

Enforcing Inbound Forum Selection Clauses in State Court

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ABSTRACT

A forum selection clause is a contractual provision that selects a court for future disputes. Such clauses serve two primary functions. First, they may be used to redirect litigation from one state to another (an “outbound” clause). Second, they may be used to extend the personal jurisdiction of the chosen court over the contracting parties (an “inbound” clause). To date, scholars have focused most of their attention on the redirecting function played by outbound clauses. In this Article, we provide a definitive account of the role played by inbound clauses as means of obtaining personal jurisdiction over out-of-state defendants.

This account is based on our review of 283 published and unpublished state court cases where the defendant challenged the enforceability of an inbound forum selection clause. We show that state courts currently enforce inbound clauses in the overwhelming majority of cases. They enforce them in consumer contracts of adhesion. They enforce them where the identity of the chosen jurisdiction is not clearly spelled out. And they enforce them when the chosen forum is extremely inconvenient. The end result is a legal regime where distant courts routinely assert personal jurisdiction over weaker contracting parties on the basis of inbound forum selection clauses.

This state of affairs is inequitable and unjust. To remedy the situation, this Article advances several proposals to reform the existing law in this area. First, we argue that courts should not enforce inbound clauses against unsophisticated actors in contracts of adhesion. Second, we argue that courts should not enforce these clauses when there is no way for the defendant to identify the chosen jurisdiction at the time of signing. Lastly, we argue that

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courts should not enforce these clauses when the chosen court is not in a reasonably convenient location.

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INTRODUCTION

In 2019, the home page for Google’s search engine received more than 258 million unique U.S. visitors.¹ Each of these visits was governed by Google’s terms of service, which contain the following language:

California law will govern all disputes arising out of or relating to these terms, service-specific additional terms, or any related services, regardless of conflict of laws rules. *These disputes will be resolved exclusively in the federal or state courts of Santa Clara County, California, USA, and you and Google consent to personal jurisdiction in those courts.*²

The italicized forum selection clause works to Google’s benefit when it is named as a defendant in a lawsuit. If one of the many visitors to Google’s website wishes to sue the company, she must do so in Santa Clara County. If she tries to bring a suit somewhere else—in Arizona, for example, or Texas—Google may invoke the clause to request that the case be moved to Santa Clara County. In the overwhelming majority of cases, this request will be

1. J. Clement, *Google—Statistics & Facts*, STATISTA (Feb. 5, 2020), <https://www.statista.com/topics/1001/google/> [https://perma.cc/64XF-LGQY]. The total population of the United States is roughly 330 million. *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [https://perma.cc/92E6-RNEU] (July 1, 2019).

2. *Terms of Service*, GOOGLE (emphasis added), <https://policies.google.com/terms?hl=en-US> [https://perma.cc/F9DG-JF9W].

granted.³ When Google is the defendant in a lawsuit, the clause serves as a sort of jurisdictional funnel that redirects lawsuits filed across the United States to a court located just ten miles from Google's headquarters.

What happens, however, when *Google* wishes to sue one of its 258 million visitors for violating the terms of service? Must it bring an action against that person in a state where she resides? Or may it sue her in Santa Clara County? The text of the forum selection clause—"you . . . consent to personal jurisdiction in those courts"—clearly suggests the latter.⁴ When Google is the plaintiff in a lawsuit, therefore, the clause acts as a jurisdictional lasso that allows California to assert personal jurisdiction over the company's customers. If the clause is valid, then Google can wield this language buried in its terms of service, of which few of its users are aware, to subject its hundreds of millions of visitors to jurisdiction in Santa Clara County.

State courts are routinely called upon to determine the validity of consent-to-jurisdiction clauses such as the one above. Their general practice is to enforce these clauses. They enforce them in consumer contracts of adhesion.⁵ They enforce them when the clause fails to provide the defendant with notice of where, exactly, she is consenting to personal jurisdiction.⁶ They enforce them when the chosen forum is extremely inconvenient.⁷ They sometimes even enforce them—remarkably—against individuals who never signed the contract containing the clause.⁸ The end result is a legal regime where distant courts assert personal jurisdiction over weaker contracting parties on the basis of forum selection clauses.

To date, legal scholars have written extensively—and often critically—about the role that forum selection clauses play in *redirecting* cases from one state to another.⁹ The role that such clauses play in permitting a state to *keep*

3. See John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L.J. (forthcoming 2021) (manuscript at 5), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3546669 [<https://perma.cc/9THR-TM2D>] (showing that the enforcement rate for outbound forum selection clauses in state court is 77%).

4. *Terms of Service*, *supra* note 2.

5. See, e.g., *Adsit Co. v. Gustin*, 874 N.E.2d 1018, 1021 (Ind. Ct. App. 2007).

6. See, e.g., *Dynacorp Ltd. v. Aramtel Ltd.*, 56 A.3d 631, 678–79 (Md. Ct. Spec. App. 2012).

7. See, e.g., *Carlyle Inv. Mgmt. L.L.C. v. Nat'l Indus. Grp. Holding*, No. 5527-CS, 2012 Del. Ch. LEXIS 238, at *22–23 (Oct. 11, 2012), *aff'd*, 67 A.3d 373 (Del. 2013).

8. See, e.g., *Solargenix Energy, LLC v. Acciona, S.A.*, 2014 IL App (1st) 123403, ¶¶ 51–52, 17 N.E.3d 171, 188–89; see also John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 NOTRE DAME L. REV. (forthcoming 2022).

9. See, e.g., Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 445–49 (1992); Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 370 (1992); Patrick J. Borchers, *Forum Selection*

a case by asserting personal jurisdiction over a defendant has received comparatively less attention.¹⁰ This inattention is troubling for three reasons. First, forum selection clauses are becoming ever more common in U.S. contracts.¹¹ A recent study of more than 500,000 contracts filed with the Securities and Exchange Commission between 2000 and 2016 found that 30% of these agreements contained forum selection clauses.¹² This same study found that 53% of loan agreements contained such clauses.¹³ As one scholar has observed: “The forum selection clause . . . is among the most important and pervasive types of contract procedure.”¹⁴ Nevertheless, there is scant empirical information about the extent to which such clauses are used to extend the personal jurisdiction of the chosen court over the contracting parties.

Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform, 67 WASH. L. REV. 55, 60 (1992); Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 711–14 (1992).

10. The leading articles discussing the role of forum selection clauses as a means of obtaining personal jurisdiction over a defendant are Hannah L. Buxbaum, *The Interpretation and Effect of Permissive Forum Selection Clauses Under U.S. Law*, 66 AM. J. COMPAR. L. 127 *passim* (2018); Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After Stewart and Carnival Cruise*, 45 FLA. L. REV. 361, 369–71 (1993); Walter W. Heiser, *The Hague Convention on Choice of Court Agreements: The Impact on Forum Non Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts*, 31 U. PA. J. INT’L L. 1013, 1019 (2010); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 329–32 (1988); David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785 *passim* (1993). Several legal treatises also discuss this topic at varying levels of depth. See ALEX MILLS, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW 114–17 (2018); GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 115–16 (5th ed. 2011); PETER HAY ET AL., CONFLICT OF LAWS 367–69 (6th ed. 2018).

11. When we use the term “forum selection clause” in this Article, we refer exclusively to contractual provisions that select a court as a place to resolve disputes. We specifically do not address the enforceability of arbitration clauses. Unlike a forum selection clause, an arbitration clause selects an arbitral forum as a place to resolve disputes.

12. Julian Nyarko, *We’ll See You in . . . Court! The Lack of Arbitration Clauses in International Commercial Contracts*, 58 INT’L REV. L. & ECON. 6, 11 (2018).

13. *Id.* at 11 tbl.2; see also Matthew D. Cain & Steven M. Davidoff, *Delaware’s Competitive Reach*, 9 J. EMPIRICAL LEGAL STUD. 92, 94 (2012) (finding that 60% of the merger agreements in the sample contained forum selection clauses with Delaware as their choice of forum); Ya-Wei Li, Note, *Dispute Resolution Clauses in International Contracts: An Empirical Study*, 39 CORNELL INT’L L.J. 789, 797–99 (2006) (finding that 67% of “merger, acquisition, stock exchange and share exchange, reorganization, and combination contracts filed with the [SEC] between January 1, 2002 and March 31, 2003 and involving at least one foreign party” contained a forum selection clause).

14. David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 975 (2008); see also Taylor, *supra* note 10, at 793 n.38.

