# Float like A Butterfly, Sting like a Bee: The Lure of Floating Forum Selection Clauses

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Franchise agreements often provide that the exclusive forum for litigation is the judicial district where the franchisor's headquarters is located. For example, a franchisor in our hometown of Toledo, Ohio, would draft its franchise agreements to provide that the exclusive forum for any litigation between the franchisee and franchisor is the federal or state courts in Lucas County, Ohio. Although such requirements are generally enforceable, difficulties may arise if the franchisor later moves to a different state. Would the parties still be obligated to file suit in the forum specified in the contract? And if the franchisor files in the forum specified in the contract, could the defendant succeed in moving to transfer the case to the judicial district where the defendant is then located?[1]

One way franchisors try to address this potential problem is by using in their franchise agreements a "floating forum selection clause," which provides that the exclusive venue for jurisdiction is the judicial district where the franchisor's headquarters is located at the time litigation is initiated. This article discusses how floating forum selection clauses have fared in the courts. We first provide a brief refresher on the law of standard forum selection clauses and then proceed to a discussion of floating forum selection clauses. After reviewing the trends in the law, we provide some practice pointers for franchisors and franchisees in seeking to enforce or challenge floating forum selection clauses.

## Forum Selection Clauses Generally

Forum selection clauses are generally enforceable. As the U.S. Supreme Court explained in *M/S Bremen v. Zapata Off-Shore Co.*, forum selection clauses in commercial contracts should be enforced absent "fraud, undue influence, or overweening bargaining power."[2]

When a plaintiff brings suit in the specified forum, the defendant challenging the forum often seeks to dismiss the action by claiming the court lacks personal jurisdiction over the defendant.[3] The defendant would argue that it lacks minimum contacts with the state. The plaintiff would argue in response that the defendant waived the defense of lack of personal jurisdiction by agreeing to the forum selection clause. Courts generally have agreed with the plaintiff's waiver argument and have thus refused to dismiss such litigation on personal jurisdiction grounds.[4]

If suit is brought in a forum other than the one selected in the forum selection clause, then the party seeking to enforce the forum selection clause may move to transfer the case to the designated forum pursuant to 28 U.S.C. § 1404. The law here, though, is not as clear-cut as one might expect. According to the U.S. Supreme Court, courts must apply a balancing test in which the forum selection clause is but one of the considerations:

> A motion to transfer under § 1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors. The presence of a forum-selection clause . . . will be a significant factor that figures centrally in the district court's calculus. . . .
>
> A forum-selection clause should receive neither dispositive consideration nor no consideration, but rather the consideration for which Congress provided in § 1404(a).[5]

Stressing that this should not be a per se issue, the Supreme Court added that courts "must weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of 'the interests of justice.'"[6]

In the wake of this guidance, district and appellate courts have struggled with what weight to give a forum selection clause in the context of a § 1404 motion to transfer. Some have held that a forum selection clause shifts the burden to the plaintiff to show why transfer to the selected forum is not warranted.[7] Others have held that a forum selection clause acts as an agreement that the § 1404 factor of the "parties' convenience" should weigh in favor of litigation in the selected forum.[8] Until the Supreme Court provides more guidance, federal courts will likely continue to differ in the weight they give forum selection clauses when faced with a § 1404 motion. Nonetheless, despite these uncertainties, the majority of courts rule that the case should be transferred to the selected forum.[9]

Finally, when a party has brought suit in a forum other than the designated forum, defendants may also seek to enforce the forum selection clause by filing a motion to dismiss, alleging the defenses of lack of subject matter jurisdiction or improper venue. These attacks, though, are generally ineffective. For example, multiple circuits have held that a

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forum selection clause does not divest a court of jurisdiction[10] and that a forum selection clause is not a proper basis for granting a motion to dismiss for improper venue.[11]

### Judicial Treatment

With this refresher on forum selection clauses behind us, we turn to the topic of this article: floating forum selection clauses. The majority of published decisions addressing floating forum selection clauses involve a company called NorVergence, which has been accused of defrauding thousands of its customers. NorVergence leased telecommunications equipment to its customers, promising them long-term and substantial discounts on their telephone bills. In the fraud investigations that followed, investigators and former customers alleged that the telecommunications equipment leased by NorVergence was nothing more than a firewall and router and did nothing to lower the customers' telephone bills.

