

Are Franchisees Subject to Personal Jurisdiction in the Franchisor's Home State?

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Geographic expansion is one of the primary goals of any successful franchise system, and litigation with franchisees located in various states is one of the inevitable consequences of such expansion for a franchisor. The diverse laws of the various states and the potential for inconsistent court rulings threaten the uniformity and consistency that franchisors desire. Franchisors litigating in numerous jurisdictions incur higher costs, both in dollars and time, due to tracking cases from all over the country, having in-house counsel or corporate witnesses appear for court hearings and depositions, securing multiple outside counsel, and training outside counsel on the business objectives of the company. Thus, it is critical for a franchisor to maintain the ability to litigate disputes with franchisees in the franchisor's home state.

This article will discuss whether franchisors can subject their franchisees to personal jurisdiction in the franchisors' home states and how franchisors can increase their chances of litigating in their home jurisdictions. It will examine how a forum selection provision impacts how courts resolve this issue.

Personal Jurisdiction in the Absence of a Forum Selection Clause

The franchise relationship is generally governed by the contract between the franchisor and franchisee. A forum selection clause is the parties' agreement to submit their disputes to the jurisdiction of a particular forum. In the absence of a forum selection clause, courts will undertake a traditional personal jurisdiction analysis when a forum's jurisdiction is challenged by a franchisor or franchisee. That analysis focuses on each party's contacts with the forum state. A corporation or business not chartered within a state can be subject to that state's jurisdiction if it has the requisite minimum contacts with that state. *International Shoe Co. v. Washington*¹ established that a corporation will be subject to the jurisdiction of any state with which it has minimum contacts as long as the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice." The purpose of the minimum contacts test is to ensure



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the fairness and reasonableness of requiring a nonresident to defend a lawsuit in the forum state.² Given this focus, courts should not apply the jurisdictional test mechanically but should consider "the quality and nature of the activity in relation to the fair and orderly administration of the laws."³

Over the years, courts have expanded on the analysis of whether to subject a party to suit in a particular forum. The defendant's contacts with the forum state must be such that the defendant "should reasonably anticipate being haled into court there."⁴ A defendant is on notice that it is subject to suit when it "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."⁵

As a consequence of these doctrines, courts have split personal jurisdiction into two types, general jurisdiction and specific jurisdiction, and a court can use either to retain jurisdiction over a defendant. The distinction between the two lies in the nature and number of contacts a party has within the state. General jurisdiction focuses more on the quantity of contacts, while specific jurisdiction evaluates the quality of the contacts.

A state will establish general jurisdiction, and thus have personal jurisdiction over a matter, if the defendant's contacts within the state are continuous and systematic.⁶ Therefore, a court may force a defendant to litigate disputes in the courts of the forum state even if the cause of action or reason for the dispute does not arise out of those contacts. Essentially, a defendant may have sufficient contact with the forum state to warrant a court asserting jurisdiction over it for all matters. The analysis of whether general jurisdiction exists is fact-sensitive and far from concrete. Decisions vary across state lines, and different courts emphasize different factors, making uniformity and predictability unlikely.⁷ The exercise of general jurisdiction over an out-of-state franchisee is an uncommon event because the contacts between a franchisee and the franchisor's home state rarely rise to a systematic, continuous, and extensive level.

Unlike general jurisdiction, specific jurisdiction does not require a defendant's contacts with the forum state to be continuous or systematic. In fact, the defendant's contacts may be infrequent or may consist of a single act as long as the cause of action arises out of that activity or act.⁸ If there is a substantial connection between a party's activity in the forum state and the claims asserted in the lawsuit, the court may find specific jurisdiction. Ultimately, specific jurisdiction requires an analysis of the relationship between the defendant, the forum state, and the cause of action to determine whether the minimum contacts test is satisfied.⁹ The specific jurisdiction analysis varies greatly from court to court and from state to state.¹⁰ Courts differ on which factors are more important and on the weight given to the defendant's due process rights versus the

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forum state's interest in litigating the matter.¹¹

One of the seminal personal jurisdiction cases is the U.S. Supreme Court case of *Burger King v. Rudzewicz*.¹² In *Burger King*, defendant-franchisees, located in Michigan, contracted with Burger King, a Florida-based franchisor. The franchise agreement contained a Florida choice of law provision but did not contain a forum selection clause. Burger King brought suit in federal district court in Florida, alleging that the franchisees breached their franchise obligations by failing to pay royalties. The franchisees claimed that because they were Michigan residents and the lawsuit's claims arose out of the day-to-day business operations of the Michigan-based franchise, the minimum contacts requirement was not met and the Florida court lacked personal jurisdiction.

