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## **Burger King Corporation v. Rudzewicz: The Minimum Contacts Test Meets the Modern-Day Franchise Agreement, 20 J. Marshall L. Rev. 169 (1986)**

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## CASENOTES

### *BURGER KING CORPORATION v. RUDZEWICZ*:\* THE MINIMUM CONTACTS TEST MEETS THE MODERN-DAY FRANCHISE AGREEMENT

The ability of a forum to exercise personal jurisdiction<sup>1</sup> over out-of-state litigants has changed dramatically in recent years.<sup>2</sup> Because the fourteenth amendment's due process clause<sup>3</sup> protects individual's liberty interests,<sup>4</sup> out-of-state litigants are subjected to liti-

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\* 105 S. Ct. 2174 (1985).

1. Personal jurisdiction or "in personam" jurisdiction is a Court's authority over a person. Casad, *Long Arm and Convenient Forum*, 20 U. KAN. L. REV. 1, 2 (1971). Specific personal jurisdiction is where a state exercises personal jurisdiction over a defendant in an action arising out of the defendant's contacts with the state. *Burger King*, 105 S. Ct. at 2182 n.15. See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 104 S. Ct. 1868, 1872 nn.8-9 (1984). See also Knudsen, *Keeton, Calder, Helicopteros and Burger King—International Shoe's Most Recent Progeny*, 39 U. MIAMI L. REV. 809, 826 n.119 (1985) (providing definitions of general and specific jurisdiction); Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-63 (1969) (discussing the Court's evolution of the concepts of general and specific jurisdiction).

2. *Helicopteros*, 104 S. Ct. 1868 (1984) (deciding a purchase contract was insufficient to constitute minimum contacts); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (deciding fortuitous circumstances of a third party's unilateral activity cannot constitute contacts); *Hanson v. Denckla*, 357 U.S. 235 (1955) (providing the requirement of purposeful availment in determining minimum contacts); *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957) (allowing jurisdiction based solely on a contract which had substantial connection with the forum); *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945) (providing the minimum contacts theory of jurisdiction); *Pennoyer v. Neff*, 95 U.S. 714 (1877) (relying on the territorial theory of presence within a forum). See also Brewer, *Jurisdiction in Single Contract Cases*, 6 U. ARK. LITTLE ROCK L.J. 1, 1-7 (1983) (providing an historical review of the development of personal jurisdiction law); Casad, *supra* note 1, at 2-12 (discussing the evolution of jurisdiction law from *Pennoyer* to *Hanson*); Knudsen, *supra* note 1 (examining the Court's most recent decisions on the subject of personal jurisdiction).

3. U.S. CONST. amend. XIV, provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." *Id.*

4. The protection of requiring minimum contacts to exercise personal jurisdiction is a function of the individual liberty interests found in the due process clause rather than a function of federalism concerns. See *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 n.10 (1982). See also Casad, *supra* note 1, at 2-6 (discussing how the Court's minimum contact theory announced in *International Shoe* virtually eliminated the traditional territorial power theory of jurisdiction); Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 7-9 & n.29 (1984) (discussing the Court's recognition that the due process question in personal jurisdiction is one of

gation in a foreign state only when they have established minimum contacts with that state.<sup>5</sup> Courts have been inconsistent, however, in their rulings as to what extent business contracts can constitute sufficient contacts to uphold jurisdiction.<sup>6</sup>

In *Burger King Corp. v. Rudzewicz*,<sup>7</sup> the United States Supreme Court resolved this inconsistency when it ruled upon the constitutionality of Florida's exercise of jurisdiction<sup>8</sup> over a Michigan resident.<sup>9</sup> In so doing, the Court determined that an out-of-state franchisee<sup>10</sup> established the necessary minimum contacts with Florida when he negotiated and executed a twenty year franchise agreement with Burger King.<sup>11</sup> The Court held that the exercise of Florida's long-arm statute over the Michigan based franchisee did not offend the traditional notions of fair play and justice<sup>12</sup> embodied in

individual, not state rights).

5. Due process requires that in order to subject a defendant to personal jurisdiction, he must have certain minimum contacts with the forum such that the maintenance of a suit there does not offend traditional notions of fair play and substantial justice. *International Shoe*, 326 U.S. at 316 (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

6. See *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 445 U.S. 907, 910-11 (1980) (White, Powell, J.J., dissenting) (noting the conflicts between the various state and federal decisions regarding jurisdiction in single contract cases), *denying cert. to*, 597 F.2d 596 (7th Cir. 1979). Compare *Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co.*, 623 F.2d 375 (5th Cir. 1980) (allowing jurisdiction in a single contract case) and *Pedi Bares, Inc. v. P & C Food Mkts., Inc.*, 567 F.2d 933 (10th Cir. 1977) (allowing jurisdiction in a single contract case) with *Iowa Elec. Light & Power Co. v. Atlas Corp.* 603 F.2d 1301 (8th Cir. 1979) (denying jurisdiction in a single contract case), *cert. denied*, 445 U.S. 911 (1980) and *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d (7th Cir. 1979) (denying jurisdiction in a single contract case), *cert. denied*, 445 U.S. 907 (1980). See also *Brewer*, *supra* note 2, at 7-10 (discussing the confusion remaining regarding personal jurisdiction in single contract cases); Note, *Long-Arm Jurisdiction In Commercial Litigation: When Is A Contract A Contact?*, 61 B.U.L. REV. 375, 384-88 (1981) [hereinafter cited as Note, *When Is A Contract A Contact?*] (discussing the conflict among the circuits regarding jurisdictional assertions based on single contract contacts).

7. 105 S. Ct. 2174 (1985).

8. Florida's long arm statute provides that:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(g) Breaching a contract in this state by failing to perform acts required by . . . the contract to be performed in this state.

*Fla. Stat.* 48.193(1)(g) (Supp. 1984).

9. *Burger King*, 105 S. Ct. at 2190.

10. A franchisee is a person or entity who contracts for the franchise from the franchisor. An owner of a franchised business chain gives a franchise when he permits a franchisee to sell a product or provide a service under that chain's name. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 727 (2d ed. 1978). See also R. CASAD, JURISDICTION IN CIVIL ACTIONS 8.11[9][b] (1983) (discussing jurisdiction in cases in which a franchisor sues a franchisee for breach of contract).

11. *Burger King*, 105 S. Ct. at 2186.

