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FOREIGN BUSINESSES CATERING TO U.S. TOURISTS CAN ENFORCE CONTRACT PROVISIONS DETERMINING WHERE LITIGATION FOR INJURIES SUFFERED OVERSEAS MUST BE INITIATED

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According to a new Eleventh Circuit opinion, *Feggestad v. Kerzner Int'l Bahamas, Ltd.*, foreign businesses that employ online purchase or reservation systems to sell goods or services to U.S. customers can enforce so-called "forum selection" clauses—contract clauses that designate the geographic location of the court that will hear disputes arising from the transaction—found in online purchase confirmations in order to avoid having to defend lawsuits in courts in the United States. In the *Feggestad* case, the Eleventh Circuit upheld dismissal of a complaint filed in the United States District Court in the Southern District of Florida by a U.S. citizen for injuries sustained at the Atlantis Resort in The Bahamas.

The facts are straight-forward: Mr. Feggestad (the U.S. citizen-plaintiff) made reservations at the Atlantis Resort. At the time Mr. Feggestad made the reservation, the hotel sent him an email confirmation that included a "terms and conditions" section, and importantly, a hyperlink to a website which provided notice that (i) any dispute between guests and the hotel (and any affiliated entity) had to be litigated in The Bahamas, and (ii) guests would have to sign a registration form containing a forum selection clause to that effect upon their arrival, which Mr. Feggestad did. Later he sustained serious injuries resulting from a slip and fall, and subsequently (and unsurprisingly) filed suit against the hotel and affiliated entities for his injuries. Defendants moved to dismiss the complaint based on the forum selection clause, arguing that the case could only be brought in The Bahamas.

Mr. Feggestad conceded that he did not read the "terms and conditions" in the electronic confirmation, access the link provided to him, when he made the reservation, or read the conditions when he signed the registration form. The Eleventh Circuit was unmoved by affidavits of Mr. Feggestad's traveling companions that the agent at the Atlantis Resort misrepresented the purpose of the registration form (*i.e.*, stating that it was to ensure payment for incidentals) because there was no evidence that resort personnel precluded Mr. Feggestad from reading and understanding the terms of the agreement. Thus, the Eleventh Circuit found that Mr. Feggestad received proper notice of the forum selection clause twice—first, through electronic notification at the time of the booking, and second, through the registration form when he arrived at the hotel. As a result, the court concluded that Mr. Feggestad could not show that the inclusion of the forum selection clause violated the legal standard U.S. courts use when evaluating a non-negotiated forum selection clause (which is included in virtually all standard reservation agreements in the hospitality industry); that is, was the forum selection clause a product of fraud or coercion.

This case solidifies already strong U.S. case law supporting enforcement of forum selection clauses requiring U.S. residents to litigate disputes in foreign courts, far away from the comforts and benefits of courts in the U.S., and subjecting U.S. residents to the risk that a foreign court might well limit remedies in a way that might not be the case in U.S. courts, in order to protect foreign companies who operate businesses which bring in needed U.S. tourist dollars.

For more information about this topic, please contact the authors Paul Avron and Ilyse Homer, on the firm's Business Reorganization Team.

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