The U.S. Supreme Court disagreed with the franchisees but held that an individual's contract with an out-of-state party, without more, is insufficient to establish minimum contacts in the individual's home forum.¹³ Rather, prior negotiations, contemplated future consequences, the terms of the contract, and the parties' actual course of dealing must be evaluated to determine whether a defendant purposefully availed itself of the laws of the forum.¹⁴ Thus, the Court articulated that a franchisee's act of entering into a contract with an in-state party will not alone subject the franchisee to personal jurisdiction in the franchisor's home state. The Court held that the record must demonstrate that the defendant has purposefully availed itself of the privilege of engaging in activities within the forum state, thereby gaining the benefits and protections of its laws.¹⁵ Consequently, defendants are protected against being haled into court in a foreign jurisdiction solely on the basis of random, fortuitous, or attenuated contacts or as a result of the unilateral activity of some other party.¹⁶

Other recent opinions involving franchise agreements without a forum selection clause highlight the difficulties that franchisors encounter when seeking to establish personal jurisdiction in their home state over franchisees.

In *Lee's Famous Recipes, Inc. v. Fam-Res, Inc.*,¹⁷ a Florida-based franchisor sued its franchisee, an Indiana corporation, in Florida federal district court. The franchisee moved to dismiss for lack of personal jurisdiction. The franchisee's contacts with Florida consisted solely of payments sent to the franchisor in Florida, reports and certification of sales to the franchisor in Florida, attendance by the franchisee's president at a conference held in Florida, and a single purchase of inventory from the franchisor in Florida. The court held that these factors did not satisfy the minimum contacts standard, and therefore Florida did not have personal jurisdiction over the franchisee.

Similarly, in *Bain's Deli Corp. v. C & L Foods, Inc.*,¹⁸ a Pennsylvania franchisor sued one of its Florida franchisees in Pennsylvania state court, claiming that the latter had breached a franchise agreement by not making royalty payments and had used "substandard" products in its deli. The franchisee moved for dismissal. The court granted the franchisee's motion, finding that the franchisee's phone calls, correspondence, and royalty payments to the franchisor in Pennsylvania did not constitute sufficient minimum contacts with Pennsylvania necessary for the court to establish personal jurisdiction. Furthermore, the court held that the franchisee did not "purposefully direct its

activities" or purposefully make its services available to residents of Pennsylvania. The franchisee entered into negotiations with the franchisor after reading an advertisement placed in Florida, and all negotiations and the execution of the franchise agreement occurred in Florida. The court specifically noted that the agreement did not contain a forum selection clause.

These cases are representative of many franchise relationships in which the franchisee's contact with the franchisor's home state is limited to telephone calls, sending checks, and an occasional visit. Generally, to satisfy the minimum contacts analysis, it appears that a franchisor must demonstrate contacts in excess of those commonly occurring in the franchise relationship.

As noted in *Burger King*, courts will often look for additional guidance to the location where the contract was negotiated and executed. In *GMAC Real Estate, LLC v. E.L. Cutler & Associates, Inc.*,¹⁹ GMAC, a franchisor based in New Jersey, sold a franchise to Cutler in Ohio. All of the precontract negotiations took place in New Jersey. Following the sale, GMAC relocated to Illinois. When a dispute arose between GMAC and Cutler, GMAC filed suit in Illinois, and Cutler moved to dismiss for lack of personal jurisdiction. GMAC argued that after its relocation, the majority of communications were channeled through Illinois and its franchisees were supported from Illinois. The court granted Cutler's motion, asserting that it had done nothing to purposefully avail itself of jurisdiction in Illinois. The court held that a contract alone is not sufficient to create specific jurisdiction. In reaching this ruling, the court noted that the contract negotiations took place in New Jersey; and, aside from the one meeting that Cutler representatives attended in Illinois, nothing else was done in the state to meet the minimum contacts standard.

Similarly, in *Blankenship v. Interim Services, Inc.*,²⁰ a franchisor based in Florida sued several West Virginia franchisees in Florida for breach of loan, franchise, and license agreements. The franchisees moved to dismiss on the ground that the Florida courts could not exercise personal jurisdiction over them. Florida law provides for personal jurisdiction over nonresidents who breach a contract in Florida by failing to perform acts required to be performed in Florida.²¹ The *Blankenship* court found that compliance with the statute "is insufficient, without substantially more, to establish minimum contacts."²² The franchisor argued that the "substantially more" required by the court was found in *Burger King*.²³ The *Blankenship* court distinguished *Burger King* on the grounds that the franchisor exercised less control, the franchisor solicited the franchisees, and the franchise agreement called for the application of West Virginia law.²⁴ The Florida District Court of Appeal concluded that the franchisees were not subject to personal jurisdiction in Florida.

Although the *Burger King* court failed to use the word *control* in its analysis, the *Blankenship* court determined that the franchisor's involvement in the operation of the franchise was one of many factors that the *Burger King* Court considered in concluding that minimum contacts existed. In *Blankenship*, the court found that the degree of control exercised by the franchisor paled in comparison to the degree of control exercised by the franchisor in *Burger King*.²⁵ The *Blankenship* court further

distinguished this case from *Burger King* because the negotiations were initiated by the franchisor, which traveled to West Virginia to solicit the franchisees. The court, relying on *Burger King*, emphasized the fact that the franchisee had not purposefully directed its activities at forum residents, holding that fact to be of “great significance in determining the essential fairness of subjecting him to that jurisdiction.” Once again, the court noted the absence of any forum selection clause designating Florida as the forum for litigation.