Second, the U.S. Supreme Court has over the past decade embarked on a sustained campaign to remake the law of personal jurisdiction. In *Daimler* and *BNSF Railway*, the Court made it more difficult for plaintiffs to obtain general, all-purpose jurisdiction over corporate defendants.¹⁵ In *Bristol Myers Squibb*, the Court made it more difficult for plaintiffs to obtain specific, case-linked jurisdiction over the same.¹⁶ As a result of these doctrinal shifts, obtaining jurisdiction by express consent via a forum selection clause represents an increasingly attractive means of bringing suit against out-of-state defendants.¹⁷

Third, and finally, the law on jurisdiction by express consent is messy, at best. Courts in New York apply the test laid down by the Supreme Court in *The Bremen v. Zapata Off-Shore Co.* to determine whether a consent-to-jurisdiction clause is enforceable.¹⁸ Courts in Florida look to that state's long-arm statute.¹⁹ Courts in Michigan look to the Model Choice of Forum Act.²⁰ Courts in Maine look to the minimum contacts framework announced by the U.S. Supreme Court in *International Shoe*.²¹ Courts in Utah apply a rational nexus test.²² To further complicate matters, some states have enacted statutes directing their courts to enforce such clauses when written into certain contracts.²³ Other states have enacted statutes directing their courts *not* to enforce such clauses when they are written into certain other contracts.²⁴ The sheer diversity of state practice makes it difficult to understand what is really going on. It also serves to obscure a number of doctrinal problems.

Our first goal in this Article is to provide a long overdue descriptive account of when forum selection clauses may provide a valid basis for asserting personal jurisdiction over a defendant in state court. In developing this account, we distinguish between (1) forum selection clauses that are used to redirect litigation from one state to another (an “outbound” clause), and

15. See *Daimler AG v. Bauman*, 571 U.S. 117, 138–39 (2014); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017).

16. See *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017).

17. Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. ON LEGIS. 377, 436–37 (2020) (observing that “plaintiffs confront insurmountable obstacles in some situations in finding an effective forum to vindicate their rights” in the wake of Supreme Court cases cutting back on general jurisdiction).

18. See *infra* Part III.A.1.

19. See *infra* Part III.A.4.

20. See *infra* Part III.A.3.

21. See *infra* Part III.A.5.

22. See *infra* Part III.A.6.

23. See *infra* Part III.B.1.

24. See *infra* Part III.B.2.

(2) forum selection clauses that extend the personal jurisdiction of the chosen court over the contracting parties (an “inbound” clause). We call the first type of clauses “outbound” forum selection clauses because they dictate that the case must be heard in a state other than the one where suit was filed. We call the second type of clauses “inbound” forum selection clauses because they select the state where the suit is filed. It is the second type—inbound clauses—that is the sole focus of this Article.²⁵

With this focus in mind, we begin with a detailed overview of the law of inbound clauses as currently applied in state courts. We show that the Supreme Court has determined that the Due Process Clause of the Fourteenth Amendment imposes virtually no restrictions on the ability of state courts to enforce such clauses. Nor have most states significantly limited enforcement under state law. The majority of states apply the test laid down by the U.S. Supreme Court in *The Bremen v. Zapata Off-Shore Co.* to determine whether an inbound clause provides a proper basis for the assertion of personal jurisdiction.²⁶ We show that states utilize no fewer than seven different methods for determining when inbound clauses may support the exercise of personal jurisdiction. We also show that all fifty state legislatures have enacted statutes that identify specific situations when inbound clauses should and should not be enforced.

After canvassing the law on the books, we turn our attention to the law in action. Drawing upon a hand-collected dataset of 283 published and unpublished state cases that address the enforceability of inbound clauses, we offer the first empirical account of what state courts actually do when called upon to give effect to these provisions.²⁷ Our data show that the overall enforcement rate for inbound clauses in state court is 80%.²⁸ The data suggest that regardless of the doctrinal approach a state utilizes to evaluate the enforceability of inbound clauses, in practice states refuse to enforce them for just a handful of predictable reasons.

We finally turn our attention to the normative project of reforming the law in this area. First, we argue that inbound clauses written into contracts of

25. We discuss outbound clauses in other work. See Coyle & Richardson, *supra* note 3.

26. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

27. The process by which we collected these cases is described in *infra* Part IV.A. In brief, our dataset of 283 cases consists of every published and unpublished state case in the last fifty years when a court was called upon to determine the enforceability of an inbound forum selection clause. We identified these cases by reviewing every state case in the Lexis Advance database that contained the term “choice of court clause” or “forum selection clause” or “choice of forum clause” or “consent to jurisdiction clause” or “venue selection clause.”

28. This rate is slightly higher than the enforcement rate for outbound clauses. In other work, we showed that the overall enforcement rate for outbound clauses is 77%. See generally Coyle & Richardson, *supra* note 3.

adhesion should not be enforced against consumers, employees, or very small businesses. If Google were to try to sue one of its typical users in Santa Clara County court, for example, we argue that the forum selection clause in its terms of service should not be enforced. Second, we argue that the primary purpose of a forum selection clause is to provide certainty as to where disputes arising out of the transaction may be litigated. Accordingly, we argue that an inbound clause should not be enforced if the identity of the chosen jurisdiction was not clear to the defendant at the time the contract was executed. Third, we argue for a comprehensive overhaul of the way that courts address the topic of “inconvenience” in the context of an inquiry as to whether to enforce an inbound clause.

The Article concludes by discussing how state implementation of the reforms listed above would affect the federal courts. We show that any reforms relating to jurisdiction by express consent enacted by a state will necessarily alter the jurisdictional reach of federal district courts sitting in diversity. This is because Federal Rule of Civil Procedure 4(k) provides that a federal district court may only assert personal jurisdiction over defendants who are “subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”²⁹ If a state were to adopt a new test for determining the validity of an inbound forum selection clause, the federal district courts sitting in that state would be obliged to follow suit in diversity cases. This fact notwithstanding, a number of federal courts currently disregard state law in determining whether a forum selection clause provides a valid basis for the assertion of personal jurisdiction. We show that this error stems from a failure to appreciate the difference between inbound and outbound forum selection clauses. Under existing Supreme Court precedent, the enforceability of an *outbound* clause in a diversity action is a question of *federal law* because it arises in the context of a motion to transfer under 28 U.S.C. § 1404 or a motion to dismiss on the basis of the federal doctrine of *forum non conveniens*. The enforceability of an *inbound* clause in a diversity action, by contrast, is a question that must be answered by reference to *state law* by operation of Federal Rule of Civil Procedure 4(k). The fact that federal courts routinely fail to appreciate this fact highlights the pressing need for more scholarship that clearly distinguishes between inbound and outbound forum selection clauses.

The Article proceeds as follows. Part I explains the differences between inbound and outbound clauses. Part II discusses the (virtually nonexistent) limits on consent jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment. Part III surveys the law relating to the enforcement

29. FED. R. CIV. P. 4(k)(1)(A).

of inbound clauses as it appears on the books. Part IV explores how this law is applied in practice. Part V lays out several reforms that, if enacted, would result in a much-improved law of jurisdiction by express consent. Part VI discusses the implications of this analysis for federal practice.

I. INBOUND AND OUTBOUND CLAUSES

Since there is very little in the existing literature that explains the distinction between an “inbound” and an “outbound” forum selection clause, we begin our discussion with a brief explanation of these terms.³⁰

An inbound forum selection clause is a contractual provision whereby the parties agree to litigate in the court where the suit was filed.³¹ Inbound clauses are also known as “consent-to-jurisdiction” clauses.³² By way of example, imagine a scenario where the parties have agreed that any disputes arising out of their contract may be litigated in the state courts of California. One party files a lawsuit against the other in California state court. The defendant moves to dismiss the suit for lack of personal jurisdiction. In this context, the forum selection clause functions as an inbound clause because it stipulates that litigation may occur in a forum (California) where the suit has been filed (California). An inbound clause may provide the basis for the court’s

30. See *Salesforce.com, Inc. v. GEA, Inc.*, No. 19-CV-01710-JST, 2019 U.S. Dist. LEXIS 136745, at *14 (N.D. Cal. Aug. 13, 2019) (invoking the distinction).