NorVergence's lease agreements allowed NorVergence to assign its interest in the equipment leases to third parties. The agreements also contained an exclusive floating forum selection clause requiring that litigation relating to the lease be brought only in the state "in which [NorVergence's] principal offices are located or, if this Lease is assigned by [NorVergence], the State in which the assignee's principal offices are located."[12] Pursuant to its assignment rights, NorVergence generally assigned the agreements to entities with principal offices in states different from the state in which NorVergence had its principal offices.

The fact pattern of the NorVergence cases differs from the pattern in franchise cases. In the NorVergence cases, the site specified for litigation floats because of the assignment of a lease, a reasonably routine transaction in today's financial markets. In franchise cases, to the contrary, sites float primarily because a franchisor is acquired or financed by a party that moves the franchisor to a different state, which is not an ordinary occurrence. Because the law has developed in the context of financial contract assignment cases, however, that is the law that franchise lawyers will need to understand and address.

As an overview, a majority of courts have enforced floating forum selection clauses, upholding the parties' freedom to contract and finding that the clauses sufficiently put both parties on notice that an assignment, sale, or move could result in consent to litigate in any state in the union. Other courts, however, have declined to enforce the clauses on the ground that they are unfair or unconscionable. The following discussion addresses some of the leading cases involving floating forum selection clauses.[13]

### Cases Supporting Selection Clauses

In *IFC Credit Corp. v. Aliano Bros. General Contractors*,[14] the Seventh Circuit upheld the NorVergence floating forum selection clause. The trial court had dismissed the case for lack of personal jurisdiction, and, on appeal, the court considered the validity of the clause first under federal law and then under state law.[15] After reviewing a leading U.S. Supreme Court case on forum selection clauses, *Carnival*

**Practice Pointer**

## Franchisor Considerations

Given the growing trend in franchising of acquisitions and commercial equity financing, all franchisors should entertain the possibility that someday another company might buy or finance them and move them to another state. Thus, for a number of reasons, all franchisors should strongly consider including a floating forum selection clause in their franchise agreements. If a standard forum selection clause is used instead of a floating clause, the franchisor that does move to a new state

- would be forced to commence litigation in its prior forum, which raises costs, increases inconvenience, and deprives the franchisor of whatever favorable treatment exists, or may be perceived to exist, in local courts;
- would be vulnerable to have any case that it commences in the old forum transferred to the franchisee's home district under a § 1404 motion to transfer; and
- may be unlikely to succeed in its own § 1404 motion if the franchisee chooses to file in its own home forum to commence suit.

Because of these pitfalls, a franchisor with a floating forum selection clause is a more attractive candidate for acquisition or investment.

But courts may refuse to enforce a floating forum selection clause on the ground that it is unconscionable or against public policy. This appears, though, to be a minority position. Further, some of the cases that have refused to enforce the clause have left open the possibility that they will enforce the clause if appropriate notice is given. Thus, a franchisor should strongly consider using the clause despite the possibility that some courts may refuse to enforce it.

In view of the problems that some courts have found with floating forum selection clauses, drafters should spell out the effects of the clause clearly. Thus, if a franchisor chooses to use a floating clause, the franchisor should use language such as the following:

> All legal actions between the parties shall be venued exclusively in a state or federal court in the judicial district in which franchisor's principal offices are located at the time suit is filed. If franchisor assigns or otherwise transfers this agreement, all legal actions between the parties shall be venued exclusively in a state or federal court in the judicial district in which the assignee's or transferee's principal offices are located at the time suit is filed.[1]

Further, given the fairness and notice concerns expressed by courts that have refused to enforce the clause, franchisor should consider adding a sentence

such as the following: "Franchisee acknowledges that this forum selection clause could result in mandatory litigation in any state within the United States, and thus franchisee specifically waives any personal jurisdiction defenses in any action brought in accordance with this forum selection clause."