These decisions highlight the difficulty that franchisors encounter when franchisees challenge jurisdiction in the absence of the safety net provided by a forum selection clause. The mere existence of a contract, coupled with payments and communications directed to the franchisor’s home state, is not by itself sufficient. Even when franchisees have occasionally visited the franchisor’s state in connection with the business operations of the franchise, courts have not regarded that as significant enough to meet the burden of showing that minimum contacts exist.

However, when these factors are coupled with additional contacts, such as multiple visits by the franchisee, negotiations, and contract execution in the franchisor’s home state, the pendulum swings in the direction of the franchisor. One recent example is *Johnson v. Schlotzsky’s Inc.*,²⁶ where the court found minimum contacts and purposeful availment because the franchisee created its business relationship with the franchisor while living in the state; worked for the franchisor for seventeen years; made numerous trips to the franchisor’s state in connection with its employment; and communicated with the franchisor by fax, mail, and telephone on a weekly basis.

Some courts have looked to provisions in the contract that pertain to choice of law or to the agreed-upon locale for arbitration. For example, in *Midas International Corp. v. Willard Enterprises, Inc.*,²⁷ Midas, an Illinois-based franchisor, sued its Maryland franchisee and the franchisee’s Pennsylvania guarantors in Illinois for breaching the terms of the franchise agreement and guarantees. The franchise agreement and guarantee agreements each contained choice of law provisions designating Illinois law as controlling. The parties negotiated the agreements through a series of phone calls. The court held that the

relevant jurisdictional facts [were] as follows: (1) plaintiff Midas has its principal place of business in Illinois; (2) the individual defendants negotiated the franchise and guarantee agreements through a series of long-distance telephone calls to Midas’ Illinois headquarters; (3) the franchise and guarantee agreements were not effective until executed in Illinois by Midas; (4) the franchise agreements contained an arbitration clause naming Chicago, Illinois, as the forum for all arbitrations; (5) the terms of the franchise agreements called for defendants to pay monthly rents and royalties directly to Midas’ Chicago, Illinois, headquarters; and (6) any payments by defendants under the guarantee agreements were to be made at Midas’ Illinois headquarters.²⁸

What distinguishes these decisions from those where minimum contacts were not found is the extent of the franchisees’ physical presence in the franchisor’s home state, whether for negotiation, contract execution, training, or other business-related visits. It is

clear that a franchisee will almost always be better-equipped to challenge out-of-state jurisdiction when there is no forum selection clause in the franchise agreement. This is because, in most franchise relationships, a franchisee can argue that it has had little or no contact with the franchisor’s state other than entering into the contract with a party from that state, making phone calls to that state, and sending payments to that state. At a minimum, the unpredictability of the personal jurisdiction analysis in the absence of a forum selection clause is an overwhelming factor to consider when crafting a franchise agreement.

Impact of the Forum Selection Clause

Over time, parties seeking to contract their way around the cumbersome personal jurisdiction analysis began to incorporate forum selection clauses demonstrating their mutual consent to subject themselves to another state’s jurisdiction. The doctrines of *Burger King* and its progeny provide that a forum selection clause allows a smoother path to ensuring personal jurisdiction.²⁹

The same holds true in franchise disputes. A forum selection clause helps secure a franchisor’s ability to litigate in its home state by creating a presumption that is difficult to rebut: that minimum contacts exist and, more importantly, that litigating in such a forum is not fundamentally unfair for the franchisee. A forum selection clause also provides a franchisor with ammunition to transfer cases out of franchisee-favorable venues “where [the franchisee] can beguile hometown juries with sympathetic histories of the franchisor’s supposedly abusive practices.”³⁰ Although it is unfair to suggest that franchisors and other corporate defendants are uniformly mistreated in state courts, the risks presented by litigating a matter in the state court of the franchisee’s hometown are significant.

The seminal U.S. Supreme Court decisions in *The Bremen v. Zapata Off-Shore Co.*³¹ and *Carnival Cruise Lines, Inc. v. Shute*³² signified the growing trend and general acknowledgment that forum selection clauses were prima facie valid³³ and should be enforced. This presumption can be rebutted only by a showing that enforcement of the forum selection clause is unreasonable under the circumstances.

