.] "More attention will be given to small and medium-sized enterprises— which form some 97% of businesses in ASEAN— better infrastructure facilities will be created and so on." [Id.] In turn, investors will also likely find it easier to put money into projects overseas.

In the coming decade, the benefits of the economic community will be enjoyed more broadly, not only by large corporations but also by other economic players, including micro, small, and medium-sized enterprises, start-ups, employees, entrepreneurs and professionals. Efforts to narrow the development gap will be strengthened, to ensure that AEC delivers real benefits of job creation and stability, welfare improvement, better sustainability and future development. [The ASEAN Secretariat, *A Blueprint for Growth, ASEAN Economic Community 2015: Progress and Key Achievements*, November 2015.] The "regional market will not only serve as a 'stepping stone' for participation in the global market but also as a true source of comparative advantage to achieve global competitiveness." [Id.]

Multimedia Development Corporation (MDeC)

To help spur the development of native entrepreneurs and the expansion of the ASEAN economy, coalitions and corporations have sprung up in the ASEAN region to further the cause. In particular, as mentioned above, MDeC in Malaysia has become a driving force in the nation because of its efforts to help native digital

technology entrepreneurs develop their businesses. MDeC was incorporated in 1996 to oversee the development of the MSC Malaysia [MSC Malaysia is Malaysia's national Information Communication Technology (ICT) initiative designed to attract world-class technology companies while grooming the local ICT industry. Fully supported by the Malaysian Government, MSC Malaysia has led the nation's transformation towards a K-Economy over the past decade and a half. MSC Malaysia is your gateway to the ICT industry in Malaysia and the region. Since its inception in 1996, MSC Malaysia has contributed over RM275.04 billion in revenue to the Malaysian economy. Overview, Official Website of Multimedia Development Corporation, www.mdec.my/about-us/overview (Last visited Feb. 3, 2016, 6:18pm).] and to advise the Malaysian Government on legislation and policies, as well as to set breakthrough standards for multimedia operations. [Overview, Official Website of Multimedia Development Corporation, www.mdec.my/about-us/overview (Last visited Feb. 3, 2016, 6:18pm).] MSC Malaysia's primary focus "is to create an ideal and conducive platform to nurture Malaysian Small and Medium Enterprises (SMEs) in the Information Communication Technology (ICT) sector, to become world-class businesses whilst attracting participation from global ICT companies to invest in and develop cutting-edge digital and creative solutions in Malaysia." [Id.] MSC Malaysia has driven the development of the Malaysian ICT industry, enhanced technology adoption, and has made significant strides in increasing the economic impact and footprint of ICT for the nation. [Id.]

MDeC's focus is on strengthening Malaysia's position as a top-shared services and outsourcing hub by attracting more ICT investments, ensuring a growing pool of talent for the ICT sector, as well as promoting the growth of a new generation of MSC-status companies to achieve success and high annual growth. [*The Next Global Invasion*, iDeas Xchange, Your Gateway to Globalisation, Issue 1, Volume 1, at p. 2.] To ensure that it achieves all it has set out to do, MDeC has continued to bolster and build its existing globalization strategy, which has led to the launch of MDeC Americas. [Id.] Its office in Silicon Valley provides MSC-status companies with market access, funding opportunities, technology capabilities, and opportunities for mergers and acquisitions. [Id.] Inevitably, the expansion will act as a launch-pad for Malaysian companies to target the global economy.

MDeC's primary objective with MDeC Americas is to help Malaysian companies expand their global footprint in the United States, and from there, the world. [Id. at 4.] MDeC wants to help Malaysian "technopreneurs" tap into the wide range of opportunities outside of the country. [Id. at 3.] To do this, it has identified five focus areas: "Big Data Analytics, The Internet of Things, Cloud Computing and Data Centers, e-Commerce, and Information Security." [Id.] MDeC hopes that through the program, the selected business owners can further advance their leadership and entrepreneurial skills and connect to a network of venture capitalists, market leaders and notable entrepreneurs. The organization also hopes to give participants international market exposure and access, and help them identify investment opportunities with US-based companies, kick-starting the process of establishing their presence in the US. [Id.]

If this wasn't enough, MDeC is also responsible for a program called Digital Malaysia (DM) that was unveiled in May 2012. [Overview, Official Website of Multimedia Development Corporation, www.mdec.my/about-us/overview (Last visited Feb. 3, 2016, 6:18pm).] The purpose of the program is to transform Malaysia into a developed digital economy by 2020, connecting and empowering the government, businesses and citizens. [Id.] It will create an ecosystem that promotes the pervasive use of ICT in all aspects of the economy to connect communities globally and interact in real time resulting in increased Gross National Income, enhanced productivity and improved standards of living. [Digital Malaysia: Overview, National Digital Economy Initiative, Official Portal of Digital Malaysia, <http://www.digitalmalaysia.my> (Last visited Feb. 5, 2016, 4:15pm).] The program is underpinned by three strategic thrusts: (1) Supply to Demand-Focused; (2) Consumption to Production-Centric; (3) Low Knowledge-Add to High Knowledge-Add. [Id.]

