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Franchise Law Committee

# Franchise Law e-Bulletin

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## California State Bar Franchise Law Committee Case Report – November 2014

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#### *Frango Grille USA, Inc. v. Pepe's Franchising Ltd.*, Business Franchise Guide (CCH) P 15,390 (July 21, 2014)

A district court sitting in California was recently asked to address the enforceability of an out-of-state forum selection clause in a franchise agreement in light of the U.S. Supreme Court's landmark decision in *Atlantic Marine Constr. Co., Inc. v. United States Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568 (2013).

As discussed below, the district court circumvented *Atlantic Marine* by finding that the California Franchise Relations Act (the "CFRA"), at Bus. & Prof. Code § 20040.5, renders the out-of-state forum selection clause invalid and "the *Atlantic Marine* analysis inapplicable."

#### Factual Background

In March of this year, Frango Grille USA, Inc. ("Frango") commenced a legal action against Pepe's Franchising Limited and several of its officers, employees, and affiliated companies (collectively, "Pepe's") arising out of a failed franchise relationship.

Pepe's, a United Kingdom company headquartered in Herts County, England, is the franchisor of a quick service chicken restaurant chain operating under the name *Pepe's Piri Piri*. Frango is a California corporation with its principal place of business Los Angeles, California.

In early 2012, a representative of Frango visited Pepe's headquarters to discuss a relationship that would allow the parties to build the Pepe's brand in California. Following a year of extensive negotiations, on February 21, 2013, Frango and Pepe's entered into a Master Franchise Agreement (the "MFA") granting Frango the right to open and operate a Pepe's Piri Piri restaurant in California, and to recruit other prospective franchisees in California.

#### Relevant Contract Provisions

The MFA contains a forum selection clause providing that “any proceedings arising out of or in connection with this Agreement shall be brought in any court of competent jurisdiction in London.” The parties also agreed that the MFA would be “governed in all respects in accordance with English Law and shall be construed and take effect as an Agreement made in England.”

### **Frango Files the Instant Action**

The honeymoon period for Frango and Pepe's quickly faded, and without opening a single Pepe's Piri Piri restaurant, Frango filed a lawsuit against Pepe's with the District Court in the Central District of California. The seven-count complaint included five separate violations of the California Franchise Investment Law (the “CFIL”) and two claims for fraud.

**Pepe's moved to dismiss on grounds of *forum non conveniens* or, in the alternative, to transfer the case to London. Replying upon the forum selection clause in the MFA, Pepe's argued that London was the only proper forum for the lawsuit. Frango opposed the motion on the grounds that the out-of-state forum selection clause is invalidated by the CFRA at Bus. & Prof. Code § 20040.5.[\[1\]](#)**

### **Applicability of the CFRA to the Dispute**

In ruling on Pepe's motion, the court first considered the applicability of the CFRA to the dispute. Pepe's argued that the CFRA did not apply in this case because (1) Frango was not “operating” a franchise in California as required under the language of Bus. & Prof. Code § 20040.5, and (2) Frango did not bring any claims for violation of the CFRA – only claims for violation of the CFIL and fraud.

The court quickly dismissed both of Pepe's arguments finding that Frango's investment of money to prepare to open a Pepe's Piri Piri restaurant satisfied the requirements under the MFA and the broad legislative intent behind the CFRA. Also, the court found that CFRA claims need not be raised in a dispute for a franchisee to be covered by the protections of the CFRA – *i.e.*, the statute applies to “any claim arising under or relating to a franchise agreement involving a franchise business within this state.”

### **Relationship of CFRA to Forum Selection Clause**

The court next turned its attention to Pepe's primary argument – that the CFRA provision cannot override the forum selection clause in the MFA in light of the U.S. Supreme Court's recent decision in *Atlantic Marine*.

In *Atlantic Marine*, the Court found that federal courts must analyze the factors laid out in 28 U.S.C. § 1404[\[2\]](#) in deciding whether to enforce a forum selection clause. The Court also interpreted *Atlantic Marine* as holding, “where a valid forum selection clause is at issue, the private interest factors are to be disregarded, and ‘a district court may consider arguments about public-interest factors only.’”

Then, relying upon *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000), the court found that the forum selection clause to be contrary to California's strong public policy codified in the CFRA. Because the

*Atlantic Marine* analysis “presupposes a contractually valid forum-selection clause,” and the forum selection clause at issue was rendered invalid because it “would contravene a strong public policy of California,” the court found the *Atlantic Marine* analysis to be “inapplicable.”

### ***Forum Non Conveniens Analysis***

Finding the forum selection clause invalid, the court then conducted a *forum non conveniens* analysis without considering the forum selection clause. For purposes of this analysis the court acknowledged that it must (1) “evaluate both the convenience of the parties and various public-interest considerations” and “decide whether, on balance, a transfer would serve the convenience of parties and witnesses and otherwise promote the interest of justice.” In addition, the court also considers “the relevant public policy of the forum state.”

Although recognizing that “most of the MFA negotiations took place in England,” the court denied Pepe’s motion to dismiss finding that Pepe’s (1) decision to do business in California, (2) registration to do business in California, (3) knowledge that the forum selection clause was not likely enforceable under California law, (4) knowledge that “disputes arising out of or concerning” the parties’ contracts and relationship would be litigated here.

In light of these facts – and some circular reasoning in its analysis – the court found that Pepe’s “failed to make ‘a strong showing of inconvenience to warrant upsetting [Frango’s] choice of forum.’”

\* \* \*

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Cal. Bus. & Prof. Code § 20040.5 provides that, “A provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state.

The factors set forth in 28 USCS § 1404 are as follows:

- (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.
- (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.
- (c) A district court may order any civil action to be tried at any place within the division in which it is pending.
- (d) Transfers from a district court of the United States to the District Court of Guam, the District Court for the Northern Mariana Islands, or the District Court of the Virgin Islands shall not be permitted under this section. As otherwise used in this section, the term “district court” includes

the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.

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