In *Bremen*, Unterweser Reederei GMBH, a German vessel-towing corporation, contracted to tow Zapata’s drilling rig from Louisiana to the Adriatic Sea, where Zapata planned to drill for oil. The contract provided that “[a]ny dispute arising must be treated before the London Court of Justice.”³⁴ Zapata reviewed the contract and negotiated various modifications but did not seek to modify the forum selection clause.³⁵ The vessel was damaged en route to the Adriatic Sea. Zapata then instituted a suit in admiralty in the federal court in Tampa against Unterweser and against the *Bremen* in rem, alleging negligence and breach of contract. Unterweser moved to dismiss for lack of jurisdiction and on forum non conveniens grounds. The court denied Unterweser’s motion on the basis that forum selection clauses were contrary to public policy, and a divided panel of the appeals court affirmed.³⁶

In concluding that forum selection clauses should be enforced unless “enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances,”³⁷ the Supreme Court noted that the contract in question was “a freely negotiated private

international agreement, unaffected by fraud, undue influence, or overweening bargaining power.³⁸

In *Carnival Cruise Lines, Inc. v. Shute*, the Court affirmed its holding in *Bremen* and the proposition that forum selection clauses are prima facie valid.³⁹ In *Carnival*, the Shutes, a Washington State couple, purchased passage on a Florida-based cruise ship and received passage contract tickets containing a forum selection clause.⁴⁰ Eulala Shute sustained injuries on board the ship while sailing in international waters near the Mexican coast.⁴¹ Upon return to the United States, the couple initiated suit in federal court in Washington, alleging negligence against Carnival and its employees.⁴² Based upon the forum selection clause contained in the tickets, Carnival moved for summary judgment, contending that the forum selection clause required that the lawsuit be brought in Florida.⁴³ Although the district court granted Carnival's motion, the appeals court reversed, holding that Carnival "had sufficient contacts with Washington to justify the [c]ourt's exercise of personal jurisdiction" in that state.⁴⁴

The Supreme Court held that the forum selection clause contained in the form contract at issue, although not subject to bargaining, was both reasonable and enforceable.⁴⁵

In evaluating the reasonableness of the forum clause, the Court refined its analysis in *Bremen* "to account for the realities of forum passage contracts."⁴⁶ The Court held that although subject to judicial scrutiny for fundamental fairness, forum selection clauses contained in form contracts are presumptively valid.⁴⁷

The holdings of *Bremen*, *Carnival*, and the subsequent line of cases are consistent with the position adopted by the *Restatement (Second) of Conflict of Laws*⁴⁸ and generally have been applied by federal and state courts confronted with jurisdictional choices involving forum selection clauses contained in franchise agreements.⁴⁹ Such rulings suggest the growing trend in the courts that forum selection clauses, if determined to be reasonable,⁵⁰ are prima facie valid and should be enforced. At a minimum, the presence of a forum selection clause creates the presumption that minimum contacts exist and directs the court's attention to the sheer number of contacts that the franchisee possesses in the franchisor's home state. This, in turn, strengthens the franchisor's argument as to why litigating in such a forum is not unfair to the franchisee.

Simply stated, the existence of a forum selection clause provides the franchisor with the best ammunition for securing its ability to litigate claims against its franchisees in its home state. In many instances, franchisees will simply abide by the agreement and not challenge jurisdiction. When there is no agreed-upon forum, franchisees intent on litigating claims will start with an attack on personal jurisdiction.

Impact of Franchise Relationship Statutes

Federal law and many states have recognized that forum selection clauses are presumptively valid; however, many states have enacted franchise relationship statutes that, among other

things, seek to invalidate forum selection clauses or to construe forum selection clauses with a heightened level of scrutiny.⁵¹ Most of these state statutes contain a provision seeking to render void any provision in the franchise agreement designating jurisdiction or venue in a forum other than the franchisee's home state.⁵² Of the states that seek to void clauses in franchise agreements limiting jurisdiction and venue, most simply invalidate such clauses rather than allow for penalties if such a clause is included.⁵³ For example, the franchise relationship statute in Illinois provides that "[a]ny provision in a franchise agreement that designates jurisdiction or venue in a forum outside of this State is void."⁵⁴ This provision has been invoked by a franchisee opposing a franchisor's motion to transfer venue out of Illinois on the basis of a forum selection clause.⁵⁵ Whether the provision may be invoked in support of an Illinois franchisee's motion to dismiss an action in the franchisor's home state

for lack of personal jurisdiction remains unanswered. Likewise, in Rhode Island and California, contract provisions in franchise agreements requiring disputes to be litigated outside of those respective states are void.⁵⁶ The California statute has been invoked in a California

court to void a forum selection clause requiring a franchisee to sue a franchisor in Virginia.⁵⁷ However, it remains to be seen whether a court outside of California will invalidate a forum selection clause on the basis of the statute if raised by a franchisee being sued in a franchisor's home state.⁵⁸

In some states, courts rely upon these franchise relationship statutes, or other public policy, to invalidate a forum selection clause even when there is no express prohibition in the statute itself.⁵⁹ In Indiana, forum selection clauses are not per se invalid but will be invalidated if construed to limit the substantive rights conferred on a franchisee by the act.⁶⁰ In Minnesota, the franchise relationship statute does not expressly bar forum selection clauses, but courts have relied on a regulation promulgated under the authority granted in the statute to find forum selection clauses invalid.⁶¹