31. *Id.*

32. Other scholars have relied on the outbound/inbound terminology to explain the mechanics of forum selection clauses. See, e.g., Symeon C. Symeonides, *Choice of Law in the American Courts in 2018: Thirty-Second Annual Survey*, 67 AM. J. COMPAR. L. 1, 37–44 (2019) (utilizing the outbound/inbound distinction); Carolyn Dubay, *From Forum Non Conveniens to Open Forum: Implementing the Hague Convention on Choice of Court Agreements in the United States*, 3 GEO. MASON J. INT’L COM. L. 1, 27–28 (2011) (distinguishing between forum selection clauses that redirect cases from one jurisdiction to another and forum selection clauses that provide a basis for the assertion of personal jurisdiction). In Europe, scholars frequently draw a distinction between “prorogation” and “derogation” clauses. See MILLS, *supra* note 10, at 113–28; James T. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1, 5 (1976); Taylor, *supra* note 10, at 791–92. We utilize the outbound/inbound language for two reasons. First, it is more commonly used by courts in the United States. See, e.g., *Burke v. Goodman*, 114 S.W.3d 276, 279 (Mo. Ct. App. 2003) (“An inbound forum selection clause provides for trial inside Missouri. An outbound forum selection clause provides for trial outside Missouri.” (citation omitted)); *Ex parte Riverfront, LLC*, 129 So. 3d 1008, 1011 n.2 (Ala. 2013) (“An ‘outbound’ forum selection clause is one providing for trial outside of Alabama, while an ‘inbound’ clause provides for trial inside Alabama.” (quoting *Pro. Ins. Corp. v. Sutherland*, 700 So. 2d 347, 348 n.1 (Ala. 1997))). Second, it maps neatly onto the actual operation of the clauses and makes it easier for the uninitiated to distinguish one from the other.

assertion of personal jurisdiction over a defendant with no other connection to the chosen forum. This is known as jurisdiction by express consent.³³

An outbound forum selection clause, by contrast, is a contractual provision stipulating that any litigation between the parties must occur in a forum *other than* the one in which the suit was filed.³⁴ By way of example, imagine a scenario where the parties have agreed that any and all disputes relating to their contract must be litigated in California. This agreement notwithstanding, one party files a lawsuit against the other in Texas state court. The defendant asks the Texas court to enforce the forum selection clause and dismiss the case because it should have been brought in California. In this context, the forum selection clause functions as an outbound clause because it stipulates that litigation must occur in a forum (California) other than the one in which the suit was filed (Texas). To be clear, the outbound clause does not deprive the Texas court of jurisdiction to hear the case.³⁵ It merely provides the Texas court with a reason to refrain from exercising that jurisdiction because the parties have previously agreed that the dispute must be resolved elsewhere.

It is impossible to know whether a particular contract provision functions as an outbound clause or an inbound clause merely by looking at the language in the clause.³⁶ The distinction only manifests after a lawsuit is filed. This means that the exact same contract provision may operate as an outbound

33. See Richard A. Epstein, *Consent, Not Power, as the Basis of Jurisdiction*, 2001 U. CHI. LEGAL F. 1, 4.

34. *Salesforce.com, Inc.*, 2019 U.S. Dist. LEXIS 136745, at *14.

35. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (“The argument that such clauses are improper because they tend to ‘oust’ a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets.”).

36. Courts and scholars often draw a distinction between “exclusive” or “mandatory” forum selection clauses and “nonexclusive” or “permissive” forum selection clauses. See, e.g., Buxbaum, *supra* note 10, at 135–36. This distinction is one that is based on the language in the clause itself. An exclusive clause by its terms provides that litigation must proceed in the chosen forum and nowhere else. *Id.* at 129. A nonexclusive clause by its terms provides that the parties consent to jurisdiction and/or venue in the chosen forum but does not preclude a suit from being brought elsewhere. *Id.* at 135–36. The distinction between exclusive and nonexclusive clauses is relevant to the distinction between outbound and inbound clauses because only exclusive clauses may qualify as outbound clauses. If a clause requires a suit to be brought elsewhere, then the court must evaluate whether to enforce the clause and decline to hear the case. *Id.* at 129. If a clause is merely permissive, there is no reason why the court cannot hear the case so long as jurisdiction and venue are otherwise proper. *Id.* The issue of whether an inbound clause is enforceable may arise with respect to both exclusive and nonexclusive clauses. Accordingly, we do not address this distinction at any length in this Article. See generally John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA L. REV. 1791, 1802–03 (2019) (discussing the distinction between exclusive and nonexclusive clauses).

clause in one case and an inbound clause in another. Inbound clauses are used offensively by plaintiffs to obtain jurisdiction over the defendant in the chosen forum. In the inbound context, the forum selection clause is a sword. Outbound clauses are used defensively by defendants who want to redirect litigation to the chosen forum. In the outbound context, the forum selection clause is a shield.

In this Article, we are concerned exclusively with inbound clauses. We address outbound clauses in other work.³⁷ The question of whether an inbound clause is enforceable generally arises in one of two contexts.³⁸ First, it may arise when a plaintiff invokes the clause as a basis for asserting personal jurisdiction over the defendant in a lawsuit. This is the most common scenario where one party seeks to enforce an inbound forum selection clause against the other. Second, the question may arise when one party seeks to enforce a default judgment previously rendered by a court in another state. A default judgment is a judgment entered by the court after a defendant fails to appear after receiving notice of the action.³⁹ As a general rule, prior judgments may not be challenged in subsequent enforcement proceedings.⁴⁰ When the judgment is a default judgment, however, the defendant may defeat the enforcement action if he can show that the rendering court lacked personal jurisdiction over the defendant.⁴¹ In situations where the sole basis for the assertion of personal jurisdiction by the rendering court is an inbound forum selection clause, therefore, the defendant may prevail in a subsequent enforcement action if she can persuade the enforcing court that the inbound clause was not enforceable.⁴²

Courts and commentators routinely overlook the differences between outbound and inbound clauses.⁴³ This is unfortunate because the clauses present very different issues. If an outbound forum selection clause is enforced, the plaintiff may not sue in her preferred forum. She must instead

37. See generally Coyle & Richardson, *supra* note 3. Our review of the academic literature suggests that scholars also routinely elide the difference between these two functions. For notable exceptions, see Taylor, *supra* note 10, at 799; Mullenix, *supra* note 10, at 330.

38. Inbound clauses may also have an impact on issues of venue and *forum non conveniens*. The Article discusses *forum non conveniens* briefly. It does not address issues relating to venue.

39. FED. R. CIV. P. 55.

40. See *Snap Advances, LLC v. Macomb Off. Supply, Inc.*, 2019 IL App (1st) 180773U, ¶ 31.

41. *Id.*

42. See, e.g., *United Leasing Corp. v. Plumides*, 531 S.E.2d 891, 893 (N.C. Ct. App. 2000). The court will apply the law of the state where the default judgment was rendered to determine whether the clause is enforceable. *Id.*

43. See, e.g., *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 49 (2013); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). See generally Tanya J. Monestier, *When Forum Selection Clauses Meet Choice of Law Clauses*, 69 AM. U. L. REV. 325 (2019).

refile her claim in the court named in the forum selection clause. If an inbound clause is enforced, the court asserts power over a defendant. This assertion of power may ultimately lead to a judgment by which the defendant is ordered to pay money damages. If the defendant refuses to pay, the sheriff may be dispatched to seize her property and sell it at auction. When it comes to the enforcement of forum selection clauses, the stakes are generally higher in the inbound context. Nevertheless, judges and scholars regularly fail to clearly distinguish between outbound and inbound clauses.

Having outlined the key differences between inbound and outbound forum selection clauses, let us now turn to the question of whether the U.S. Constitution imposes any limits upon the ability of plaintiffs to use inbound clauses to obtain personal jurisdiction over out-of-state defendants.

II. CONTRACTING FOR PERSONAL JURISDICTION

As every first-year law student learns, a court cannot hear a case unless it has personal jurisdiction over the defendant.⁴⁴ There are at least four possible bases for such jurisdiction. First, if a defendant is domiciled in the state where the suit is brought, then the courts in that state have general personal jurisdiction to hear any and all claims against that defendant.⁴⁵ Second, if a natural person is served with process while physically present within a state, then that state's courts have general personal jurisdiction over that person.⁴⁶ Third, if an out-of-state defendant has certain minimum contacts with a state, such that the assertion of personal jurisdiction will not offend traditional notions of fair play and substantial justice, then that state's courts have specific personal jurisdiction to hear claims that arise out of that defendant's contacts with the forum.⁴⁷

The fourth basis for personal jurisdiction is waiver or consent.⁴⁸ If a defendant makes a general appearance before a court after being named in a lawsuit, then that defendant is said to have *waived* his right to object to personal jurisdiction.⁴⁹ If a defendant contractually agrees to submit to jurisdiction in a court before a lawsuit is filed, then that defendant is said to

44. See, e.g., DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE 49–117 (6th ed. 2012); STEPHEN C. YEAZELL & JOANNA C. SCHWARTZ, CIVIL PROCEDURE 69 (9th ed. 2016).