A franchisor should also adapt the cover-page risk factors section of its disclosure document[2] for its floating forum selection clause. The risk factors disclosure prescribed by the UFOC Guidelines for forum selection clauses[3] leaves a blank to be filled in for the state selected. If a floating forum selection clause is used, the franchisor should not fill in the then current site of the franchisor's headquarters but instead should use the phrase "the state in which the franchisor's headquarters is located at the time of initiation of (arbitration) (litigation)."

Finally, if using a floating clause, a franchisor should be sensitive to disclosure issues if any plans (sale, investment, or otherwise) may involve moving its business to another state. Such plans raise disclosure issues that franchisors need to address regardless of a forum selection clause. Franchisors would need to take into account their obligations generally under franchise disclosure guidelines and, if the company is publicly traded, under the securities laws. For the narrow purpose, though, of disclosure as it affects a floating forum selection clause, timely disclosure is the proper course to maximize the likelihood that a court will enforce the clause.

1. A similar clause should be used for setting the locale for arbitration. Arbitration providers should honor the parties' choice of locale. *See* American Arbitration Association Commercial Rules, Rule 10, JAMS Comprehensive Arbitration Rules and Procedures, Rule 6(b) (rev. Mar. 27, 2007).

2. Under the amended FTC Rule, franchisors will be required to include the risk factors page only in registration states. One factor to consider in deciding whether to use the risk factors page elsewhere is that use of the factors would likely assist in enforcing forum selection clauses in states where notice is an issue.

3. The guidelines state: "If applicable, disclose the following risk factors using the following language on the cover:
'1. The franchise agreement permits the franchisee (to sue) (to arbitrate with) _____ only in _____. Out of state (arbitration) (litigation) may force you to accept a less favorable settlement for disputes. It may also cost more (to sue) (to arbitrate with) _____ in _____ than in your home state.'"

*Cruise Lines, Inc. v. Shute*,[16] the Seventh Circuit concluded that forum selection clauses are valid unless procured by fraud or misconduct.[17] Finding no fraud or related misconduct, the court found that if federal law applied, the floating forum selection clause was clearly valid and, thus, defendant had waived its objection to personal jurisdiction. The court then considered the validity of the clause under Illinois law, finding that "Illinois law concerning the validity of forum selection clauses [was] materially the same as federal law," except in circumstances where a huge disparity existed between the bargaining powers of the parties and where the transaction was not significant enough to warrant close scrutiny of the agreement. Finding these exceptions inapplicable, the court concluded that the NorVergence floating forum selection clause was enforceable under either federal law or Illinois law, and, thus, defendant had waived its personal jurisdiction defense. Accordingly, the Seventh Circuit reversed the trial court's dismissal of the action.

Similarly, in *Susquehanna Patriot Commercial Leasing v. Holpher Industries*,[18] a Pennsylvania state appellate court enforced the NorVergence floating forum selection clause by overturning the trial court's dismissal for lack of personal jurisdiction. The appellate court explained that under Pennsylvania law, a forum selection clause is presumed to be enforceable and should be enforced unless the clause was procured by fraud or unless enforcement of the clause would "seriously impair a party's ability to pursue his cause of action."[19] Although the court noted the likelihood of fraud by NorVergence, it also found that such fraud was not specifically related to the forum selection clause itself. Further, the court found that Pennsylvania was not so inconvenient as to preclude defendants from an opportunity to defend themselves. Based on these findings, the court upheld the forum selection clause and reversed the trial court's dismissal of the action.