12. Once minimum contacts have been established, these contacts should be

the due process clause.<sup>13</sup>

Rudzewicz<sup>14</sup> applied for and received<sup>15</sup> a Burger King franchise in Michigan.<sup>16</sup> He entered into three separate agreements with Burger King: a preliminary franchise agreement,<sup>17</sup> a lease,<sup>18</sup> and a twenty year franchise agreement.<sup>19</sup> The franchise soon experienced

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considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice. *International Shoe*, 326 U.S. at 320. In determining the fairness of jurisdiction, courts should, in appropriate cases, evaluate "the burden on the defendant, . . . the forum State's interest in adjudicating the dispute, . . . the plaintiff's interest in obtaining convenient and effective relief, . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen*, 444 U.S. at 292. See also Brewer, *supra* note 2, at 7-10 (discussing the factors to be weighed in determining the fairness of exercising jurisdiction); Comment, *Jurisdiction Over Unnamed Plaintiffs in Multistate Class Actions*, 73 CALIF. L. REV. 181, 186-87 (1985) (discussing the second function of the minimum contacts test of ensuring that jurisdiction is fair).

13. *Burger King*, 105 S. Ct. at 2190.

14. John Rudzewicz is a citizen and resident of Michigan. *Id.* at 2179. He is the senior partner in a Detroit accounting firm which at the time of his application for a franchise represented a client who owned three Burger King franchises. Brief for Appellee at 4, *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985). In 1978, he had an income of \$170,000 and a net worth of \$1,125,000.00. *Id.*

15. Rudzewicz with Brian MacShara, the son of a business acquaintance, jointly applied to Burger King's Michigan district office for a franchise in the Detroit area. *Burger King*, 105 S. Ct. at 2179. This application was forwarded to Burger King's Miami headquarters which subsequently approved the application. *Id.*

16. The parties agreed that Rudzewicz and MacShara were to assume the operation of an existing facility in Drayton Plains, Michigan. *Id.*

17. Rudzewicz entered into a preliminary agreement with Burger King's Miami headquarters in February 1979. *Id.* This preliminary agreement specified that Burger King was a Florida corporation, that the agreement was made and entered into in Florida, and that the franchisee agreed to send the agreement, the lease, and all franchise and site development fees to Burger King Corporation located in Florida. Joint Appendix at 37-40, *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985).

18. Along with the return of the preliminary agreement, Rudzewicz was required to return an executed lease agreement. Joint Appendix at 38, *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985). The lease provided for the rental of the Drayton Plains facility for twenty years. *Id.* at 81. The lease also contained a reduced rental amount in the third year that Rudzewicz had obtained after negotiations with the Miami office. *Id.* at 82. See also *Burger King*, 105 S. Ct. at 2179. Moreover, the lease provided for binding arbitration in Miami for certain condemnation disputes. *Id.* at 2187 n.24.

19. Rudzewicz signed the final agreements in June 1979, personally obligating himself to payments exceeding \$1 million over the twenty year franchise relationship. *Burger King*, 105 S. Ct. at 2179. The agreement called for the franchisee to commit himself to the payment of an initial \$40,000 fee, monthly royalties, advertising and sales promotion fees, and rent computed in part from monthly gross sales. *Id.* at 2178. The franchisee additionally agreed to submit to the organization's regulation of virtually every conceivable aspect of his operations. *Id.* For example, the franchisee agreed to adhere to Burger King's regulation of the restaurant design and color schemes, the use of signs, the interior decor and equipment systems requirements, the menu and service format (including the ingredients, methods of preparation and service, and standards of cleanliness), the installation of vending machines, the hours of operation, the employee's uniforms, and the advertising and promotional materials. Joint Appendix at 47-51, *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985). The

financial difficulties,<sup>20</sup> and fell behind in its contract payments.<sup>21</sup> After several unsuccessful attempts to help Rudzewicz correct these deficiencies,<sup>22</sup> Burger King terminated the franchise.<sup>23</sup> Rudzewicz, however, continued to operate the facility as a Burger King restaurant.<sup>24</sup>

Burger King sued Rudzewicz<sup>25</sup> for breach of contract<sup>26</sup> in the United States District Court for the Southern District of Florida.<sup>27</sup> Rudzewicz filed a motion to dismiss contending the court lacked personal jurisdiction over him.<sup>28</sup> The district court denied the motion<sup>29</sup> holding that a nonresident franchisee is subject to Florida's jurisdiction in actions arising out of its franchise agreement.<sup>30</sup> After a bench trial, the court held that Rudzewicz had breached his contract and awarded Burger King damages accordingly.<sup>31</sup>

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agreement also provided that all payments and notices were to be sent to the Miami headquarters, that the contract was made in and entered into in Miami, and that Florida law would be applied in all disputes. *Burger King*, 105 S. Ct. at 2178-79, 2187.

20. The facility enjoyed steady business during the summer of 1979, but business declined after a recession occurred later that year. *Id.* at 2179.

21. *Id.*

22. The Miami headquarters determined the initial delinquency and requested the initial notices of default. Brief for Appellee at 19, *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985). Additionally, three different officials from the Miami office engaged the franchisees in a continuous series of telephone conversations regarding how to solve the problem. *Id.* See also *Burger King*, 105 S. Ct. at 2179-80.

23. *Burger King*, 105 S. Ct. at 2180. The Miami headquarters, as well as terminating the franchise, ordered Rudzewicz to vacate the premises. *Id.*

24. *Id.*

25. The original action named Rudzewicz and MacShara as defendants. *Id.* at 2180. MacShara, however, did not appeal his judgment. See *Burger King Corp. v. MacShara*, 724 F.2d 1505, 1506 n.1 (11th Cir. 1984), *rev'd sub. nom.* *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985).

26. The original action sought damages, injunctive relief, and costs and attorney's fees on two counts. *Burger King*, 105 S. Ct. at 2180. First, it alleged that defendants had breached their franchise obligations when they failed to make the required payments to plaintiffs in Florida. *Id.* Second, it charged that defendants were tortiously infringing plaintiff's trademarks and service marks through their continued, unauthorized operation of a Burger King restaurant. *Id.* After judgment, Rudzewicz entered into a compromise with Burger King and waived his right to appeal the finding of trademark infringement. *Id.* at 2180 n.11.

27. *Burger King*, 105 S. Ct. at 2180. Burger King invoked the district court's diversity jurisdiction pursuant to section 1332(a), Title 28 of the United States Code and its original jurisdiction over federal trademark disputes pursuant to section 1338(a), Title 28 of the United States Code. *Id.*

28. Rudzewicz and MacShara entered special appearances and argued that the Florida court lacked personal jurisdiction over them because they were Michigan residents and because Burger King's claim did not arise within the Southern District of Florida. *Id.*

29. *Burger King Corp. v. MacShara*, No. 81-1145 (S.D. Fla. March 5, 1982). See also Joint Appendix at 152-65, *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985).

30. *Burger King*, 105 S. Ct. at 2180.