45. See RESTATEMENT (SECOND) OF CONFLICT OF L. § 29 (AM. L. INST. 1988).

46. *Id.* § 28.

47. *Id.* § 37.

48. See *id.* § 32. Waiver and consent may only operate to confer personal jurisdiction upon a court. See *Designs for Health, Inc. v. Miller*, 201 A.3d 1125, 1130 n.4 (Conn. App. Ct. 2019). They may not operate to confer subject-matter jurisdiction. *Id.*

49. See RESTATEMENT (SECOND) OF CONFLICT OF L. § 33 (AM. L. INST. 1988).

have *consented* to personal jurisdiction in the chosen court.⁵⁰ Although jurisdiction by express consent is generally understood to operate outside of the minimum contacts framework first announced in *International Shoe*, it is subject to the due process provisions of the Fifth and Fourteenth Amendment, as discussed below.⁵¹

A. Waiver and Express Consent

The notion that a defendant may waive the right to object to personal jurisdiction after the suit is filed is uncontroversial. In 1956, the Supreme Court unanimously held in *Petrowski v. Hawkeye-Security Insurance Co.* that a defendant who stipulated to personal jurisdiction after proceedings began waived any right to assert a lack of personal jurisdiction.⁵² In 1982, the Court unanimously held in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee* that a party could waive objections to personal jurisdiction by its conduct in the course of a lawsuit.⁵³ A defendant's submission to the personal jurisdiction of a given court *after* being notified of the claims being asserted against it presents no significant due process issues.

When a defendant agrees to submit to the personal jurisdiction of a given court *before* it knows the nature of the claims being asserted against it, by comparison, a more searching due process inquiry is warranted.⁵⁴ The seminal decision addressing the constitutional validity of consent obtained prior to suit is *National Equipment Rental, Ltd. v. Szukhent*, which was decided by the Supreme Court in 1964.⁵⁵ In that case, two Michigan farmers had leased some farming equipment from a New York company.⁵⁶ The standard form lease agreement drafted by the equipment company appointed a New York agent to accept service on behalf of the farmers in New York in any lawsuit arising out of the agreement.⁵⁷ When the equipment company brought suit against the farmer in federal court in New York, it served a

50. *See id.* § 32 cmt. e.

51. Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1072–73 (2012) (“A consent theory changes the constitutional inquiry. First, it shifts any due process analysis from minimum contacts to the validity of the consent. Under *Bauxites*, consent is a proper basis for jurisdiction, independent of *International Shoe* minimum contacts analysis.”); *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

52. *Petrowski v. Hawkeye-Sec. Ins. Co.*, 350 U.S. 495, 496 (1956).

53. *Ins. Co. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982).

54. Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 46–49 (2014) (discussing relationship between waiver and consent in context of personal jurisdiction).

55. *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964).

56. *Id.* at 313.

57. *Id.*

summons on this agent—the spouse of one of the executives at the leasing company⁵⁸—who then provided notice to the Michigan defendants.⁵⁹ These defendants made a special appearance in New York to contest jurisdiction.⁶⁰ The Court concluded that the contract provision allowing for service on a New York agent was valid and that the New York courts had personal jurisdiction over the defendants.⁶¹ In reaching this conclusion, five Justices agreed that “parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether.”⁶²

Four Justices dissented.⁶³ Justice Black, in particular, expressed serious concerns about the practical implications of enforcing consent-to-jurisdiction clauses.⁶⁴ In his words:

It is hardly likely that these Michigan farmers, hiring farm equipment, were in any position to dicker over what terms went into the contract they signed. Yet holding this service effective inevitably will mean that the Szukhents must go nearly a thousand miles to a strange city, hire New York counsel, pay witnesses to travel there, pay their own and their witnesses’ hotel bills, try to explain a dispute over a farm equipment lease to a New York judge or jury, and in other ways bear the burdens of litigation in a distant, and likely a strange, city. The company, of course, must have had this in mind when it put the clause in the contract. It doubtless hoped, by easing into its contract this innocent-looking provision for service of process in New York, to succeed in making it as burdensome, disadvantageous, and expensive as possible for lessees to contest actions brought against them.⁶⁵

Justice Black also observed that the routine enforcement of such clauses would give large companies the ability to sue their customers in the companies’ home jurisdictions:

It should be understood that the effect of the Court’s holding is not simply to give courts sitting in New York jurisdiction over these Michigan farmers. It is also, as a practical matter, to guarantee that whenever the company wishes to sue someone who has contracted

58. *Id.* at 319 (Black, J., dissenting).

59. *Id.* at 314 (majority opinion).

60. *Id.* at 319 (Black, J., dissenting).

61. *Id.* at 314 (majority opinion).

62. *Id.* at 316.

63. *Id.* at 318–33 (Black, J., dissenting); *id.* at 333–34 (Brennan, J., dissenting).

64. *Id.* at 320 (Black, J., dissenting).

65. *Id.* at 326–27.

with it, it can, by force of this clause, confine all such suits to courts sitting in New York.⁶⁶

Finally, Justice Black made a pessimistic prediction about the future:

The end result of today's holding is not difficult to foresee. Clauses like the one used against the Szukhents—clauses which companies have not inserted, I suspect, because they never dreamed a court would uphold them—will soon find their way into the “boilerplate” of everything from an equipment lease to a conditional sales contract. Today's holding gives a green light to every large company in this country to contrive contracts which declare with force of law that when such a company wants to sue someone with whom it does business, that individual must go and try to defend himself in some place, no matter how distant, where big business enterprises are concentrated, like, for example, New York, Connecticut, or Illinois, or else suffer a default judgment. In this very case the Court holds that by this company's carefully prepared contractual clause the Szukhents must, to avoid a judgment rendered without a fair and full hearing, travel hundreds of miles across the continent, probably crippling their defense and certainly depleting what savings they may have, to try to defend themselves in a court sitting in New York City. . . . It is a long trip from San Francisco—or from Honolulu or Anchorage—to New York, Boston, or Wilmington. And the trip can be very expensive, often costing more than it would simply to pay what is demanded. The very threat of such a suit can be used to force payment of alleged claims, even though they be wholly without merit. This fact will not be news to companies exerting their economic power to wangle such contracts. No statute and no rule requires this Court to place its imprimatur upon them. I would not.⁶⁷

In another dissent, Justice Brennan, joined by Chief Justice Warren and Justice Goldberg, expressed concerns about enforcing consent-to-jurisdiction clauses in standard-form contracts:

[S]ince the corporate plaintiff prepared the printed form contract, I would not hold the individual purchaser bound by the appointment without proof, in addition to his mere signature on the form, that the individual understandingly consented to be sued in a State not that of his residence. We must . . . strive not to be “that ‘blind’ Court . . . that does not see what ‘[a]ll others can see and understand.’” It offends common sense to treat a printed form which closes an installment sale as embodying terms to all of which the individual

66. *Id.* at 327.

67. *Id.* at 328–29.

knowingly assented. The sales pitch aims solely at getting the signature on the form and wastes no time explaining or even mentioning the print. Before I would find that an individual purchaser has knowingly and intelligently consented to be sued in another State, I would require more proof of that fact than is provided by his mere signature on the form.⁶⁸

These arguments failed to persuade the majority. As noted above, the majority opinion in *Szukhent* clearly states that “parties to a contract may agree in advance to submit to the jurisdiction of a given court.”⁶⁹

The most recent case in which the Supreme Court directly addressed the enforceability of a consent-to-jurisdiction clause is *Burger King Corp. v. Rudzewicz*.⁷⁰ In that case, decided in 1985, the Court was called upon to determine whether a federal district court in Florida had personal jurisdiction over a franchisee based in Michigan.⁷¹ Although the franchise agreement lacked a consent-to-jurisdiction clause, the Court nevertheless seized the opportunity to clarify its views as to the enforceability of such clauses in a footnote:

We have noted that, because the personal jurisdiction requirement is a waivable right, there are a “variety of legal arrangements” by which a litigant may give “express or implied consent to the personal jurisdiction of the court.” For example, particularly in the commercial context, parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction. Where such forum-selection provisions have been obtained through “freely negotiated” agreements and are not “unreasonable and unjust,” their enforcement does not offend due process.⁷²

In this passage, the Court draws a connection between its prior case law relating to the enforceability of *outbound* forum selection clauses—developed in *The Bremen*—and the inquiry into whether *inbound* forum selection clauses may confer personal jurisdiction upon a given court by express consent. The Supreme Court, in short, announced that the reasonableness inquiry it had previously developed in the outbound context should likewise be used to evaluate whether inbound forum selection clauses

68. *Id.* at 333–34 (Brennan, J., dissenting) (fourth alteration in original) (quoting *United States v. Rumely*, 345 U.S. 41, 44 (1953)).