Likewise, in *Liberty Bank v. Best Litho, Inc.*,[20] an Iowa state appellate court upheld the NorVergence floating forum selection clause. Without explanation, the court applied federal law to the question of the clause's enforceability, noting that under U.S. Supreme Court authority, a forum selection clause is unenforceable only when its enforcement would be unreasonable or unjust or when the clause was procured through fraud.[21] The court found that the contract put defendant on notice that the contract could be assigned and that, following such an assignment, any litigation would have to be conducted in the assignee's home state. Based on this clear notice, the court concluded that the clause was not unreasonable and should be enforced and that defendants had thus waived their objections to personal jurisdiction.

Similarly, in *Preferred Capital, Inc. v. Associates in Urology*,[22] the Sixth Circuit enforced the NorVergence floating forum selection clause. The district court had granted defendant's motion to dismiss for lack of personal jurisdiction. Plaintiff had argued that defendant had waived the personal jurisdiction defense when it consented to the floating forum selection clause. The Sixth Circuit, applying Ohio

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### Franchisee Considerations

Franchisees facing a floating forum selection clause may have grounds to challenge the clause if the franchisor has moved to a new state. First, start by reviewing the language of the clause and the disclosure document language carefully. Franchisors may have drafted the clause or done their disclosure poorly. Second, examine the timing and circumstances of the franchisor's move to the new state. Could the franchisor have given notice before the franchise agreement was signed? Third, consider filing first in the franchisee's home state and then fighting the clause under a § 1404 motion to transfer, which gives lower courts discretion under the U.S. Supreme Court's guidance in *Stewart Organization, Inc. v. Ricoh Corp.*[1] And fourth, if the franchisor files first in its new forum, review carefully the federal law and the state law in the new forum[2] and consider crafting motions for lack of personal jurisdiction and for transfer under § 1404. It is likely that the franchisee will have few, if any, contacts with the new state other than sending payments to the new state and communicating with the franchisor in the new state.[3] This is significantly different from franchisees' typical contacts with the franchisor's original location as franchisees frequently have traveled to the original location for discovery days, store viewings, negotiations, or training. Thus, courts may be inclined to favor franchisees on these points.

1. 487 U.S. 22 (1988).

2. *See* discussion of application of state or federal law in note 4 of the article.

3. Under standard contacts analysis, such contacts may be insufficient to establish personal jurisdiction. *See, e.g.,* Lee's Famous Recipes, Inc. v. Fam-Res, Inc., No. 3:07cv24, 2007 U.S. Dist. LEXIS 35311, Bus. Franchise Guide (CCH) ¶ 13,620 (N.D. Fla. May 15, 2007) (holding that court lacked personal jurisdiction over franchisee when franchisee's only contact with Florida, the state of the new franchisor's principal place of business, was sending payments and sales reports to the franchisor in Florida).

law, agreed. Under Ohio law, a number of factors are relevant to the enforceability of a forum selection clause: "(1) the commercial nature of the contract; (2) the absence of fraud or overreaching; and (3) whether enforcement of the forum selection clause would otherwise be unreasonable or unjust."[23] The court found that it was undisputed that the contract was a commercial contract, and that no evidence had been introduced of fraud directed toward the forum selection clause.

As to the unreasonable/unjust factor, the court held that unless enforcement of the clause would essentially deprive defendant of its day in court, the clause was enforceable. The court explained that

> [d]efendant is a commercial entity, and should have realized the implications of agreeing to the inclusion of a forum selection clause that did not identify an assignee or specified jurisdiction. . . . While Defendant may be dissatisfied with the litigation forum, it is not our task to save Defendant from the consequences of an agreement it freely entered into.[24]

Shortly after deciding the *Associates in Urology* case, the Sixth Circuit reached the same conclusion on nearly identical facts in *Preferred Capital, Inc. v. Aetna Maintenance, Inc.*[25] As discussed below, however, based on an intervening decision of the Ohio Supreme Court, the Sixth Circuit in the spring of 2007 reversed its position as to cases applying Ohio law.