31. *Id.* The district court entered judgment against Rudzewicz and MacShara, jointly and severally, for \$228,875 in contract damages and awarded costs and attor-

The United States Court of Appeals for the Eleventh Circuit reversed the judgment.<sup>32</sup> The court determined that the franchise agreement and the parties' negotiations did not give Rudzewicz notice that he could be subject to litigation in Florida.<sup>33</sup> The court held that jurisdiction in this case would offend the fundamental fairness requirement embodied in the due process clause.<sup>34</sup>

The United States Supreme Court reversed the Eleventh Circuit's decision.<sup>35</sup> In so doing, the Court resolved the division among lower courts<sup>36</sup> regarding the extent to which a long term franchise contract can constitute a "contract"<sup>37</sup> for due process analysis.<sup>38</sup> The Court addressed the question of whether a Michigan resident's twenty year franchise agreement with a Florida corporation was sufficient contact with the state to justify Florida's exercise of jurisdiction over the Michigan resident.<sup>39</sup> The Court held that the district court's exercise of jurisdiction pursuant to Florida's long arm statute<sup>40</sup> was constitutional.<sup>41</sup> Accordingly, a Florida court's exercise of personal jurisdiction over a Michigan franchisee was consistent with the due process requirements of fair play and justice.<sup>42</sup>

Justice William Brennan, writing for the majority of the court, stated that the test for determining the constitutionality of a forum's exercise of personal jurisdiction is whether the defendant has purposefully established minimum contacts in the forum.<sup>43</sup> The

ney's fees to Burger King. *Id.* The court also ordered defendants to turn over the Drayton Plains facility to Burger King immediately. *Id.*

32. *Burger King Corp. v. MacShara*, 724 F.2d 1505 (11th Cir. 1984), *rev'd sub nom.*, *Burger King v. Rudzewicz*, 105 S. Ct. 2174 (1985).

33. *Id.* at 1513.

34. *Id.*

35. *Burger King*, 105 S. Ct. at 2190. Because it was unclear whether the court of appeals actually held the Florida statute itself unconstitutional, the Court concluded that its appellate jurisdiction did not lie properly and dismissed the appeal. *Id.* at 2181. The Court treated the jurisdictional statement as a petition for a writ of *certiorari*, granted it and then reversed the lower court. *Id.*

36. For a discussion of the division in lower courts regarding jurisdiction in single contract cases, see *supra* note 6.

37. For a definition of a "contract" in jurisdictional analysis, see *supra* note 5.

38. *Burger King*, 105 S. Ct. at 2185. See also Knudsen, *supra* note 1, at 840 (discussing how the Court clarified the due process significance of a contract between parties).

39. *Burger King*, 105 S. Ct. at 2186.

40. For a duplication of the Florida statute's language, see *supra* note 8.

41. *Burger King*, 105 S. Ct. at 2190.

42. *Id.*

43. *Id.* at 2183. The minimum contacts test has been broken down into three steps: first, whether the defendant purposefully availed himself of the benefits and protections of the forum state's laws; second, whether the cause of action arose from the defendant's activities within the forum, third, whether the assertion of jurisdiction over the defendant is consistent with fair play and substantial justice. See Brewer, *supra* note 2, at 12-18 (giving an application of the three step test); Note, *When Is A Contract A Contract*, *supra* note 6, at 377-84 (discussing the birth and growth of the minimum contacts test and providing a three part synthesis of the

Court noted that an additional element of foreseeability is also important.<sup>44</sup> This element is critical, however, only to the extent that a defendant's activities in a forum are such that he should reasonably anticipate being haled into court there.<sup>45</sup> The Court reasoned that because a defendant has purposefully availed<sup>46</sup> himself of the benefits and protections of a forum's laws, it is reasonable to require him to submit to suit there.<sup>47</sup>

The Court rejected the idea that a contract alone can establish sufficient minimum contacts to invoke a forum's jurisdiction.<sup>48</sup> The Court examined both Rudzewicz's contracts with Burger King<sup>49</sup> and the parties' course of dealings<sup>50</sup> to determine that Rudzewicz had

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current test).

44. *Burger King*, 105 S. Ct. at 2183. The Court noted that the kind of foreseeability of causing injury in another State is not a sufficient benchmark for exercising personal jurisdiction. *Id.* (citing *World-Wide Volkswagen*, 44 U.S. at 295).

45. *Burger King*, 105 S. Ct. at 2183. The Court rejected the appellate court's "fair warning" requirement in favor of *Hanson's* "purposeful availment" concept. *Id.* See Knudsen, *supra* note 1, at 837-38 (discussing the Court's construction of the factor of foreseeability). The requirement was first found in *dicta* of the *World-Wide Volkswagen* opinion. 444 U.S. at 297. In that opinion, the Court stated that the importance of this requirement was that the defendant's conduct and connection with the forum State should be such that he should reasonably anticipate being haled into court there. *Id.* The specific references to the "defendant's conduct" and the "defendant's connection with the forum" as well as the requirement that his anticipation be "reasonable" makes it clear that a court should employ an objective basis for the defendant's anticipation. See Lewis, *supra* note 4, at 20.

46. *Burger King*, 105 S. Ct. at 2183. The Court noted that the purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely because of "random," "fortuitous" or "attenuated" contacts or because of the "unilateral activity" of a third person. *Id.* See also *Helicopteros*, 104 S. Ct. at 1873 (unilateral activity of third party is not an appropriate consideration for determining minimum contacts); *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1478 (1984) (random or fortuitous contacts will not justify jurisdiction); *World-Wide Volkswagen*, 444 U.S. at 299 (attenuated contact should not justify the exercise of jurisdiction).

47. *Burger King*, 105 S. Ct. at 2184. A defendant who is an active participant in interstate commerce takes advantage of the economic benefits and opportunities offered by the various States in which he has commercial activities. See *Helicopteros*, 104 S. Ct. at 1877 (Brennan, J., dissenting). It is, therefore, fair and reasonable to subject that defendant to the obligations, as well as protections, that those jurisdictions' laws may impose. *Id.*

48. *Burger King*, 105 S. Ct. at 2185. The Court rejected the notion that personal jurisdiction might turn on mechanical tests or conceptualistic theories of the place of contracting or performance. *Id.* It emphasized the need for a realistic approach which views a contract as an intermediate step. *Id.* This step serves to connect the prior business negotiations with the future business consequences that are the real object of the transaction. *Id.* It is this character of a contract that should be evaluated in determining whether a defendant established minimum contacts. *Id.* at 2186.

49. The contract documents themselves emphasized that Burger King's operation were conducted and supervised from the Miami headquarters, that all relevant notices and payments were to be sent there, and that the agreements were made in and enforced from Miami. *Id.* For a list of the agreement's provisions relating to notice and payments, see *supra* notes 17-19.