69. *Id.* at 316 (majority opinion).

70. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

71. *Id.* at 464.

72. *Id.* at 472 n.14 (citations omitted) (first quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982); and then quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15–16 (1972)) (citing *Szukhent*, 375 U.S. 311).

were consistent with due process. In light of this doctrinal move, it is useful to briefly review the Court's jurisprudence relating to outbound clauses.

B. The Bremen and Carnival Cruise

In *The Bremen*, a U.S. company wanted to transport an oil platform from the Gulf of Mexico to the Adriatic Sea.⁷³ To accomplish this goal, it contracted with a German shipping company to tow the platform across the Atlantic.⁷⁴ En route, the platform was damaged in a storm, and the ship made port in Florida.⁷⁵ The U.S. company then sued the German company in federal district court in Florida under federal admiralty law, alleging negligent towage and breach of contract.⁷⁶ The German company moved to have the suit dismissed on the basis of a forum selection clause in the transportation agreement requiring all suits to be brought in London.⁷⁷ The Fifth Circuit held that the clause was unenforceable.⁷⁸ The Supreme Court reversed.⁷⁹

Outbound forum selection clauses, the Court held, were presumptively enforceable and should be given effect unless they were (1) unreasonable or unjust, (2) contrary to public policy, or (3) subject to a contract defense such as fraud or undue influence.⁸⁰ The Court offered three general guidelines as to when a clause might be unreasonable.⁸¹ First, it noted that a clause was unreasonable if “trial in the contractual forum will be so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court.”⁸² Second, it observed that a clause might be unreasonable if it designated a “seriously inconvenient”⁸³ or “remote alien”⁸⁴ forum. Third, the Court intimated that a clause might also be unreasonable if it was procured

73. *The Bremen*, 407 U.S. at 2.

74. *Id.*

75. *Id.* at 3.

76. *Id.* at 3–4.

77. *Id.* at 4.

78. *Id.* at 7–8.

79. *Id.* at 20.

80. *Id.* at 15.

81. *Id.* at 16–18; *see also* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591–92 (1991) (“The [*Bremen*] Court did not define precisely the circumstances that would make it unreasonable for a court to enforce a forum clause. Instead, the Court discussed a number of factors that made it reasonable to enforce the clause at issue in *The Bremen* and that, presumably, would be pertinent in any determination whether to enforce a similar clause.”).

82. *The Bremen*, 407 U.S. at 18.

83. *Id.* at 16.

84. *Id.* at 17.

by “overweening bargaining power.”⁸⁵ The Court observed that international agreements between sophisticated business entities should generally be given effect so long as they were “freely negotiated.”⁸⁶

The decision in *The Bremen* was largely uncontroversial. Very few commentators had a problem with enforcing an outbound forum selection clause in a commercial contract freely negotiated between two sophisticated companies in an international transaction. The controversy arrived in 1991, when the Supreme Court decided *Carnival Cruise Lines v. Shute*.⁸⁷ In that case, a woman who lived in Washington State fell and injured herself on the deck of a cruise ship.⁸⁸ A forum selection clause, buried on the back of the passenger ticket,⁸⁹ designated Florida as the exclusive forum for all litigation.⁹⁰ When the woman tried to bring a claim against the cruise ship company in Washington, the company sought to enforce the clause under federal admiralty law and have the plaintiff refile her claim in Florida.⁹¹

In considering whether the clause was reasonable, the Court acknowledged that the facts of *Carnival Cruise* differed significantly from those in *The Bremen*.⁹² First, the Shutes could not and did not negotiate the terms of the form contract on the back of their passenger tickets.⁹³ Second, the parties in *Carnival Cruise* represented a significant shift in bargaining parity from sophisticated commercial entities, such as those in *The Bremen*, to the less sophisticated Shutes, who did not even receive notice of the forum selection clause until it was too late to cancel their vacation for a refund.⁹⁴ Finally, the Court also acknowledged that Florida represented a “distant forum” for the Washington-based plaintiff.⁹⁵ Nevertheless, the Court held that the clause was enforceable.⁹⁶ In so doing, it held that forum selection clauses set forth in non-negotiated contracts of adhesion requiring an

85. *Id.* at 12. On the facts presented by *The Bremen*, the issue of overweening bargaining power was not really presented. There was not any disparity in power between the two sophisticated contracting parties in that case, and the Court was unsympathetic to claims of serious inconvenience, as any inconvenience would have been apparent and foreseeable to the parties at the time of contracting. *Id.* at 16–18.

86. *Id.* at 12–13.

87. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 585 (1991); *see also* Borchers, *supra* note 9, at 92 (surveying the nature of the reasonableness inquiry after *Carnival Cruise*).

88. *Carnival Cruise*, 499 U.S. at 585.

89. The impassioned dissent from Justice Stevens points out that the clause was contained in section eight of twenty-five sections. *Id.* at 597 (Stevens, J., dissenting).

90. *Id.* at 587–88 (majority opinion).

91. *Id.* at 588.

92. *Id.* at 590–95.

93. *Id.* at 592–93.

94. *Id.* at 597 (Stevens, J., dissenting).

95. *Id.* at 596 (majority opinion).

96. *Id.* at 596–97.

individual to travel thousands of miles to bring a claim could be “reasonable” under a refined version of the analysis the Court had previously laid down in *The Bremen*.⁹⁷

After *Carnival Cruise*, the quest to identify an “unreasonable” outbound forum selection clause presents clear challenges. If an outbound clause buried in a consumer contract of adhesion requiring a woman to travel thousands of miles to litigate her claims against a huge corporation is not unreasonable, then perhaps no clause is. And if a clause written into a take-it-or-leave-it contract where the counterparty had no power to negotiate changes was “freely negotiated,” then that term has no real meaning. It is important to remember, however, that the decisions in *The Bremen* and *Carnival Cruise* were decided by the Supreme Court while that Court was exercising its federal admiralty jurisdiction.⁹⁸ These decisions are not binding on the states weighing whether to enforce outbound forum selection clauses outside of the admiralty context. These decisions are binding on states weighing whether to enforce inbound clauses only to the extent that they are incorporated into the due process analysis via the footnote in *Burger King*.

Against this doctrinal backdrop, let us now examine the due process framework for evaluating the enforceability of inbound forum selection clauses.

C. Implications for Due Process

The Due Process Clause of the Fourteenth Amendment functions as an outer limit on the ability of states to assert personal jurisdiction over out-of-state defendants.⁹⁹ Reading *Szukhent* and *Carnival Cruise* together, it would appear that the outer limits of personal jurisdiction premised on consent are very broad indeed. In *Szukhent*, the Court held that a contract that permitted service to be made in New York upon the wife of an executive at the corporation that had drafted the contract did not offend due process. In *Carnival Cruise*, the Court held that enforcing a forum selection clause in a contract of adhesion when the plaintiff was an unsophisticated consumer was reasonable under the test set forth in *The Bremen*. In light of these decisions, the Due Process Clause of the Fourteenth Amendment would seem to impose relatively few limitations on the ability of states to assert jurisdiction over

97. *Id.* at 593–94.

98. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); *Carnival Cruise*, 499 U.S. at 590.

99. *Due Process and Personal Jurisdiction: Doctrine and Practice*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt5_4_6_1_1/ [https://perma.cc/EH7S-Y4XM].

out-of-state defendants who have consented to jurisdiction in the forum.¹⁰⁰ Accordingly, cases in which the courts have refused to enforce an inbound forum selection clause on the basis that it violates due process are exceedingly rare.