One franchise case that upholds a light version of a floating forum selection clause is *ABC Rental Systems, Inc. v. Colortyme, Inc.*[26] There, a Louisiana franchisee sued its franchisor in the Eastern District of Texas, the site of franchisor's former principal place of business. Franchisor moved to transfer the case to the Northern District of Texas, where its principal place of business was currently located. The franchise agreement contained a provision that suit "shall be brought within the State of Texas in the judicial district in which the Franchisor has its principal place of business."[27] The court, applying federal law, held that the forum selection clause was enforceable and interpreted the clause as requiring litigation in the judicial district of franchisor's principal place of business at the time suit was filed, not at the time the contract was executed. In reaching that conclusion, the court stated that a "forum selection clause would be nonsensical if it required the parties to litigate a claim in [a] venue with little or no relation to either party."[28] The court, though, provided little analysis in its decision, so it does not provide as much guidance for those involved in franchise law as one would hope.

Finally, a number of other courts have recently upheld the validity of floating forum selection clauses, including state appellate courts in Georgia[29] and Colorado[30] and federal district courts in Pennsylvania,[31] Missouri,[32] and New Jersey.[33]

### Cases Opposing Selection Clauses

A minority of courts have refused to enforce floating forum selection clauses. The Ohio Supreme Court recently held the NorVergence floating forum selection clause was unenforceable under Ohio law. In *Preferred Capital, Inc. v. Power Engineering Group, Inc.*,[34] the Ohio Supreme Court considered an appeal of the trial court's dismissal of plaintiff's claims based on a lack of personal jurisdiction. The Ohio Supreme Court applied the long-standing Ohio three-pronged test, recited above, to determine whether a forum selection clause would be enforceable: (1) whether both parties are commercial entities, (2) whether there is evidence of fraud or overreaching, and (3) whether enforcement of the clause would be against public policy.[35]

The court had little trouble concluding that prongs one and two favored enforcement of the clause. Defendants were unquestionably commercial entities, and the forum selection clause was set out in plain English in the two-page contract.

The court, however, had more trouble with the public policy issue. The court first rejected defendants' argument that litigating in Ohio would be burdensome. The court found that none of the defendants had offices in New Jersey, which is the forum that would have been selected absent an assignment of the leases. Accordingly, the court found that litigating in Ohio would not be more burdensome than litigating in New Jersey and that litigating in Ohio would not deprive defendants of their day in court.[36] Nevertheless, the court found that "the clause is unreasonable because even a careful reading of the clause by a signatory would not answer the question of where he may be forced to defend or assert his contractual rights."[37]

Although this sounds like a per se rejection of floating forum selection clauses, the court then continued its analysis by addressing what appears to be its primary concern: that NorVergence knew that it would assign the leases immediately after they were executed, but NorVergence did not disclose this to defendants.[38] Thus, based on "the superior knowledge and position of NorVergence and Preferred Capital," the court held that the forum selection clause was "unreasonable" and that "it would be unjust to enforce it."[39] The court concluded by stating that floating forum selection clauses in commercial contracts are generally valid but that

> when one party to a contract containing a floating forum-selection clause possesses undisclosed information of its intent to assign its interest in the contract almost immediately to a company in a foreign jurisdiction, the forum-selection clause is unreasonable and against public policy absent a clear showing that the second party knowingly waived personal jurisdiction and assented to litigate in any forum.[40]

The court failed to identify what would constitute such a "clear showing" of waiver, but apparently the court believed that signing a clear, two-page commercial contract that provides for that exact waiver is not sufficient.