50. When problems arose over building design, site development fees, rent computation, and the defaulted payments, Rudzewicz learned that the Michigan office was powerless to resolve any disputes. *Burger King*, 105 S. Ct. at 2187. It was only a

established the necessary minimum contacts with Florida.<sup>51</sup> Rudzewicz voluntarily entered into a twenty year relationship that envisioned continued and wide reaching contacts with Burger King in Florida.<sup>52</sup> The Court found that his breach of that relationship caused injury in Florida.<sup>53</sup> Thus, it was reasonable to subject Rudzewicz to Florida's jurisdiction to account for those injuries.<sup>54</sup>

After finding that Rudzewicz had sufficient minimum contacts,<sup>55</sup> the Court examined whether it was reasonable for Rudzewicz to expect to be haled into court in Florida.<sup>56</sup> The Court noted that the contract documents themselves contained several provisions which evidenced that Rudzewicz must have known he was connecting himself with a Florida enterprise.<sup>57</sup> The Court specifically placed a great deal of weight on the choice of Florida law provision in the documents.<sup>58</sup> The Court held that this provision, when combined with the long term relationship of the parties, reinforced the foreseeability of possible litigation in Florida.<sup>59</sup> Additionally, Rudzewicz's course of dealings with the Miami office showed his awareness that he was dealing with a Florida corporation.<sup>60</sup> These contacts with Burger King's Florida offices were deemed sufficient to show that Rudzewicz reasonably should have known that he might be subject to suit there.<sup>61</sup>

Once Rudzewicz's minimum contacts were established, the Court addressed the question of whether subjecting Rudzewicz to

conduit to channel the franchisees' communications to the Miami headquarters. *Id.* Upon learning that the district office had "very little" decision making authority, Rudzewicz turned directly to the Miami headquarters in seeking to resolve the disputes. *Id.* at 2179 n.7. Throughout these disputes, the Miami headquarters carried on continuous mail and telephone communications with Rudzewicz. *Id.* at 2187.

51. *Id.*

52. *Id.* at 2186.

53. Rudzewicz's refusal to make the contractually required payments in Miami, and his continued use of Burger King's trademarks and confidential business information caused foreseeable injury to the corporation in Florida. *Id.*

54. *Id.*

55. For a list of the facts the Court examined in establishing Rudzewicz's minimum contacts, see *supra* notes 49-51.

56. *Burger King*, 105 S. Ct. at 2186.

57. For a list of the contract provisions that indicated to Rudzewicz he was dealing with a Florida corporation, see *supra* note 49.

58. *Burger King*, 105 S. Ct. at 2187. The Court stated that the appellate court gave insufficient weight to the contract provisions providing that Florida law would govern all disputes. *Id.* Although the "choice-of-law analysis . . . is distinct from minimum-contacts jurisdictional analysis, . . . a choice-of-law provision should [not] be ignored in considering whether a defendant has 'purposefully invoked the benefits and protections of a State's laws'. . . ." *Id.* (emphasis in original).

59. *Id.* Additionally, the contract provision that the choice-of-law designation did not require that all suits be filed in Florida, should have suggested to Rudzewicz, by negative implication, that such suits could be filed there. *Id.* at 2187 n.24.

60. *Id.* For a discussion of Rudzewicz's dealings with the Miami office, see *supra* note 50.

61. *Burger King*, 105 S. Ct. at 2186-87.



Florida's jurisdiction would comport with the fair play and substantial justice requirements embodied in the due process clause.<sup>62</sup> The Court rejected the Eleventh Circuit's conclusion that the parties' disparity of bargaining power and the contract's boilerplate language<sup>63</sup> made Florida's jurisdiction over Rudzewicz unfair.<sup>64</sup> The Court further noted that the federal rules of civil procedure<sup>65</sup> required it to accept the district court's findings.<sup>66</sup> The district court had found that Rudzewicz was an experienced and sophisticated businessman and was not acting under any imposition of economic duress or disadvantage.<sup>67</sup>

Although the *Burger King* Court defined a test to determine minimum contacts, the Court emphasized that the facts of every case must be examined individually.<sup>68</sup> The Court stated that in this case, it was Rudzewicz's choice to accept the advantages and commercial benefits of affiliating himself with a national organization.<sup>69</sup> This voluntary affiliation established a substantial and continuing relationship with Burger King's Miami headquarters.<sup>70</sup> The Court,

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62. *Id.* at 1287-88. This fairness step requires a weighing and balancing of several factors. See *supra* note 12. In this case, the Court found that the Florida Court's exercise of personal jurisdiction over Rudzewicz was constitutional because it did not infringe upon Michigan's interest in the action. *Burger King*, 105 S. Ct. at 2188. Additionally, litigation in Florida was not so substantially inconvenient to Rudzewicz as to make it unconstitutional. *Id.*

63. In a franchise contract, the franchisor normally occupies the dominant role. Annot., 67 *A.L.R. 3d* 1299, 1302 (1975). The Eleventh Circuit discerned a characteristic disparity of bargaining power because there was no indication that Rudzewicz had any latitude to negotiate a reduced rent or franchise fee in exchange for the added risk of litigation in Florida. *Burger King*, 724 F.2d at 1512. The court found that the contract was a standard form instrument whose terms were nonnegotiable. *Id.* But see *Burger King*, 105 S.Ct. at 2179 n.8 (noting that Rudzewicz was able to secure changes in the contract); *supra* note 18 (listing the changes that Rudzewicz was able to secure.)

64. *Burger King*, 105 S. Ct. at 218-9. Rudzewicz was represented by counsel throughout all of the transactions and was himself an experienced accountant. *Id.* Additionally, he was able to secure a modest reduction in rent and other concessions from the Miami headquarters. *Id.*

65. Findings of fact shall not be set aside unless clearly erroneous. FED. R. CIV. P. 52(a).

66. *Burger King*, 105 S. Ct. at 2189. Neither Rudzewicz nor the appellate court raised anything in the record that supported a definite and firm conviction that the district court's findings were clearly erroneous. *Id.*

67. *Id.* at 2188-89.

68. *Id.* at 2189. The Court stated that the exercise of jurisdiction in this case would not necessarily result in the exercise of jurisdiction over out of state consumers to collect payments due on modest personal purchases, or jurisdiction over franchisees owing smaller debts. *Id.* Some franchises may be primarily intrastate in character or involve different decisionmaking structures so as to make personal jurisdiction unconstitutional. *Id.* at n. 28. For these reasons, the Court rejected the suggestion for a general rule or presumption that participation in an interstate franchise relationship represents consent to the jurisdiction of the franchisor's principal place of business. *Id.*

69. *Burger King*, 105 S. Ct. at 2188.

