

Forum Selection Clauses Used in Franchise Agreements Should Be Given More Deference

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Courts should be more likely to uphold forum selection clauses following a recent U.S. Supreme Court ruling. Forum selection clauses are used in almost all agreements, including in franchise agreements, to provide that any litigation between the parties to the agreement be brought and adjudicated in only certain listed state or federal courts. Franchisors rely on forum selection clauses to funnel litigation to only selected courts (usually in their home state) rather than having to “put out fires” across the country. Franchisors should revisit their forum selection and choice of law clauses to ensure they are valid and provide for the most favorable venue and governing law for the franchisor because courts are now more likely to uphold such clauses as written.

Often a plaintiff will bring a case in its home jurisdiction, regardless of any contractually agreed forum in a contract it has with the defendant, and the defendant in federal court then moves to transfer the case to the forum selected in the contract under 28 U.S.C. § 1404(a) “in the interest of justice.” Until now, federal courts have decided these federal venue transfer motions based on a factor test, where the forum selection clause is a “significant factor.” The U.S. Supreme Court went even further in *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, No. 12-929, 571 U.S. ____ (2013), holding in a unanimous decision that if the forum selection clause itself is valid, the case should be addressed in the selected forum only.

In *Atlantic Marine Construction*, despite a subcontractor agreement providing that disputes be litigated in certain state and federal courts of Virginia, the subcontractor brought a lawsuit in a Texas federal district court. The contractor moved under the above federal venue transfer statute to transfer the case to the selected forum in Virginia. Nonetheless, the lower courts declined to transfer the case to Virginia under the factor test. But the U.S. Supreme Court then held that “when the parties have agreed to a valid forum selection clause, the district court should ordinarily transfer the case to the forum specified in that clause.” The Supreme Court further noted that the forum contractually selected between the parties should be “given

controlling weight” in most cases under 28 U.S.C. § 1404(a). One of the factors used in the factor test is the convenience of the parties. The Supreme Court held that by using a forum selection clause in a contract, the parties to the lawsuit are contractually agreeing that the selected forum is the most convenient forum.

Atlantic Marine Construction should give franchisors stronger arguments that the forum contractually selected in their franchise agreements and/or other agreements be given deference, provided that the clause itself is valid. Generally, courts will uphold forum selection clauses—and therefore, under *Atlantic Marine Construction*, the case will be decided in that forum except in the “most exceptional cases”—if the clause is not contrary to public policy or unjust. That is, such a clause cannot create injustice, be imposed by fraud or coercion, or be extremely onerous. *E.g.*, *Gregory Fowler v. Cold Stone Creamery, Inc.*, No. 13-662 (R.I. Dist. Ct. 2013) (a forum selection clause in a franchise agreement was not unconscionable merely because the franchisor drafted the “non-negotiable” franchise agreement and included “standard” boilerplate terms because the franchisee could have walked away rather than enter into a franchise relationship); *Salehpour v. Just A Buck Licensing, Inc.*, No. 2013-Ohio-4436, P14, 2013 Ohio App. LEXIS 4657 (Ohio Ct. App. 2013) (holding that a forum selection clause in a franchise agreement was valid because it was not unreasonable or unjust); *but see Business Store, Inc. v. Mail Boxes Etc.*, 2012 U.S. Dist. LEXIS 19381, 12-20 (N.J. Dist Ct. 2012) (denying a franchisor’s motion to transfer a case against a New Jersey franchisee to the forum selected in the franchise agreement because a forum other than New Jersey would be against “public policy” under the New Jersey Franchise Practices Act). When coupled with the choice of law or governing law clause in a franchise agreement or other agreement with a franchisee, a court is now more likely to apply the specific law selected in such agreements and address disputes under such agreements in the court contractually selected.