In *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*,⁶² plaintiff franchisee, a New Jersey corporation, and defendant franchisor, a California corporation, entered into a franchise agreement with a forum selection clause providing that any litigation was to be "governed by California law and had to be filed in a certain California federal or state court." The franchisee brought suit in New Jersey, alleging that the franchisor terminated the contract in violation of New Jersey's Franchise Practices Act. The trial court upheld the forum selection clause and dismissed the action. The appellate court affirmed. The Supreme Court of New Jersey reversed, holding "that enforcement of forum-selection clauses in contracts subject to the Franchise Act would substantially undermine the protections that the Legislature intended to afford to all New Jersey franchisees."⁶³ The court found that such clauses are presumptively invalid "because they fundamentally conflict

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with the basic legislative objectives of protecting franchisees from the superior bargaining power of franchisors and providing swift and effective judicial relief against franchisors that violate the Act.⁶⁴

Clearly, the franchise relationship statutes will often prevent a franchisor from relying on a forum selection clause to transfer or dismiss a case venued in the franchisee's state. However, courts rarely invoke the statutes to defeat the personal jurisdiction exercised by a franchisor's state where there exists an enforceable forum selection clause. Nonetheless, it is crucial for a franchisor to stay abreast of changes in these statutes and the regulations promulgated by the agencies in these states, as well as the various states' case law interpreting these provisions. The protections afforded to franchisees by franchise relationship statutes vary from state to state.

A savvy franchisor can properly navigate the prohibitions in the statutes, both in the manner in which the clauses are drafted and in the ability to pierce the shield offered to the franchisee in litigation. For example, a franchisor can initiate litigation in federal court to ensure maximum protection from a state franchise relationship statute. Although substantive contract disputes are appropriately resolved under applicable state law,⁶⁵ in federal court the effect and weight accorded to a contractual forum selection clause are governed exclusively by federal law.⁶⁶ Because a forum selection clause is *prima facie* valid under federal law, a state law to the contrary is simply inapplicable in federal court, regardless of whether the court is exercising diversity or federal question jurisdiction.⁶⁷ Accordingly, when possible, a franchisor can initiate litigation in federal court to avoid the implication of a state franchise relationship statute that seeks to invalidate forum selection clauses.

In drafting the franchise agreement, a franchisor should consider inserting a permissive forum selection clause as opposed to a mandatory forum selection clause.⁶⁸ Most of the franchise relationship statutes seek to invalidate forum selection clauses that "require" litigation in the designated state or "restrict" litigation to the designated state.⁶⁹ A forum selection clause that is permissive in nature, rather than mandatory, is arguably outside the scope of these franchise relationship statutes because it simply requires the franchisee to consent to the nonexclusive jurisdiction of the courts located in the franchisor's state. It does not require or restrict the franchisee in any way, nor does it prevent the franchisee from suing the franchisor in the franchisee's home state.

Current State of Affairs

The issue of personal jurisdiction in a franchise dispute is impacted not only by the traditional minimum contacts analysis but also by contractual and statutory interpretation due to the prevalence of forum selection clauses and franchise relationship statutes. Two significant conclusions may be drawn from the analysis rendered above.

First, if a forum selection clause is absent in a franchise agreement, a court in the franchisor's home state will analyze personal jurisdiction over a franchisee using a traditional minimum contacts analysis under *International Shoe* and *Burger King*. This is true whether or not the franchisee is located in a

state with a franchise relationship statute.

Second, if a forum selection clause is present in a franchise agreement, personal jurisdiction turns on the enforceability of the clause. Since the advent and proliferation of forum selection clauses in franchise agreements, which effectively create the presumption that minimum contacts exist, the majority of federal and state courts have upheld their enforcement. Through forum selection clauses, both the franchisor and the franchisee have the ability to express their mutual consent to jurisdiction in the franchisor's home state. Indeed, most modern franchise agreements contain such clauses. However, the enforceability of a forum selection clause may be affected by the existence of an applicable franchise relationship statute that seeks to void such a clause.

Practical Tips for Franchisors

What can a franchisor do to enhance its ability to litigate claims against its franchisees in its home state? First and foremost, a franchisor should strongly consider inserting a forum selection clause into each of its franchise agreements. Forum selection clauses are convenient, have the potential to prevent financial burden on the franchisor, and allow a franchisor to maximize its business efficiency. In states that seek to void such clauses, franchisors should take care to draft the clauses in such a way as to circumvent the language of the statute. Many of the statutes discussed above seek to void clauses that require disputes between the parties to be litigated in a forum other than the franchisee's state. In these instances, a forum selection clause that is permissive may escape the implications of the statute. A permissive forum selection clause does not require disputes to be litigated in one particular state. Rather, it merely obligates the parties to consent to the jurisdiction of the franchisor's home state. In agreeing that the franchisor's home state has nonexclusive personal jurisdiction, the franchisee avails itself of that particular state's jurisdiction but does not concede that it is the only state in which disputes may be litigated. The upside to a permissive forum selection clause is that it permits the franchisor to sue franchisees in its home state, even where the franchisee hails from a state that seeks to invalidate forum selection clauses. Conversely, the downside is the inability of the franchisor to challenge a suit filed first by the franchisee in its home state. The franchisor is often able to forecast potential litigation prior to the franchisee and, thus, is in a better position to file a claim first when a dispute arises. Therefore, the benefit of a permissive forum selection clause far outweighs the downside risk.