70. *Id.* at 2190.

therefore, concluded that Florida's jurisdiction in this case was constitutional.<sup>71</sup>

The Court's decision in *Burger King* correctly resolved the division among lower courts<sup>72</sup> as to when a contract justifies the exercise of a state's personal jurisdiction.<sup>73</sup> Although the Court used most of the relevant factors set out in prior cases for determining jurisdiction,<sup>74</sup> a more concise three-step test is available and should have been used.<sup>75</sup> This test insures that all relevant factors are considered<sup>76</sup> through sequentially examining:<sup>77</sup> (1) whether the defendant

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71. *Id.*

72. For a discussion of the division in lower courts regarding jurisdiction in single contract cases, see *supra* note 6.

73. See Knudsen, *supra* note 1, at 840.

74. See *infra* note 76.

75. The three part test attempts to provide a guide to direct the investigation and insure that all relevant factors present in single contract cases are considered. See Brewer, *supra* note 2, at 11-18. The test places considerable importance on the relationships among the defendant, the forum, and the litigation, and guarantees the protection of nonresident's due process rights. See Note, *When Is A Contract A Contract*, *supra* note 6, at 383.

Various federal and state courts have adopted similar tests. See, e.g., *Amba Marketing Systems, Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 789 (9th Cir. 1977) (adopting a basic three-step analysis which examines the defendant's acts in the forum, the claims relationships with the forum, and the reasonableness of the jurisdiction); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 497-98 (5th Cir. 1974) (considering the state's interest, the parties convenience, and the basic equities); *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968) (examining the defendant's availment of the forum, the cause of action's connection to the defendant's actions, and the reasonableness of jurisdiction); *O.N. Jonas v. B. & P. Sales Corp.*, 232 Ga. 256, 259, 206 S.E.2d 437, 439 (1974) (basing jurisdiction upon an examination of the defendant's acts in the state, the cause of action arising from those acts, and if jurisdiction is reasonable); *Zerbel v. H.L. Federman & Co.* 48 Wis. 2d 54, 62-63, 179 N.W.2d 872, 877 (1970) (stating that to reach a nonresident defendant, he must do some act within the forum, the cause of action must arise from that act, and the jurisdiction must be reasonable). See also Note, *Jurisdiction Over Nonresident Corporations Based On a Single Act: A New Sole For International Shoe*, 47 GEO. L. J. 342 (1958-59) (providing a version of the three step jurisdictional test based on earlier case law).

76. Step one of the test addresses the purposeful availment requirement of *Hanson*. 357 U.S. at 253. The Court has subsequently enforced this requirement of purposeful availment in several cases. See *World-Wide Volkswagen*, 444 U.S. at 297 (stating that when a corporation purposefully avails itself of the privilege of conducting activities within the forum state, it has clear notice that it is subject to suit in that state); *Rush v. Savchuk*, 444 U.S. 320, 329 (1980) (noting that the defendant had not engaged in any purposeful availment related to the forum that would make the exercise of jurisdiction fair); *Kulko v. California Superior Court*, 436 U.S. 84, 94 (1978) (noting that it is essential that defendant's purposefully avail themselves of the privileges of conducting activities within the forum state to justify bringing them to suit there). Step two of the test addresses the connection with the state requirement found in *International Shoe*, 326 U.S. at 319. Together steps one and two determine the existence of *International Shoe's* minimum contacts. See Brewer, *supra* note 2, at 12. Step three addresses *International Shoe's* requirement of fairness and substantial justice. 326 U.S. at 316.

77. Each step must be answered affirmatively before the next step can be considered. This is necessary to ensure that a nonresident is not deprived of his due process rights. Considering the factors relevant to the fairness and reasonableness

purposefully availed himself of the benefits and protections of the forum's laws;<sup>78</sup> (2) whether the cause of action arose from the defendant's contacts with the forum;<sup>79</sup> and (3) whether the exercise of jurisdiction was fair and reasonable.<sup>80</sup> An application of this test would not have changed the result in *Burger King*,<sup>81</sup> but would have more clearly resolved the disputes in lower courts regarding jurisdiction in contract cases.

The *Burger King* Court correctly found that Rudzewicz's activities in Florida were such that he should have reasonably expected to be subject to suit there.<sup>82</sup> This conclusion, however, addresses only part of the *Hanson v. Denckla*<sup>83</sup> purposeful availment requirement<sup>84</sup> enumerated in step one of the three-step test. To fulfill all of step one, two distinct requirements must be met.<sup>85</sup> First, the defendant must perform some affirmative act which affects the forum.<sup>86</sup> Second, that act must have been connected with the forum in such a

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step before finding that the defendant was connected to the forum could result in a deprivation of due process. If a court examines the fairness of exercising jurisdiction before it examines a defendant's connection with the forum, it may fail to give the defendant's activities appropriate consideration. Fairness alone, therefore, cannot independently establish jurisdiction. See Note, *When Is A Contract A Contract*, *supra* note 6, at 383.

78. This step ensures that out-of-state residents will not be subject to litigation in foreign jurisdictions with which they have no intentional connection. See *Hanson*, 357 U.S. at 253. See also Note, *When Is A Contract A Contract*, *supra* note 6, at 382 n.50.

79. This step ensures that the defendant is connected to the litigation. See *International Shoe*, 326 U.S. at 317-18. The *International Shoe* Court noted, however, that jurisdiction might be asserted in some causes of action arising from dealings entirely distinct from defendant's activities in the forum. *Id.* at 318. This would be possible where the business's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suits against it." *Id.*

80. This test represents the essence of the jurisdictional analysis. It permits an equitable weighing of the case to determine if jurisdiction would be fair and reasonable. For a listing of the various factors to be weighed, see *supra* note 12 and *infra* text accompanying notes 116-35. Because this is a test of fairness and reasonableness, it cannot be mechanically applied to each situation without taking into account the individual circumstances. *International Shoe*, 326 U.S. at 319. Few answers, therefore, will be written in black and white. *Kulko*, 436 U.S. at 92. The grey areas dominate among them and their shades are innumerable. *Id.*

81. See *supra* notes 84-135 and accompanying text.

82. *Burger King*, 105 S. Ct. at 2186-87.

83. 357 U.S. 235 (1958).

84. In *Hanson*, the Court stated that the defendant must perform some act in which he purposefully avails himself of the privileges of conducting activities within the forum state, thus invoking the benefits and protections of its law. 357 U.S. at 253. This act and its connection to the forum should be such that the defendant should reasonably anticipate being haled into court there. *World-Wide Volkswagen*, 444 U.S. at 297. This language can be broken into two requirements of (1) a defendant's affirmative act, and (2) a defendant's foreseeability of being haled into a forum's courts due to that act and its connection with the forum. See Brewer, *supra* note 2, at 12-14.