In May 2007, the Sixth Circuit followed the Ohio Supreme Court's *Power Engineering* decision by refusing to enforce yet another NorVergence lease. In *Preferred Capital v. Sarasota Kennel Club*,[41] the district court had dismissed the case for lack of personal jurisdiction, finding the clause unenforceable under both state and federal law. The Sixth Circuit, though, found that federal law and the 2006 Ohio Supreme Court's decision invalidating the NorVergence forum selection clause were in conflict. Thus, the Sixth Circuit found that the determinative issue was whether federal or state law should apply. The court concluded that questions of personal jurisdiction in a diversity case are decided under the forum state's substantive law. Hence, it followed the Ohio Supreme Court in finding the floating forum selection clause to be invalid and upheld the district court's dismissal for lack of personal jurisdiction.

Other courts have reached similar conclusions. In *Copelco v. Shapiro*,[42] a New Jersey appellate court found a floating forum selection clause (unrelated to the NorVergence lease) to be unenforceable. Defendant was a Missouri attorney who contracted with a Florida corporation for the rental of office equipment. The rental agreement contained a floating forum selection clause similar to the NorVergence clause in that it required litigation to be conducted in the renter's home state or the home state of the renter's assignee. The court found that under New Jersey law the clause was not enforceable because it did not provide the rentee notice of the specific forum in which litigation would be required. Thus, the court held that the trial court lacked personal jurisdiction over defendant.

Finally, in *AT&T Capital Leasing Services, Inc. v. CJP, Inc.*,[43] a Massachusetts trial court held a floating forum selection clause that was similar to the NorVergence clause to be unenforceable. Defendant, a small copy shop in Arizona, had rented copying equipment, and the lessor had assigned the rental agreement to a Massachusetts company. The court dismissed the Massachusetts litigation for lack of personal jurisdiction over defendant, finding that it would be unreasonable and unjust to require defendant to litigate in Massachusetts:

> The court is disturbed by the far-reaching nature of a clause that forces one side to waive jurisdictional defenses as to a forum that has not even been identified. The defendant here is not a large company doing business in many locations, where such a clause might be eminently reasonable. . . . Requiring [the defendant] to defend itself in any court in the nation, depending on where ABCC happens to assign the contract, is not fair or reasonable.[44]

## Conclusion

For franchisors, the lure of a floating forum selection clause is that the franchisor will be able to float like a butterfly from state to state and still be able to sting like a bee by forcing the franchisee to litigate in the franchisor's new home. Right now, the trend in the case law appears to be favorable for franchisors in this effort. But enough contrary decisions and considerations exist that one can safely say only that the fight is in the early rounds and it's still too early to call.

## Endnotes

1. The only case of which we are aware that has addressed this issue was a franchise case where the court enforced the standard forum selection clause despite the fact that no party had any ties to the selected forum at the time the suit was brought. *See* DFO, Inc. v. Ne. Inn of Meridian, Inc., No. CV 97-8462, Bus. Franchise Guide (CCH) ¶ 11,552 (C.D. Cal. Dec. 3, 1998).

2. 407 U.S. 1, 12–13 (1972); *see also* Jones v. GNC Franchising, 211 F.3d 493, 497, Bus. Franchise Guide (CCH) ¶ 11850 (9th Cir. 2000).

3. Some states with relationship laws bar enforcement of forum selection clauses, e.g., Michigan (MICH. COMP. LAWS § 445.1527(f)); Illinois (815 ILL. COMP. STAT ANN. 705/4); Iowa (IOWA CODE § 523H.3. Other state statutes do not specifically prohibit forum selection clauses, but their general antiwaiver provisions have been held to bar forum selection clauses. *See, e.g.,* Wimsatt v. Beverly Hills Weight

Loss Clinics, 38 Cal. Rptr. 2d 612 (Ct. App. 1995) (interpreting California law); Kubis & Perszyk Assocs., Inc. v. Sun Microsys., Inc., 680 A.2d 618 (N.J. 1996) (interpreting New Jersey law). This article focuses on how clauses fare in states that do not have statutes purporting to bar enforcement of the clauses.