Further, a franchisor can take additional steps to solidify the enforceability of a forum selection clause. For example, a franchisor can offer a benefit to the franchisee in exchange for agreeing to the forum selection clause, whether in the form of discounted royalty and advertising fees, a termination window, or an option to renew. If a franchisor can demonstrate that the parties specifically bargained for such a provision, this will go a long way toward its enforceability.⁷⁰ A franchisor may also include specific indicators in the agreement requiring the franchisee to direct its attention to the forum selection clause and thereafter requiring the franchisee to initial the clause. Such a combination of consideration and acknowledgement is likely to defeat the suggestion

that the forum selection clause was not a bargained-for provision but was simply boilerplate in a contract of adhesion.⁷¹

Finally, a franchisor can protect the enforceability of its forum selection clause by initiating litigation in federal court when possible. This will lessen the implication of state franchise relationship statutes or case law from states that have not adopted the federal approach to forum selection clause analysis.

In the absence of a forum selection clause, a franchisor must be able to demonstrate other activities within the relationship that provide minimum contacts between the franchisee and the franchisor's home state. As it does not appear sufficient in most jurisdictions to merely communicate with, or make payment to, the franchisor in that state, the franchisor must consider additional mechanisms. These may include requiring the franchisee to attend training sessions in the franchisor's home state or requiring the negotiations and/or signing of the franchise agreement to occur in the franchisor's home state, even if at the franchisor's expense.

The nature of franchising requires a franchisor to protect not only its trademarks but also its ability to expand regionally, nationally, or globally without sacrificing uniformity, quality, and consistency. Litigation is effectively a by-product of a franchisor's efforts to maintain these traits, but the unpredictability of litigation outcomes in various states creates a problematical situation for franchisors. Although some of the above-mentioned measures may seem extreme, especially to a franchisor's sales team, ensuring that franchisees are subject to personal jurisdiction in the franchisor's home state is critical to safeguarding the franchise.

Endnotes

1. 326 U.S. 310 (1945).
2. *Id.* at 317.
3. *Id.* at 319.
4. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).
5. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).
6. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984).
7. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446 (1952), where the Supreme Court held that personal jurisdiction may exist regardless of where or how the cause of action arose if the contacts are continuous, systematic, and extensive. *Compare with Helicopteros Naciona de Colombia*, 466 U.S. 408, where the Court found that negotiations and purchasing in the forum state were not enough to establish the continuous and systematic contacts necessary for general jurisdiction.
8. *See McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957).
9. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).
10. *See McGee*, 355 U.S. at 223 (finding that a state may exercise jurisdiction over a defendant whose contacts with that state are only a single act as long as the cause of action arises out of that act and that act was purposely directed toward the state); *see also Gray v. Am. Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432 (1961) (holding that even if a corporation conducts no business in a state, the minimum contacts test will be met if there is a substantial connection between the state and the action giving rise to the lawsuit). *But see Hanson*, 357 U.S. at 235 (personal jurisdiction was not found; without some action "by which the

defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws," it cannot be said to have the necessary contacts with that state).

11. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (holding that in order to be subject to a state's jurisdiction, defendant must purposefully avail itself of the jurisdiction of that state; furthermore, considerations of fairness, convenience, and the interests of the state in litigating the matter are irrelevant).

12. 471 U.S. 462 (1985).

13. *Id.* at 478-79.

14. *Id.*

15. *Id.* at 475.

16. *Id.*

17. 2007 U.S. Dist. LEXIS 35311 (N.D. Fla. 2007).

18. 2002 WL 31053837 (Pa. Ct. Com. Pl. 2002).

19. 472 F. Supp. 2d 960 (N.D. Ill. 2006).

20. 700 So. 2d 429 (Fla. 3d Dist. Ct. 1997).

21. FLA. STAT. § 48.193(1)(g) (1995).

22. 700 So. 2d 429, 431 (Fla. 3d Dist. Ct. App. 1997).

23. *Id.*

24. *Id.*

25. *Id.*

26. 2003 WL 22964291 (Tex. App. 2003).

27. 1993 WL 92447 (N.D. Ill. 1993).

28. *Id.*

29. This article is limited in scope to forum selection clauses that relate to litigation. It does not address the impact of arbitration forum selection clauses and the effect of the Federal Arbitration Act.

30. Edward Wood Dunham, et al., *Franchisor Attempts to Control the Dispute Resolution Forum: Why the Federal Arbitration Act Trumps the New Jersey Supreme Court's Decision in Kubis*, 29 RUTGERS L.J. 237, 239-40 (1998).

31. 407 U.S. 1 (1972).

32. 499 U.S. 585 (1991).