85. Brewer, *supra* note 2, at 12-14 (listing factors relevant in analyzing purposeful availment). See also Note, *When Is A Contract A Contract*, *supra* note 6, at 389-401 (providing a framework for analyzing purposeful availment).

86. See *supra* note 84.

way that the defendant could reasonably expect the forum to assert personal jurisdiction over him.<sup>87</sup>

As to the first requirement of step one, the *Burger King* Court did not specifically conclude that Rudzewicz performed an affirmative act. It did, however, examine the two factors in single contract cases which are used to determine if there has been an affirmative act.<sup>88</sup> The Court first examined Rudzewicz's lack of physical presence in Florida, and second his voluntary execution of the franchise contract.<sup>89</sup> The Court noted that actual physical presence in the forum, while a good indication of an affirmative act, is not necessary.<sup>90</sup> This is especially true in modern commercial life where a substantial amount of business transactions are conducted through mail and wire communications.<sup>91</sup> Consequently, the Court concluded that, in this case, Rudzewicz performed affirmative acts through his mail and phone communications with Florida.<sup>92</sup>

There is a conflict in lower court decisions as to whether a defendant's act of entering into a contract is a sufficient affirmative act to constitute purposeful availment.<sup>93</sup> The *Burger King* Court correctly settled this conflict when it examined the contract as an intermediate step in a business transaction.<sup>94</sup> The focus of a court's inquiry should not be on the mere existence of a contract, but whether the contract was voluntarily and evenly negotiated and executed.<sup>95</sup>

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87. *Id.*

88. The Court noted that a defendant need not physically enter a forum state to assert jurisdiction. *Burger King*, 105 S.Ct. at 2184. The Court also examined the relevance of a party's entering into a contract with a resident of the forum state in establishing jurisdiction. *Id.* at 2185.

89. *See supra* note 88.

90. *Burger King*, 105 S. Ct. at 2186. The Court discussed the relevance of Rudzewicz's partner's presence in Florida for Burger King training seminars. *Id.* at 2186 n.22. Although it stated that this issue was not necessary to decide the case, it noted that when commercial activities are performed on behalf of an out-of-state party, those activities may sometimes be attributed to the party. *Id.* MacShara and Rudzewicz, as equal members of a corporation, both participated in the decision that MacShara should go to Florida for training. *Id.* The Court intimated that due to Rudzewicz's involvement in the decision-making process, MacShara's presence in Florida might be attributed to Rudzewicz. *Id.*

91. *Id.* at 2184.

92. *Id.* at 2179-80 nn.7, 9.

93. For a discussion of the conflict among lower courts regarding jurisdiction in single contract cases, see *supra* note 6. *See also* Ripple & Murphy, *World-Wide Volkswagen Corp. v. Woodson: Reflections on the Road Ahead*, 56 NOTRE DAME LAW, 65, 78-81 (1980) (discussing the division in courts as to whether voluntarily establishing contractual relations can alone establish purposeful availment).

94. 105 S. Ct. at 2185-86. The Court recognized that a contract is an intermediate step serving to consummate prior business negotiations with future consequences which themselves are the real object of the business transaction. *Id.* (citing *Hoopston Canning Co. v. Cullen*, 318 U.S. 313, 316-17 (1943)).

95. *Burger King*, 105 S.Ct. at 2186. Some courts have rejected the sufficiency of a single contract to establish purposeful availment and have employed a "contract plus" analysis. *See, e.g.*, *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079 (1st

The Court found that Rudzewicz's voluntary execution and negotiation of the twenty year franchise agreement established a relationship that had a substantial connection to Florida.<sup>96</sup>

In examining the second requirement of step one, the Court relied on the reasoning in *Hanson* and *World-Wide Volkswagen Corp. v. Woodson*<sup>97</sup> to define correctly the foreseeability element.<sup>98</sup> That definition is that the defendant, through his connections to the forum, invokes the benefits and protections of its laws<sup>99</sup> and, therefore, should foresee being subject to that forum's laws.<sup>100</sup> The Court noted the importance of both the language of the contract documents and the parties' course of dealings in determining foreseeabil-

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Cir. 1973) (considering the nature and purpose of the contract in determining minimum contacts); *Benjamin v. Western Boat Bldg. Corp.*, 472 F.2d 723, 729 (5th Cir.) (examining the preliminary negotiations and terms of the contract in determining minimum contacts), *cert. denied*, 414 U.S. 830 (1973); *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784, 788 (1970) (examining the nature of the defendant's business in the state and notice requirements in determining jurisdiction). This method considers the nature of the actions underlying the contract in determining the purposeful availment requirement. See Note, *When Is A Contract A Contract*, *supra* note 6, at 388-401. See also Comment, *In Personam Jurisdiction: Quality v. Quantity—A Dilemma in the Fifth Circuit*, 31 U. FLA. L. R. 658, 663-64 (1979) (analyzing the Fifth Circuit's application of a "contract plus" analysis). Like the *Burger King* Court's analysis, this approach correctly looks at the negotiation and execution of the contract, rather than solely the contract itself.

96. *Burger King*, 105 S. Ct. at 2186. In determining the defendant's connections with the forum, some courts have considered as important whether the role of the parties is active or passive. *Whitter*, 482 F.2d at 1079; *Yankee Metal Prod. Co. v. District Court*, 528 P.2d 311, 312-13 (Okla. 1974). See also Note, *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.: Inflexible Application of Long-Arm Jurisdiction Standards to the Nonresident Purchaser*, 75 Nw. U. L. Rev. 345, 353 (1980) (discussing defendant's status of buyer as active or passive).

Active participants are viewed as more dominant and considered more able to defend themselves in a foreign jurisdiction. *Brewer*, *supra* note 2, at 16. Sellers are traditionally viewed as the active, dominant party and, therefore, more able to defend themselves in a foreign jurisdiction. *Id.* A buyer is active if he initiates negotiations, specifies drawings or otherwise actively participates in the transaction. *Id.* This type of buyer is more closely connected with the forum state than a buyer who simply places an order for goods and accepts delivery. *Id.* The act of solicitation, therefore is important in determining this dominance. *Id.* Although the *Burger King* Court did not address this distinction, it did note that Rudzewicz actively solicited the franchise from *Burger King*, and actively carried on negotiations that led to contract concessions. *Burger King*, 105 S. Ct. at 2186. Unlike a passive buyer of merchandise, Rudzewicz actively solicited and carried on a continuing relationship with *Burger King* in Florida.

