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Business Litigation Note

The Growth of Cross-Border Business and a Contract Issue to Consider

It is well known that growth markets for many U.S. companies—both large and small—are now found overseas in emerging economies rather than here at home. This economic reality, and the presence of foreign businesses in the United States, will increasingly place U.S. companies and interests in unanticipated circumstances in which their rights will be adjudicated through a hybrid of foreign and U.S. laws, and foreign and U.S. courts. Choosing venues and applicable laws by contract therefore is an increasingly important first step in thinking about and addressing business and legal issues.

To see a quick example of these ideas at work, look at the decision in *Giannopoulos v. Iberia Airlines* decided in the United States District Court in Chicago. The plaintiffs, Illinois residents, were scheduled to fly to Europe but their flight out of Chicago was delayed by over three hours—a material delay period under European Union regulations. Under the relevant EU passenger rights regulation, a three-hour delay entitles passengers to certain damages.

The plaintiffs sued in Chicago to enforce their rights against Iberia. The airline asked that the suit be dismissed. One of the airline's arguments was that dismissal was appropriate because of the doctrine of "comity." Comity allows a court to dismiss a lawsuit in order to defer to another court in another jurisdiction that has a greater interest in the development and administration of a law. The airline argued that because the relevant regulation had been created by the EU and was in the midst of being interpreted by European authorities, comity required deference to the EU courts.

The court, however, disagreed. In its view, the legal principles involved in the case were not terribly complex and, if needed, the court could even stay the Chicago litigation until after the European courts had ruled on the meaning of the regulation. But by continuing to interpret and apply the developing law of a foreign state, even with guidance from EU courts, the Chicago court created the potential for the uneven development of the law—and unpredictable outcomes for the parties.

By contrast, the EU regulation, and the contract between the passengers and the airline, did not provide that the exclusive venue for the interpretation of the EU regulation would be the EU courts. Had the passengers and Iberia anticipated that issue when they formed their contract, they may have shortcut this litigation and delivered the parties a more predictable result—the one preferred by the airline. Addressing foreign law and venue issues through contract provisions is a lesson worth considering.

Protecting Confidential Information

A recent case reemphasizes that it will be difficult for an Illinois business to protect its confidential information against misuse by a former employee in the absence of a written confidentiality and/or covenant not to compete agreement. In *Clinical Wound Solutions v. Morris*, the defendant, Morris, was an officer and employee of the plaintiff CWS, a medical products company. Before resigning from CWS, Morris started her own company that was in direct competition with CWS, transferred CWS corporate information to her personal computer; and used the CWS cell phone that she had been issued as a CWS employee, along with her CWS email account and CWS computer-based information, to market and sell product for her new company.

Notwithstanding this conduct, the court refused to allow CWS to pursue a claim for violation of its common law trade secret rights. Although the court noted that CWS had taken steps to protect its confidential information—including using a secure

computer program and verbally informing its employees that CWS's information was confidential and that such information was not to be disclosed outside of CWS—the court ruled those steps were not enough.

What determined the court's decision was that CWS had not required Morris to sign a "confidentiality agreement, a covenant not to compete or any other restrictive covenant when she was hired."

While the courts will, in appropriate circumstances, help a business protect its confidential information, it seems clear that the courts must first be satisfied that the business has done all that it reasonably can to protect its confidential information. Without a signed confidentiality agreement or a covenant not to compete, a court will be far less willing to assist a business whose confidential information is misappropriated by a rogue employee or officer.

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Katten Muchin Rosenman LLP

www.kattenlaw.com

CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK OAKLAND WASHINGTON, DC

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