Currently, the Malaysian public sector spends almost 54% of its ICT investment on building information-based infrastructure. [Id.] Initiatives such as the High Speed Broadband project have successfully ensured that the ICT infrastructure needed to prepare this nation for the change is in place. [Id.] In order to fully leverage on the existing initiatives, DM will focus on "initiating more demand-focused activities that will maximize usage of the existing information and infrastructure to enhance ROI before obsolescence sets in." [Id.] DM also targets to develop industries, especially new sources of growth that will create high-value jobs. [Id.]

And while Malaysians are no strangers to the Internet, "they consume information and use the internet extensively for social networking, news and research but Malaysians have to fully capitalize on the internet for revenue generation." [Id.] DM intends to "create platforms and programs to nurture and grow netizens to become producer-consumers or prosumers." [Id.] It also plans to create new income generation opportunities via new digital business models. [Id.] DM will also help to promote innovative digital business models that "will drive the creation of high-value products and services." [Id.]

Today, both MSC Malaysia and DM run concurrently to spur Malaysia's technology industry development and digital economic growth, under the purview of MDeC. [Overview, Official Website of Multimedia Development Corporation, www.mdec.my/about-us/overview (Last visited Feb. 3, 2016, 6:18pm).]

Foreign Investment

The rise in commercialization and technological advancement in the area has not gone unnoticed. In fact, the EU caught onto this profitable trend and began making substantial investments into the ASEAN community as early as 2012. [Prashanth Parameswaran, *Sustaining Europe's Pivot to Asia: ASEAN-EU Dimension*, RSIS Commentaries, March 6, 2013.] European investors have been the fastest to seize on ASEAN's potential, with net foreign direct investment (FDI) of \$75 billion over 2011 to 2013, followed by Japan's \$56 billion, with \$24 billion from the United States and \$22 billion from China. ASEAN as a whole represents the EU's third-largest trading partner outside of Europe (after

the U.S. and China), and the EU is ASEAN's third largest trading partner after China and Japan. [European Commission, Directorate-General for Trade Countries and Regions, Association of South East Asian Nations, <http://ec.europa.eu> (Last visited Feb. 5, 2016, 11:03am).]

The EU solidified its presence in the region by negotiating a free trade agreement with individual ASEAN countries with an eye on an eventual region-to-region FTA. [Prashanth Parameswaran, *Sustaining Europe's Pivot to Asia: ASEAN-EU Dimension*, RSIS Commentaries, March 6, 2013.] Negotiations with Singapore and Malaysia were launched in 2010, with Vietnam in June 2012 and with Thailand in March 2013. [European Commission, Directorate-General for Trade Countries and Regions, Association of South East Asian Nations, <http://ec.europa.eu> (Last visited Feb. 5, 2016, 11:03am).] And in 2014, the European Commission finalized the negotiation of a bilateral FTA with Singapore. [Id.]

ASEAN, the US, and the Future

Coincidentally, ASEAN is also the largest Asian destination for U.S. investment. [ASEAN's Bright Future: Growth Opportunities for Corporates in the ASEAN Region, 2016, <https://www.jpmorgan.com/country>.] The value of U.S. exports to ASEAN nations is approximately the same as those to China and almost four times those to India; the ASEAN region is also a favorite location for U.S. multinationals. [Michael Plummer, *How (and Why) The U.S. Should Help Build An ASEAN Economic Community*, East-West Center.] Given ASEAN's focus on trade and investment liberalization, the region will no doubt become increasingly important to the United States. [Id.]

In fact, representatives from the United States and ASEAN recently met to discuss possible trade and investment opportunities. President Obama recently closed a historic summit with Southeast Asian leaders calling for reduced tensions in the South China Sea, where territorial disputes over shipping lanes have spilled into international court, and announcing several new business development initiatives. [Rosalie Murphy, Jesse Mars, *Obama, SE Asian Leaders seek to ease maritime tensions*, USA Today, Feb. 17, 2016, <http://www.usatoday.com/story/news/nation-now/2016/02/16/obama-se-asian-leaders-see-ease-maritime-tensions/80482142/>.] Obama announced a new initiative called "U.S.-ASEAN Connect" in which the U.S. will set up "hubs" across the region to connect entrepreneurs and business people. [Id.] Together, the ASEAN nations comprise America's fourth-largest trading partner and represent nearly 10% of the world's population. [Id.] Going forward, the increase in foreign investment, informational technology, and multinational corporations will continue to draw U.S. investors and corporations to a region that is increasingly seen as pivotal to the global digital economy.

However, this expansion does not come without challenges. These commercial opportunities, coupled with uncertainty over global markets, are likely to spur a spike in cross-border disputes. Differences in culture and ways of doing business are also potential causes for concern. For these reasons and many others, it is imperative to familiarize yourself with the laws and the customs of the region, and arm yourself with a legal team knowledgeable about the area and its practices.