Even if Rudzewicz was not an active participant, courts should focus on the parties' involvement in the contractual transaction rather than the parties active/passive role. See *Pedi Bares*, 567 F.2d at 936-37; *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 226-28 (6th Cir. 1972). See also *Brewer*, *supra* note 2 at 16. In this case, the Court correctly focused on the parties course of dealing, as well as the contract documents, to determine that Rudzewicz purposefully availed himself of the benefits and protections of Florida's laws. *Burger King*, 105 S. Ct. at 2186.

97. 444 U.S. 286, 295-96 (1980).

98. *Burger King*, 105 S. Ct. at 2183.

99. *Hanson*, 357 U.S. at 253.

100. *World-Wide Volkswagen*, 444 U.S. at 297.

ity.<sup>101</sup> Specifically, the Court placed great emphasis on the contract's choice-of-law provision.<sup>102</sup>

Prior to the *Burger King* case, courts were divided over the relevance of choice-of-law provisions to step one of the three-part test, the purposeful availment requirement.<sup>103</sup> The *Burger King* Court correctly interpreted the language in *Hanson* to clarify this division.<sup>104</sup> The Court noted that *Hanson* was concerned with a choice-of-law *analysis* and it did not discount the importance of a choice-of-law *provision* in determining jurisdiction.<sup>105</sup> A choice-of-law provision indicates the parties' preference for the application of a particular body of substantive law.<sup>106</sup> Such a provision allows parties to structure their commercial activities according to the agreed-upon law and ensures predictability.<sup>107</sup> A defendant who has invoked the benefit of a forum's laws through this provision cannot later claim that he did not intend to avail himself of the benefits and protections of those laws.<sup>108</sup> The *Burger King* Court correctly noted that, although not dispositive, the choice of Florida law provision indicated that Rudzewicz purposefully availed himself of the benefits and protections of Florida law.<sup>109</sup> The Court specifically noted that this provision, when combined with the parties' relationship, rein-

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101. *Burger King*, 105 S. Ct. at 2186.

102. *Id.* at 2187.

103. Compare *O'Hare Int'l Bank v. Hampton*, 437 F.2d 1173, 1177 (7th Cir. 1971) (holding a choice-of-law clause strongly implied the defendant had invoked the benefits and protections of that forum) and *United States Ry. Equip. Co. v. Port Huron & Detroit R.R.*, 495 F.2d 1127, 1130 (7th Cir. 1974) (upholding the *Hampton* analysis) with *Galgay v. Bulletin Co.*, 504 F.2d 1062, 1066 (2d Cir. 1974) (holding a choice of law provision has no jurisdictional implications) and *Agrashell, Inc. v. Bernard Sirota Co.*, 344 F.2d 583, 588 (2d Cir. 1965) (rejecting the *Hampton* analysis). See also Note, *When Is A Contract A Contract*, *supra* note 6, at 396-97 (discussing the importance of choice-of-law provisions in jurisdictional analysis).

104. *Burger King*, 105 S.Ct. at 2187.

105. *Id.* (emphasis in original). In *Hanson*, the Court held that a Florida court could not assert jurisdiction over a Delaware trustee solely on the basis that Florida was the focal point of the transaction in question. 357 U.S. at 254. The Court distinguished the defendant-oriented jurisdictional analysis from the focal point choice-of-law analysis. *Id.* The *Hanson* Court generally considered the role of the choice-of-law analysis in jurisdictional analysis. It did not specifically consider whether choice-of-law provisions indicate purposeful activity. *Hanson* did not imply that factors in the choice-of-law analysis must be excluded from jurisdictional determinations. See Note, *When Is A Contract A Contract*, *supra* note 6, at 397 (discussing *Hanson's* applicability to the importance of choice-of-law provisions in jurisdictional analysis.)

106. See Note, *When Is A Contract A Contract*, *supra* note 6, at 397.

107. *Id.* These provisions benefit parties by facilitating convenient dispute resolution. *Id.*

108. *Id.*

109. *Burger King*, 105 S. Ct. at 2187. The Court stated that such a provision standing alone would be insufficient to confer jurisdiction. *Id.* The Court also noted that one of the contracts, the lease, provided for binding arbitration in Miami of certain condemnation disputes. *Id.* at n.24. Although not applicable in this case, the Court noted that this should have made it apparent to Rudzewicz that he was dealing with the Miami headquarters and not the Michigan office. *Id.*

forced Rudzewicz's reasonable foreseeability of possible litigation in Florida.<sup>110</sup>

The Court did not address the second step of the three-step test which questions whether the cause of action arose from the defendant's activities.<sup>111</sup> In single contract cases, however, this inquiry is always answered in the affirmative.<sup>112</sup> Suits for breach of contract certainly arise from the activities<sup>113</sup> surrounding the negotiation, execution, and performance of his franchise agreement.<sup>114</sup>

The final step of the three-part test for personal jurisdiction questions whether the exercise of jurisdiction over Rudzewicz was fair and reasonable.<sup>115</sup> In determining this step, the *Burger King* Court listed the various factors to be weighed.<sup>116</sup> These factors are the defendant's burden,<sup>117</sup> the forum's interest in providing relief for its residents,<sup>118</sup> the plaintiff's interest in obtaining convenient and effective relief,<sup>119</sup> the interstate judicial system's interest in obtaining the most efficient resolution of controversies,<sup>120</sup> and the shared states' interest of the effect on social policies.<sup>121</sup> The Court, however, only specifically addressed the first two of these five factors.<sup>122</sup> The Court did not examine the plaintiff's interest in a con-

110. *Id.* at 2187.

111. *See supra* note 79 and accompanying text.

112. *See In-Flight Devices*, 466 F.2d at 229. *See also* Brewer, *supra* note 2, at 14-15.

113. Brewer, *supra* note 2, at 14-15.

114. *Burger King*, 105 S. Ct. at 2177.

115. For a discussion of the final step of the three part test, see *supra* note 80 and accompanying text.

116. *Burger King*, 105 S. Ct. at 2184.

117. The first factor which examines the burden on a defendant to litigate in a foreign jurisdiction is the most important. *World-Wide Volkswagen*, 444 U.S. at 292. A review of this factor begins with the defendant's economic ability to defend the suit and whether litigation would create an undue hardship. *See In-Flight Devices*, 466 F.2d at 234.

118. The forum state has an interest in providing relief for its resident. *See McGee*, 355 U.S. at 223. This is especially true when the suit involves a contract calling for performance in the forum. *See In-Flight Devices*, 466 F.2d at 232; *Hampton*, 437 F.2d at 1177.

119. The factor which examines the plaintiff's interest looks at his/her interest in obtaining convenient and effective relief. *World-Wide Volkswagen*, 444 U.S. at 292.