The mere fact that the enforcement of inbound clauses generally does not offend due process does not, however, mean that they must always be given effect. There is no rule that the states must always enforce consent-to-jurisdiction clauses to the fullest extent permitted by the U.S. Constitution.¹⁰¹ If a state court were to take the position that such clauses are unenforceable in consumer contracts, for example, such a decision would be fully consistent with the relevant Supreme Court precedents. Indeed, courts and legislatures in several states have acted to limit the enforceability of these provisions. These states' efforts to develop more demanding rules than those required by the Due Process Clause are recounted in the next Part.

III. LAW ON THE BOOKS

In this Part, we first discuss the *general* rules that the courts apply to decide whether consent-to-jurisdiction clauses should be given effect. We then turn our attention to *targeted* rules that direct courts to enforce—or not enforce—such clauses when certain criteria are satisfied. The goal of this Part is to provide a comprehensive doctrinal overview of the law on the books as it relates to enforcement of inbound forum selection clauses under state law.

A. General Rules

States have adopted many different approaches to determine whether a consent-to-jurisdiction clause is enforceable. In this Part, we identify seven methods by which states evaluate the validity of such clauses. Some states apply the factors laid down in *The Bremen* and *Carnival Cruise* without modification. Others apply a modified version of this test. Some apply the

100. See Aaron D. Simowitz, *Jurisdiction as Dialogue*, 52 N.Y.U. J. INT'L L. & POL. 485, 510 (2020) (observing that “consent is simply different and insulated from meaningful constitutional scrutiny”).

101. See *Petty v. Cadwallader*, 482 N.E.2d 225, 227 (Ill. App. Ct. 1985) (“[T]he due process standard represents only an outer limit beyond which a state may not go in obtaining personal jurisdiction over a nonresident and a state is free to set narrower standards within these limits.”); see also *Green v. Wilson*, 565 N.W.2d 813, 817 (Mich. 1997) (“[T]he Michigan Legislature could have written language into the statutes that confers jurisdiction to the broadest limits of due process, as other states have done. It chose not to do so.”); *Thomason v. Chem. Bank*, 661 A.2d 595, 602 (Conn. 1995) (“If the legislature had meant to allow our courts to exercise the full extent of constitutionally permissible long arm jurisdiction, it could have done so explicitly.”).

rules set forth in a uniform law known as the Model Choice of Forum Act. Others have interpreted their state long-arm statute to say that a consent-to-jurisdiction clause—standing alone—is not enough to confer jurisdiction on a state court. Still others evaluate the enforceability of these clauses through the lens of minimum contacts. One state considers whether the chosen jurisdiction has a rational nexus to the transaction. And one state relies exclusively on the contract doctrine of unconscionability to determine whether consent-to-jurisdiction clauses are enforceable. This section describes each of these various approaches and attempts to make sense of the myriad, and often messy, ways in which state courts grapple with the question of when to enforce an inbound forum selection clause.

1. The *Bremen* Factors

A majority of states apply the criteria laid down in *The Bremen* to determine whether a consent-to-jurisdiction clause is enforceable.¹⁰² These factors focus on the question of whether the clause is “unreasonable or unjust.”¹⁰³ They ask whether litigation in the chosen forum would be so difficult and inconvenient so as to “deprive” the challenging party of its “day in court.”¹⁰⁴ They inquire whether the clause is invalid due to “fraud or overreaching.”¹⁰⁵ They also provide that clauses should not be enforced when they are contrary to public policy or are subject to contract defenses such as fraud.¹⁰⁶ The courts applying these factors will also frequently—though not always—look to *Carnival Cruise* for guidance.

2. Modified *Bremen* Factors

A few states supplement or modify the criteria laid down in *The Bremen* and *Carnival Cruise*. In the spirit of Justice Brennan’s *Szukhent* dissent,¹⁰⁷

102. See *Desarrollo Inmobiliario y Negocios Industriales de Alta Tecnologia de Hermosillo, S.A.de C.V. v. Kader Holdings Co.*, 276 P.3d 1, 6–7 (Ariz. Ct. App. 2012); *Lux Tan, Inc. v. JK Prods. & Servs., Inc.*, 2013 Ark. App. 275, at 2–3, 2013 Ark. App. LEXIS 290, at *1–3; *Quick Bridge Funding, LLC v. Sw. Fiber Optic Commc’ns-LLC*, No. G054935, 2018 Cal. App. Unpub. LEXIS 5006, at *2–6 (Cal. Ct. App. July 23, 2018); *Costas v. Roukey*, No. 2017-CV-32627, 2019 Colo. Dist. LEXIS 3113, at *4–5 (Feb. 26, 2019); *RSR Corp. v. Siegmund*, 309 S.W.3d 686, 697–98 (Tex. Ct. App. 2010).

103. *RSR Corp.*, 309 S.W.3d at 704 (quoting *The Bremen*, 407 U.S. at 15).

104. *Kader Holdings Co.*, 276 P.3d at 7.

105. *RSR Corp.*, 309 S.W.3d at 704.

106. *Id.*

107. See *supra* text accompanying note 68.

the Minnesota courts consider whether the contract was one of adhesion.¹⁰⁸ The Ohio courts specifically inquire whether the contract in question was a business contract or a consumer contract.¹⁰⁹ The Kentucky courts look to whether there was some disparity of bargaining power between the parties.¹¹⁰ In Illinois and South Dakota, the courts consider a range of factors, including the location of the parties and their witnesses, to determine whether a clause should be given effect.¹¹¹ As a rule, the states that follow a modified *Bremen* approach police the enforceability of inbound clauses more strictly than the states that follow an unmodified approach.

3. Model Act

In 1968, the National Conference of Commissioners on Uniform State Laws adopted the Model Choice of Forum Act.¹¹² That Act provides that inbound forum selection clauses should generally be enforced if each of the following statements is true:

- (1) the court has power under the law of this state to entertain the action;
- (2) this state is a reasonably convenient place for the trial of the action;
- (3) the agreement as to the place of the action was not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; and
- (4) the defendant . . . was served [with process as provided by court rules].¹¹³

108. *Lyon Fin. Servs. v. Arjang Miremadi, M.D., Inc.*, No. A14-2171, 2015 Minn. App. Unpub. LEXIS 706, at *9–10 (Minn. Ct. App. June 29, 2015) (“(1) [T]he chosen forum is a seriously inconvenient place for trial; (2) the choice of forum agreement is one of adhesion; and (3) the agreement is otherwise unreasonable.”).

109. *LexisNexis v. Moreau-Davila*, 2017-Ohio-6998, 95 N.E.3d 674, at ¶ 17 (“(1) Are both parties to the contract commercial entities? (2) Is there evidence of fraud or overreaching? (3) Would enforcement of the clause be unreasonable and unjust?”).

110. *Aries Ent., LLC v. Puerto Rican Ass’n for Hisp. Affs.*, 591 S.W.3d 850, 856–57 (Ky. Ct. App. 2019).

111. *GPS USA, Inc. v. Performance Powdercoating*, 2015 IL App (2nd) 131190, ¶¶ 8, 38, 26 N.E.3d 574, 578, 584; *O’Neill Farms, Inc. v. Reinert*, 2010 SD 25, ¶¶ 11–20, 780 N.W.2d 55, 59–62.

112. MODEL CHOICE OF FORUM ACT, reprinted in Willis L. M. Reese, Document, *The Model Choice of Forum Act*, 17 AM. J. COMPAR. L. 292, 292 (1969).

113. *Id.* at 294. Unlike many U.S. courts, the Model Act distinguishes between inbound and outbound forums selection clauses and lists separate enforcement criteria for each.

To date, four states have adopted the Model Act—Michigan, Nebraska, New Hampshire, and North Dakota.¹¹⁴ The Act was withdrawn in 1975.¹¹⁵ No states have adopted it since that date.

The Model Act functions as a long-arm statute for consent jurisdiction. It spells out when a state court should and should not assert personal jurisdiction over an out-of-state defendant when the sole basis for the assertion of jurisdiction is an inbound forum selection clause. Its rule statements do not always align with Supreme Court case law. As discussed above, the Supreme Court has set a high threshold for invalidating a clause on the basis of inconvenience, i.e., whether the party challenging the clause would be effectively “deprived” of a day in court. The Model Act states that a clause should not be enforced when the chosen forum is not a “reasonably convenient” place for trial.¹¹⁶ The Supreme Court has also indicated that enforcing consent-to-jurisdiction clauses in consumer contracts of adhesion is permissible. The comments to the Model Act, by contrast, specifically direct courts not to enforce clauses that are obtained through the “abuse of economic power” and note that “[a] significant factor to be considered in determining whether there was an ‘abuse of economic power or other unconscionable means’ is whether the choice of forum agreement was contained in an adhesion, or ‘take-it-or-leave-it,’ contract.”¹¹⁷ As a long-arm statute for consent jurisdiction, in summary, the Model Act takes a relatively restrained view as to when consent-to-jurisdiction clauses should be enforced.