4. *See, e.g.,* Airtel Wireless, LLC v. Mont. Elec. Co., 393 F. Supp. 2d 777 (D. Minn. 2005); QFA Royalties, LLC v. Case, No. 05-cv-00685-WYD-CBS, 2006 U.S. Dist. LEXIS 31941 (D. Colo. Mar. 31, 2006); Hardee's Food Sys., Inc. v. Hoffman, No. 4:05cv2264, 2006 U.S. Dist. LEXIS 1596 (E.D. Mo. Jan. 18, 2006); IFC Credit Corp. v. Aliano Bros. Gen. Contractors, 437 F.3d 606 (7th Cir. 2006). In diversity actions, when suit is filed in the selected forum and the defendant challenges the forum selection clause by filing a motion to dismiss for lack of personal jurisdiction, some courts apply the law of the forum state to determine the enforceability of the forum selection clause. For instance, in *Preferred Capital v. Sarasota Kennel Club*, No. 06-3063, 2007 U.S. App. LEXIS 12352 (6th Cir. May 29, 2007), the Sixth Circuit held that in a diversity action a federal court is bound to apply the forum state's law to questions of personal jurisdiction. The court acknowledged that federal law applies when a forum selection clause is being considered in the context of a motion to transfer under § 1404. *See id.* at *7. The court explained, however, that "[w]hen deciding to apply federal or state law to a forum-selection clause, the context in which the clause is asserted can be determinative." The Sixth Circuit was considering a forum selection clause in the context of a motion to dismiss for lack of personal jurisdiction. The court explained that it was well-settled law that in diversity actions, "federal courts apply state law to determine questions of personal jurisdiction." *Id.* at *10–11. Accordingly, the court applied the law of the forum state, Ohio, and concluded that even though Ohio supports waiver of personal jurisdiction for a valid forum selection clause, the particular forum selection clause at issue was not enforceable. The Eleventh Circuit appears to be in accord. *See* Alexander Proudfoot Co. World Headquarters L.P. v. Thayer, 877 F.2d 912 (11th Cir. 1989) (applying Florida law to motion to dismiss based on lack of personal jurisdiction in a forum selection case, court enforced the clause).

5. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29, 31 (1988).

6. *Id.* at 30.

7. *See, e.g.,* Jumara v. State Farm Ins. Co., 55 F.3d 873, 880 (3d Cir. 1994); *In re* Ricoh Corp., 870 F.2d 570, 573 (11th Cir. 1989).

8. *See, e.g.,* Red Bull Assocs. v. Best Western Int'l, 862 F.2d 963, 967 (2d Cir. 1988).

9. "[A] forum selection clause . . . does not necessarily determine the ruling on the motion for transfer. But 'despite that other factors might conceivably militate against transfer . . . the venue mandated by a choice of forum clause rarely will be outweighed by other Section 1404(a) factors.'" 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3854.1 (3d ed. 2007) (quoting P & S Bus. Machs., Inc. v. Canon USA, Inc., 331 F.3d 804 (11th Cir. 2003)).

10. *See, e.g.,* Lambert v. Kysar, 983 F.2d 1110, 1119 (1st Cir. 1993); Gibson v. Am. Bankers Ins. Co., 289 F.3d 943, 948 (6th Cir. 2002); Mind-Peace, Inc. v. Pharmacon Int'l Inc., No. 2:06cv632, 2006 U.S. Dist. LEXIS 71309, at *4 (S.D. Ohio Oct. 2, 2006) (holding that motion for dismissal of an action under Fed. R. Civ. P. 12(b)(1) based on a forum selection clause was not appropriate and, instead, a forum selection clause should be considered as a factor in a § 1404(a) motion to transfer).

11. *See* Salovaara v. Jackson Nat'l Life Ins. Co., 246 F.3d 289, 298 (3d Cir. 2001); Kerobo v. Sw. Clean Fuels Corp., 285 F.3d 531, 536 (6th Cir. 2002); Bennett v. AOL, Inc., 471 F. Supp. 2d 814, 819 (E.D. Mich. 2007) (refusing to dismiss a case for improper venue based on a forum selection clause and explaining that "§ 1404(a) controls requests to give effect to the parties' contractual choice of venue"). *See generally* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 187 (1971).