120. The factor which examines the interstate judicial system's interest looks at the interest of the various states' legal systems in obtaining the most efficient resolution of controversies. *Burger King*, 105 S. Ct. at 2184.

121. The factor which examines the shared states' interest focuses on public policies and the effect that granting or denying jurisdiction will have on those social policies. The fear in single contract cases is that allowing jurisdiction will interfere with and discourage interstate trade. *See Lakeside Bridge*, 597 F.2d at 603 n.12; *Whittaker*, 482 F.2d at 1085.

122. *Burger King*, 105 S. Ct. at 2188. The Court held that Rudzewicz had not established that litigation in Florida was so substantially inconvenient or burdensome as to make jurisdiction unfair. *Id.* Additionally, the Court held that jurisdiction in Florida did not infringe Michigan's interests. *Id.* *Burger King* had fully complied with

venient forum, the interstate judicial system's interest, or the shared states' interest in substantive social policy.

The Court probably did not examine the plaintiff's interest in a convenient forum due to Burger King's greater wealth.<sup>123</sup> This factor usually focuses upon the plaintiff's economic ability to pursue its claim in another state.<sup>124</sup> Although Burger King was financially able to litigate in Michigan, it still had substantial reasons for litigating in Florida. Burger King, which has franchises all over the United States,<sup>125</sup> might be forced to litigate in every state if it was not allowed to sue those franchisees in Florida for their wrongful acts. This would put an unfair financial burden on Burger King and might result in its restricting the economic availability of franchises.<sup>126</sup> In failing to address this issue, the Court minimized Burger King's substantial interest in litigating its contract disputes in Florida.

Although the Court did not specifically address the interstate judicial system's interest, it did examine some of the elements relevant to this factor.<sup>127</sup> This factor has been likened to the doctrine of *forum non conveniens* in that it evaluates whether the forum can effectively litigate the action.<sup>128</sup> In this case, the Court correctly noted that the Florida litigation did not affect Rudzewicz's ability to obtain witnesses or evidence.<sup>129</sup> In fact, Rudzewicz never requested a change of venue so as to avail himself of the procedural safeguard which avoids litigation in an inconvenient forum.<sup>130</sup> Thus, the inter-

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Michigan's franchise laws. *Id.* at n.26. The Court noted that although two or more states might have an interest in the outcome of a dispute, the resolution of this conflict can usually be handled through choice-of-law rules. *Id.* In this case, the contracts contained choice-of-law provisions that called for the application of Florida law. *Id.* at 2187.

123. The Court did note, however, that a defendant who has purposefully derived commercial benefit from affiliating himself with a forum cannot defeat jurisdiction simply because of his adversary's greater wealth. *Id.* at 2188 n.25.

124. For a discussion of the plaintiff's interest factor, see *supra* note 117.

125. *Burger King*, 105 S. Ct. at 2178.

126. If Burger King were required to litigate in every state or country in which there was a Burger King franchise, Burger King would be subjected to enormous expenditures. Consequently, Burger King might reasonably compensate for these additional costs through raising the cost of an out-of-state franchise or requiring franchise applicants to have a higher net worth. These things would make franchises harder to obtain, thereby inhibiting interstate trade.

127. The availability of witnesses, the cost of obtaining witnesses, and access to demonstrative evidence are all factors to be considered in determining whether a forum can efficiently litigate a cause of action. Brewer, *supra* note 2, at 17-18.

128. *Id.*

129. *Burger King*, 105 S. Ct. at 2188. The Court found that the only arguable instance of trial inconvenience occurred when Rudzewicz had difficulty authenticating some records. *Id.* at n.27. The trial court allowed him as much time as necessary to get the information from Burger King's district office in Michigan. *Id.* Burger King eventually stipulated to their authenticity rather than delay trial. *Id.*

130. *Id.* at 2188. A defendant claiming substantial inconvenience may seek a



state judicial system's interest was satisfied because Florida could and did effectively litigate the action.

Moreover, the *Burger King* Court did not examine the shared states' interest in fundamental substantive social policies. An examination of this interest considers what effect, if any, that allowing jurisdiction in a case will have on social policies such as interfering with or discouraging interstate trade.<sup>131</sup> In single contract cases, however, a reverse effect can happen because a denial of jurisdiction can effectively discourage businesses from participating in interstate trade.<sup>132</sup> Due to this possible effect, the shared states' interest should not be considered in contract cases unless some special policy reason applies.<sup>133</sup> Even if it had been applied in this case, however, the Court limited its decision in such a way as to obviate any negative effects on interstate trade. It stated that the facts of each case should be examined individually,<sup>134</sup> and that its holding was not a general rule applicable to all franchise agreements.<sup>135</sup> Allowing jurisdiction in this individual case, therefore, will not have a negative effect on interstate trade.

In conclusion, the *Burger King* Court settled the dispute as to when a contract is a "contact" for jurisdictional purposes.<sup>136</sup> In so doing, the Court also established that choice-of-law provisions are very important in jurisdictional analysis.<sup>137</sup> In its analysis, the Court reasonably analyzed a modern-day commercial contract and its surrounding circumstances.<sup>138</sup> Although it did not specifically enumerate a test, the Court, through its opinion, provided guidelines for lower courts to use when determining jurisdiction. The Court could have provided clearer tests and guidelines, however, if it had used a specifically enumerated three part test for personal jurisdiction.<sup>139</sup> Although the Court did not enumerate a specific test and even

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change of venue. *Id.* at 2185. In appropriate circumstances, a court may decline to exercise jurisdiction in the interest of an expeditious resolution of a controversy. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). See also 28 U.S.C. 1404(a) (allowing a district court to transfer any action to where it might have been brought for convenience sake).

131. For a discussion of the factor examining the shared states' interest, see *supra* note 121.

132. Brewer, *supra* note 2, at 18. For a discussion of the ways *Burger King* might inhibit the availability of franchises if forced to litigate outside Florida, see *supra* note 126 and accompanying text.

133. Brewer, *supra* note 2, at 18.

134. *Burger King*, 105 S. Ct. at 2189. See *Kulko*, 436 U.S. at 92.

135. *Burger King*, 105 S. Ct. at 2189 n.28. For an explanation of why the Court's decision was not a general rule for all franchises, see *supra* note 68.

136. See Knudsen, *supra* note 1, at 840.

137. See *supra* notes 102-110 and accompanying text.

138. See *supra* notes 49-52.

139. See *supra* notes 75-80.

though it noted the individual nature of its holding,<sup>140</sup> this decision will have far-reaching positive effects in all courts that determine jurisdictional issues. In effect, the Court's decision is a clear indication of how the minimum contacts test should be applied to an extensive commercial contract.

*Valerie Ann Hall*

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140. See *supra* notes 134-35 and accompanying text.