33. James Zimmerman, *Restrictions on Forum-Selection Clauses in Franchise Agreements and the Federal Arbitration Act: Is State Law Preempted?*, 51 VAND. L. REV. 759, 771 (1998). Prior to *Bremen* and *Carnival Cruise*, many courts viewed a forum selection clause as one of many equal factors to be considered in the minimum contacts analysis. *See, e.g., Meineke Discount Muffler Shops, Inc. v. Feldman*, 480 F. Supp. 1307 (1979) (finding that a New York resident who came to Texas to discuss a licensing agreement with the licensor's representatives, to sign the license agreement, and to receive training as required by the franchise agreement was subject to jurisdiction in Texas).

34. *Bremen*, 407 U.S. at 2.

35. *Id.* at 3.

36. *Id.* at 4-8.

37. *Id.* at 10.

38. *Id.* at 12.

39. 499 U.S. 585, 595 (1991).

40. *Id.* at 587.

41. *Id.* at 588.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 593.

46. *Id.*

47. *Id.*

48. “The parties’ agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1969).

49. *See, e.g.,* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593–95 (1991) (upholding, 7-2, validity of forum selection clause in form cruise-ship passage contract although not subject to bargaining); Plum Tree, Inc. v. Stockment, 488 F.2d 754 (3d Cir.1973) (reversing district court decision granting franchisee’s motion to transfer franchisor’s Pennsylvania action to Texas on ground that forum selection clause designating Pennsylvania as place of suit was contrary to public policy, and remanding to district court to reconsider on adequate record whether enforcement of forum selection clause would be unreasonable); ABC Mobile Sys., Inc. v. Harvey, 701 P.2d 137 (Colo. Ct. App. 1985) (enforcing forum selection clause designating California as exclusive forum against California franchisor that relocated to Massachusetts and sued franchisee in Colorado, and holding enforcement of clause against franchisor not unreasonable notwithstanding franchisor’s contention that clause was inserted in contract primarily for its benefit); Horner v. Tilton, 650 N.E.2d 759 (Ind. Ct. App. 1995) (dismissing dealer’s suit against supplier filed in Marion County, Indiana; and enforcing forum selection clause designating Peoria County, Illinois, as exclusive forum, holding that underlying agreement did not constitute franchise, finding that forum selection clause was not product of overreaching or unequal bargaining power, and noting that enforcement of clause would not impose heavy burden on dealer); Jacobson v. Mailboxes Etc. U.S.A., Inc., 419 Mass. 572, 646 N.E.2d 741 (1995) (holding that franchise agreement designating California courts as exclusive forum and California law as controlling required court to determine whether forum selection clause was enforceable under California law; concluding that such clauses were enforceable under California law if not unreasonable but remanding to trial court to determine whether precontract claims for deceit were dominant claims alleged, in which event forum selection clause in franchise contract would not apply); Minuteman Press Int’l, Inc. v. Hoffman, 826 S.W.2d 34 (Mo. Ct. App. 1992) (holding that Missouri courts would enforce New York judgment obtained by franchisor against Missouri franchisee where New York action was instituted pursuant to forum selection clause of franchise agreement; concluding that franchisees were validly served with process under New York’s long-arm statute and that enforcement of forum selection clause, which was not product of fraud or overreaching, would be reasonable); Bakhsh v. JACRRC Enters., Inc., 895 P.2d 746 (Okla. Civ. App. 1995) (affirming trial court’s decision dismissing franchisee’s Oklahoma action against franchisor and holding that enforcement of forum selection clause designating Texas as exclusive forum was not unreasonable).

50. A forum selection clause will only be found to be unreasonable if “the forum selected is so gravely difficult and inconvenient that the defendant will for all practical purposes be deprived of its day in court.” Foster v. Chesapeake Ins. Co., 933 F.2d 1207, 1219 (3d Cir.), *cert. denied*, 502 U.S. 908 (1991).

51. *See* Zimmerman, *supra* note 33, at 774 (“Several states have case law upholding forum-selection clauses only if the clauses are demonstrated to be reasonable and not the product of unfair bargaining power. Many of these states apply rules that arguably are stricter than both the federal law of forum-selection and the general state law of unconscionability.”). It is important to note that “[t]hese franchising-specific prohibitions of judicial forum selection clauses are, of course, in addition

to whatever restrictions already exist by general statute or at common law. . . . For example, Alabama needs no legislation directed at franchising, since no judicial forum selection clause is enforceable there [under Ala. Code § 7-2A-106 (1996)].” Dunham, *supra* note 30.

52. *See, e.g.,* CAL. BUS. & PROF. CODE § 20040.5 (2008); 815 ILL. COMP. STAT. 705/4, §§ 4, 14 (2008); IOWA CODE § 523H.3 (2008); MICH. COMP. LAWS § 445.1527 (2008); R.I. GEN. LAWS § 19-28.1-14 (2008).