12. The clause also provided as to choice of law that "[t]his agreement shall be governed by . . . the laws of the State in which Rentor's principal offices are located or, if this Lease is assigned by Rentor, the State in which the assignees' principal offices are located." Although this article does not address choice of law, the clause does appear to be unconscionable because the parties' substantive rights, duties, powers, and liabilities would change if the obligee moved its principal offices to another state.

13. This article addresses federal court of appeals decisions, state supreme court decisions, and other recent decisions that include insightful analysis. For citations to additional cases addressing floating forum selection clauses, *see* Paul Hartman Cross & Hubert Oxford, IV, *"Floating" Forum Selection and Choice of Law Clauses,* 48 S. TEX. L. REV. 125 (2006).

14. 437 F.3d 606 (7th Cir. 2006).

15. *See* discussion *supra* note 4 regarding the application of federal or state law in the context of motions to dismiss for lack of personal jurisdiction.

16. 499 U.S. 585 (1991).

17. *See IFC Credit Corp.*, 437 F.3d at 610.

18. Nos. 3409-3425 EDA 2005, 2007 Pa. Super. LEXIS 1611 (June 12, 2007).

19. *Id.* at *7–8 (quoting Cent. Contracting Co. v. C.E. Youngdahl & Co., 209 A.2d 810 (Pa. 1965)).

20. Nos. 7-046, 05-0791, 2007 Iowa App. LEXIS 538 (Apr. 25, 2007).

21. *See id.* at *6–7.

22. 453 F.3d 718 (6th Cir. 2006).

23. *Id.* at 721.

24. *Id.* at 723–24.

25. No. 05-4072, 207 F. App'x 562 (6th Cir. Nov. 29, 2006).

26. 893 F. Supp. 636 (E.D. Tex. 1995).

27. *Id.* at 637.

28. *Id.* at 639.

29. *See* OFC Capital v. Colonial Distribs., Inc., No. A07A0039, 2007 Ga. App. LEXIS 655 (Ga. Ct. App. June 14, 2007).

30. *See* Edge Telecom, Inc. v. Sterling Bank, 143 P.3d 1155 (Colo. Ct. App. 2006).

31. *See* Commerce Commercial Leasing, LLC v. Jay's Fabric Ctr., No. 04-4480, 2004 U.S. Dist. LEXIS 22262 (E.D. Pa. Nov. 2, 2004).

32. *See* Popular Leasing USA, Inc. v. Terra Excavating,

Inc., No. 4:04-CV-1625, 2005 U.S. Dist. LEXIS 32267 (E.D. Mo. June 28, 2005).

33. *See* Danka Funding, LLC v. Page, Scrantom, Sprouse, Tucker & Ford, P.C., 21 F. Supp. 2d 465 (D.N.J. 1998).

34. 860 N.E. 2d 741 (Ohio 2007).

35. *See id.* at 744.

36. *See id.* at 746.

37. *Id.*

38. *See id.* ("The record indicates that NorVergence knew that it intended to assign these leases. . . . Preferred Capital and NorVergence had superior information. . . . NorVergence knew that it would likely assign its interest in appellants' leases to Preferred Capital or some other entity, but withheld that information from appellants.").

39. *Id.*

40. *Id.*

41. No. 06-3063, 2007 U.S. App. LEXIS 12352 (6th Cir. May 29, 2007).

42. 750 A.2d 773 (N.J. Super. Ct. App. Div. 2000).

43. No. 97-1804, 1997 Mass. Super. LEXIS 181 (Mass. Super. Ct. Sept. 18, 1997).

44. *AT&T Capital Leasing Servs.,* 1997 Mass. Super. LEXIS 181, at *8.