4. Consent Plus

Other states go even further than the Model Act in limiting the enforceability of inbound clauses. In Florida, for example, a consent-to-jurisdiction clause is generally unenforceable if that clause provides the sole basis for the assertion of personal jurisdiction.¹¹⁸ The courts

114. Act of Apr. 25, 1974, 1974 Mich. Pub. Acts 168 (codified as amended at MICH. COMP. LAWS § 600.745 (2021)); Model Uniform Choice of Forum Act, ch. 179, 1969 Neb. Laws 769 (codified as amended at NEB. REV. STAT. § 25-415 (2021)); Uniform Model Choice of Forum Act, ch. 320, 1969 N.H. Laws 361 (codified as amended at N.H. REV. STAT. ANN. § 508-A:2 (2021)); Act of Mar. 27, 1971, ch. 308, 1971 N.D. Laws 715 (codified as amended at N.D. CENT. CODE § 28-04.1-02 (2021)).

115. See Cleon H. Foust, *Report of the Committee on Review of Conference Acts*, 84 HANDBOOK NAT’L CONF. COMM’RS ON UNIF. ST. L. & PROC. ANN. CONF. MEETING 138, 142 (1975) (listing reasons why the Model Choice of Forum Act was withdrawn).

116. MODEL CHOICE OF FORUM ACT, *supra* note 112, at 294.

117. See *id.* at 296.

118. *McRae v. J.D./M.D., Inc.*, 511 So. 2d 540, 542 (Fla. 1987).

may only assert personal jurisdiction over a defendant if the defendant has some other connection to the state. We refer to this approach as “consent plus” because it requires both consent *plus* something more.

The origins of this rule may be traced back to 1987. In that year, the Florida Supreme Court was asked to decide whether to enforce a contract clause consenting to jurisdiction in Florida when the defendants lacked any other contacts with Florida.¹¹⁹ The defendants argued that the Florida courts lacked personal jurisdiction because they had done none of the acts set forth in the Florida long-arm statute, and none of the parties’ dealings had anything to do with Florida.¹²⁰ The plaintiffs argued that this was irrelevant because the defendants had consented to jurisdiction in Florida in the contract.¹²¹ The Florida Supreme Court sided with the defendants.¹²² Citing the absence of any reference to consent in the state long-arm statute, the court held that “a forum selection clause, designating Florida as the forum, cannot operate as the sole basis for Florida to exercise personal jurisdiction over an objecting non-resident defendant.”¹²³

A similar rule appears to apply in Louisiana, though the case law is unclear. In 2001, the Louisiana Court of Appeals held that “in the absence of minimum contacts, parties to a contract cannot agree that a particular court will have jurisdiction to decide a contractual dispute.”¹²⁴ The court based its decision on a Louisiana statute that declares contract provisions that “waive or select venue or jurisdiction in advance of the filing of any civil action” to be contrary to state public policy.¹²⁵ In 2014, the Louisiana Supreme Court held that this same statute does not bar the enforcement of *outbound* forum selection clauses.¹²⁶ To date, however, that court has not had occasion to decide whether the earlier decision by the Court of Appeals relating to *inbound* clauses was wrongly decided. Until the Louisiana Supreme Court weighs in on that question, the state’s only binding precedent on this issue

119. *Id.* at 541.

120. *Id.*

121. *See id.* at 541–42.

122. *Id.* at 543–44.

123. *Id.* at 542. As discussed below, the Florida legislature subsequently passed a statute that repealed this rule for certain high-dollar-value contracts. *See infra* Part III.B. The rule announced in *McRae* is, however, still regularly applied by the Florida courts. *See* TBI Caribbean Co. v. Stafford-Smith, Inc., 239 So. 3d 103, 104 (Fla. Dist. Ct. App. 2017).

124. *Tulane Indus. Laundry, Inc. v. Quality Lube & Oil, Inc.*, 2000-0610, p. 6 (La. App. 4 Cir. 1/24/01); 779 So. 2d 99, 102.

125. *Id.* at 5, 779 So. 2d at 102 (citing Act of July 10, 1997, No. 943, § 1, 1997 La. Acts 1594, 1595–96 (codified at LA. STAT. ANN. § 51:1407 (2021))); *see also* Calahan v. Haspel, 99-44, p. 5–6 (La. App. 3 Cir. 5/5/99); 732 So. 2d 796, 799–800.

126. *Shelter Mut. Ins. Co. v. Rimkus Consulting Grp., Inc. of La.*, 2013-1977, p. 16–18 (La. 7/1/14); 148 So. 3d 871, 881–82.

provides that a consent-to-jurisdiction clause, standing alone, is insufficient to confer personal jurisdiction on the courts of Louisiana absent some other contact with the state. In this respect, it announces a rule that is similar to the one that is followed by the courts in Florida.

5. Minimum Contacts

Most states view consent as a basis for personal jurisdiction that is separate and distinct from the minimum contacts framework.¹²⁷ A few states, however, analyze the question of whether an inbound clause is enforceable through the lens of minimum contacts.

The trial courts in Maine, for example, analyze the enforceability of an inbound clause through the minimum contacts lens.¹²⁸ These courts have reasoned that their ability to assert personal jurisdiction over nonresident defendants is controlled by the state long-arm statute, which has been interpreted to authorize the assertion of jurisdiction to the extent permitted by the Due Process Clause.¹²⁹ Under the applicable Maine precedents, due process is satisfied when “(1) Maine has a legitimate interest in the subject matter of the litigation; (2) the defendant, by his or her conduct, reasonably could have anticipated litigation in Maine; and (3) the exercise of jurisdiction by Maine’s courts comports with traditional notions of fair play and substantial justice.”¹³⁰ The courts have held that in agreeing to litigate future disputes in Maine via a forum selection clause, a defendant could reasonably have anticipated litigation in Maine.¹³¹ The existence of such a clause thus operates to satisfy the second prong of the test set forth above. The courts must still inquire, however, as to whether prongs one and three are satisfied before they may assert personal jurisdiction over the defendant.¹³²

The Iowa Supreme Court has expressed conflicting views about this same question. In 2000, it unequivocally held that consent provided a basis for the assertion of personal jurisdiction separate and apart from minimum

127. See, e.g., *Johnston Cnty. v. R.N. Rouse & Co.*, 414 S.E.2d 30, 35 (N.C. 1992). In some instances, state courts will conduct a minimum contacts analysis even when they conclude that the consent-to-jurisdiction clause standing alone provides a basis for the assertion of personal jurisdiction on a “belt-and-suspenders” theory. See *Blue Bird, LLC v. Nolan*, No. 302920-V, 2009 Md. Cir. Ct. LEXIS 9, at *13–14 (Apr. 28, 2009).

128. The Maine Supreme Court has never rendered a decision on this issue.

129. *Wolf v. Cullen*, No. CV-08-181, 2010 Me. Super. LEXIS 149, at *7–8 (Dec. 6, 2010).

130. *Id.* at *8.

131. *Id.* at *9–11.

132. *Id.* at *8; *Coast to Coast Eng’g Servs. v. Stein Eng’rs, Inc.*, No. CV-06-158, 2006 Me. Super. LEXIS 167, at *4–5 (Aug. 1, 2006). This test for inbound clauses is different from the test Maine uses to evaluate the enforceability of outbound clauses. See *Clean Harbors Env’t Servs. v. James*, No. CV-06-439, 2006 Me. Super. LEXIS 263, at *3 (Dec. 12, 2006).

contacts.¹³³ In 2014, however, it invoked the minimum contacts framework to evaluate whether Iowa could assert personal jurisdiction over an out-of-state defendant when an inbound forum selection clause selected Iowa as a proper forum.¹³⁴ As part of its minimum contacts analysis, the court invoked the clause as evidence that the defendant “‘should reasonably anticipate being haled into court’ in Iowa.”¹³⁵ It also noted that the existence of the clause served to “reinforce” the defendant’s “deliberate affiliation with” Iowa.¹³⁶ On the basis of this analysis, the court held that the defendant had sufficient minimum contacts with Iowa to justify the assertion of personal jurisdiction.¹³⁷ It did not explain why this analysis was necessary in light of its prior case law suggesting that the clause, standing alone, provided an adequate basis for the assertion of personal jurisdiction.