53. Only Rhode Island specifically penalizes the inclusion of clauses limiting jurisdiction and venue. In Rhode Island, the director of the Department of Business Regulation may deny a franchise application where a clause limiting jurisdiction, venue, or choice of law is included in the franchise agreement. R.I. GEN. LAWS § 19-28.1-18(a).

54. 815 ILL. COMP. STAT. 705/4, §§ 4, 14.

55. *See, e.g.,* Bo Foods, Inc. v. Bojangles’ of Am., Inc., No. 86 C 8014, 1987 U.S. Dist. LEXIS 531, at *7 (N.D. Ill. Jan. 23, 1987).

56. R.I. GEN. LAWS § 19-28.1-14; CAL. BUS. & PROF. CODE § 20040.5.

57. *Wimsatt v. Beverly Hills Weight Loss Clinics*, 32 Cal. App. 4th 1511, 1514 (Cal. Ct. App. 1995).

58. In *Best W. Int’l, Inc. v. Govan*, 2006 WL 2523460 (D. Ariz. 2006), the franchisor sued the franchisee in Arizona state court. The franchisee removed the case to federal court and moved to dismiss for lack of venue, alleging that the forum selection clause of the franchise agreement was void because it violated the California franchise relationship statute prohibition against restricting venue to a forum outside of California. *Id.* The Arizona district court refused to apply the California statute because the venue transfer analysis was governed by federal law. *Id.*

59. *See Elec. & Magneto Serv. Co. v. AMBAC Int’l Corp.*, 941 F.2d 660, 664 (8th Cir. 1991) (voiding forum selection clause as violative of Missouri public policy); *see also Weidner Commc’ns, Inc. v. H.R.H. Prince Bandar Al Faisal*, 859 F.2d 1302, 1310 (7th Cir. 1988) (concluding that the forum selection clause was unenforceable and void on the grounds of duress and unequal bargaining power); *Davis v. Great Am. Cleaners, Inc.*, 1996 WL 1185042 (Mass. Sup. Ct. 1996) (voiding the forum selection clause because it found an imbalance of bargaining power and that its enforcement would seriously inconvenience the franchisee); *Barter Exch., Inc. of Chi. v. Barter Exch., Inc.*, 606 N.E.2d 186, 192 (Ill. App. Ct. 1992) (finding that franchisors should not be able to break the law in one state and then avoid that state’s consideration of the claims under its franchise statutes by providing for the dispute to be heard in its home state via a forum selection clause).

60. *See Sheldon v. Munford, Inc.*, 950 F.2d 403, Bus. Franchise Guide (CCH) ¶ 9923 (7th Cir. 1991) (choice of law provision violated Indiana Franchise Act because it stripped the franchisee of substantive rights under the statute). *Compare Deans v. Tutor Time Child Care Sys., Inc.*, 982 F. Supp. 1330 (S.D. Ind. 1997) (forum selection clause upheld as reasonable where franchisees had traveled to Florida prior to executing the agreement and were represented by counsel during the review, negotiations, and execution of the agreement).

61. *Van Dusen Airport Servs. Co., L.P. v. Allied Signal, Inc.*, 1991 WL 151377 (Minn. Ct. App.); MINN. R. 2860.4400 (Supp. 1990).

62. 146 N.J. 176 (1996).

63. *Id.* at 192–93.

64. *Id.* at 193.

65. Many of the franchise relationship statutes also seek to invalidate choice of law clauses, thereby giving effect to the law of the franchisee state. This article does not address choice of law. However, choice of law may factor into whether a court of a franchisor’s home state recognizes a

franchise relationship statute of the franchisee's home state that seeks to invalidate a forum selection clause.

66. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30, 32 (1988) (rejecting application of Alabama law invalidating forum selection clause because state law cannot be allowed to interfere, under the supremacy doctrine, with “the flexible and multifaceted analysis that Congress intended to govern motion to transfer within the federal system”).

67. *Id.* at 31.

68. A forum selection clause is permissive when it simply designates that venue or jurisdiction is proper in a specific jurisdiction. *See, e.g., Travelodge Hotels, Inc. v. Mangat Houston Race Track, LLC*, 2007 U.S. Dist. LEXIS 53655 (D.N.J. July 25, 2007) (unpublished opinion) (finding that the forum selection clause is permissive because the franchisee

consented to the “non-exclusive” jurisdiction of the New Jersey courts). A mandatory forum selection clause mandates that a claim can only be brought in the specified forum. *See Von Graffenreid v. Craig*, 246 F. Supp. 2d 553, 560 (N.D. Tex. 2003).

69. *See, e.g., CAL. BUS. & PROF. CODE* § 20040.5 (2008); 815 ILL. COMP. STAT. 705/4, §§ 4, 14 (2008); IOWA CODE § 523H.3 (2008); MICH. COMP. LAWS § 445.1527 (2008); R.I. GEN. LAWS § 19-28.1-14 (2008).

70. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (holding that only “some compelling and countervailing reason” will excuse enforcement of a bargained-for forum selection clause).

71. ROBERT L. HAIG, *BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS* 498–99 (2d ed. 2008).