6. Rational Nexus

Utah has developed its own *sui generis* approach to determining whether a consent-to-jurisdiction clause should be enforced. This approach is known as the rational nexus test. It stipulates that:

[W]hile a forum selection/consent-to-jurisdiction clause by itself is not sufficient to confer personal jurisdiction over a defendant as a matter of law, such clauses do create a presumption in favor of jurisdiction and will be upheld as fair and reasonable so long as there is a rational nexus between the forum selected and/or consented to, and either the parties to the contract or the transactions that are the subject matter of the contract.¹³⁸

This approach is facially similar to Florida’s in that it demands some contact with Utah other than the consent-to-jurisdiction clause selecting the state as a forum. The approach is distinguishable from Florida’s, however, in that the requisite contacts need not come from the defendant. As the Utah Supreme Court explained:

133. EFCO Corp. v. Norman Highway Constructors, Inc., 606 N.W.2d 297, 299 (Iowa 2000). In upholding the enforceability of an inbound clause in that case, incidentally, the court specifically held that outbound clauses were subject to a different—and more demanding—test for enforcement. *Id.*

134. Ostrem v. Prideco Secure Loan Fund, LP, 841 N.W.2d 882, 901–02 (Iowa 2014).

135. *Id.* at 902 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

136. *Id.*

137. *Id.* at 902–03.

138. Phone Directories Co. v. Henderson, 2000 UT 64, ¶ 14, 8 P.3d 256, 261.

Although the rational nexus element does require *some* connection between Utah and either the parties to or the actions contemplated by the contract, it need not rise to the level required under [the Utah long-arm statute]. This partial departure from the traditional [long-arm] inquiry when the parties have contractually selected or consented to a forum has two bases. First, people are free to waive the requirement that a court must have personal jurisdiction over them before that court can adjudicate a case involving them. Second, people are generally free to bind themselves pursuant to any contract, barring such things as illegality of subject matter or legal incapacity. When combined, these two concepts support the conclusion that people can contractually agree to submit to the jurisdiction of a particular court, even if that court might not have independent personal jurisdiction over them under the [long-arm statute]. The potential risks of expanded jurisdiction—particularly the waste of judicial resources—are addressed by the requirement of a *rational nexus between this state and either the parties to or the subject matter of the contract*.¹³⁹

As a practical matter, the rational nexus test requires a party challenging the enforceability of an inbound clause to show that neither the parties nor the transaction has any connection to Utah. In contrast to the consent plus approach and the minimum contacts analysis, which focus solely on the actions of the defendant, the rational nexus test permits the enforcement of an inbound clause if the plaintiff or the transaction has a connection to Utah.¹⁴⁰

The Utah Supreme Court has explained that the “rational nexus test is not properly considered a due process requirement.”¹⁴¹ Instead, the test “operates as a safety valve, providing a mechanism whereby Utah courts may decline to exercise jurisdiction when Utah has no real interest in the outcome of a given dispute.”¹⁴² The principal function of the rational nexus test, in short,

139. *Id.* ¶¶ 14–15, 8 P.3d at 261–62 (emphasis added) (citations omitted).

140. *Jacobsen Constr. Co. v. Teton Builders*, 2005 UT 4, ¶ 43, 106 P.3d 719, 728 (“In this case, the rational nexus test is satisfied because [plaintiff]’s primary place of business is in Utah.”); *Rocky Mountain Builders Supply Inc. v. Marks*, 2017 UT App 41, ¶¶ 8–10, 392 P.3d 981, 984–85 (“Ultimately, a rational nexus exists in this case for the district court to exercise jurisdiction over [defendant] because [plaintiff] is a Utah corporation and its principal place of business, corporate officers, and legal counsel are all in Utah.”). The Utah courts have not been sympathetic to claims that consent-to-jurisdiction clauses are unenforceable in nonbusiness contracts. *See id.* ¶ 9, 392 P.3d at 984 (“The only distinctions [defendant] draws between this case and *Jacobsen Construction* are that here a relatively small sum of money is in dispute and that one of the parties to the contract was an individual rather than a business. But courts have not viewed these distinctions as dispositive in this context.”).

141. *Jacobsen Constr. Co.*, 2005 UT 4, ¶ 41, 106 P.3d at 728.

142. *Id.*

is to screen for cases with no connection to Utah. As that same court has explained:

[U]nder certain circumstances it may be reasonable for a resident of Colorado and a resident of Wyoming to bargain for a forum selection clause designating Utah as the appropriate forum for any dispute arising in relation to a contract to be performed in Nevada. A Utah court hearing a subsequent action brought pursuant to the contract could very well find that the forum selection clause was reasonable under the circumstances, but nevertheless decline to exercise jurisdiction over the matter due to the lack of a rational nexus to Utah.¹⁴³

The Utah courts have, in summary, decided as a matter of state law not to exercise consent jurisdiction to the full extent permitted by the Due Process Clause. When neither the parties nor the transaction has any connection to Utah, the Utah courts will refuse to assert personal jurisdiction over a defendant even when that defendant has previously agreed not to contest the issue of personal jurisdiction in Utah.¹⁴⁴ In this respect, the courts have fashioned yet another approach to deciding when inbound clauses should be given effect.

7. Unconscionability

The Wisconsin courts evaluate the enforceability of inbound clauses solely through the contract doctrine of unconscionability.¹⁴⁵ If the clause is unconscionable, then it is not enforceable.¹⁴⁶ In evaluating whether a clause is unconscionable, the Wisconsin courts look for evidence of procedural and substantive unconscionability.¹⁴⁷

143. *Id.* ¶ 42, 106 P.3d at 728.

144. The Utah courts utilize a very different framework to determine whether an outbound clause is enforceable. In the outbound context, these courts rely on the *Bremen* factors. *Coombs v. Juice Works Dev., Inc.*, 2003 UT App 388, ¶ 9, 81 P.3d 769, 773.

145. *First Fed. Fin. Serv., Inc. v. Derrington's Chevron, Inc.*, 602 N.W.2d 144, 146–47 (Wis. Ct. App. 1999).

146. *Id.*

147. *Disc. Fabric House of Racine, Inc. v. Wis. Tel. Co.*, 345 N.W.2d 417, 425 (Wis. 1984) (“Under the ‘procedural’ rubric come those factors bearing upon . . . the ‘real and voluntary meeting of the minds’ of the contracting parties: age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question. The ‘substantive’ heading embraces the contractual terms themselves, and requires a determination whether they are commercially reasonable.” (quoting *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 268 (E.D. Mich. 1976))).

8. Summary and Overview

The table below provides an overview of the various approaches utilized by states to determine whether an inbound clause is enforceable. As the table makes clear, just over half the states apply the test laid down in *The Bremen*—as modified by *Carnival Cruise*—to determine whether an inbound clause may be given effect. A significant number of states, however, utilize a different approach. When there were no state cases from a given state addressing the question of whether an inbound clause was enforceable, we denote this fact with an “N/A.”

Table 1: State Approaches to Enforcing Consent-to-Jurisdiction Clauses			
State	Approach	State	Approach
Alabama	N/A	Montana	<i>Bremen</i>
Alaska	N/A	Nebraska	Model Act
Arizona	<i>Bremen</i>	Nevada	<i>Bremen</i>
Arkansas	<i>Bremen</i>	New Hampshire	Model Act
California	<i>Bremen</i>	New Jersey	<i>Bremen</i>
Colorado	<i>Bremen</i>	New Mexico	N/A
Connecticut	<i>Bremen</i>	New York	<i>Bremen</i>
Delaware	<i>Bremen</i>	North Carolina	<i>Bremen</i>
Florida	Consent Plus	North Dakota	Model Act
Georgia	<i>Bremen</i>	Ohio	Modified <i>Bremen</i>
Hawaii	N/A	Oklahoma	<i>Bremen</i>
Idaho	N/A	Oregon	<i>Bremen</i>
Illinois	Modified <i>Bremen</i>	Pennsylvania	<i>Bremen</i>
Indiana	<i>Bremen</i>	Rhode Island	N/A
Iowa	Minimum Contacts	South Carolina	<i>Bremen</i>
Kansas	<i>Bremen</i>	South Dakota	Modified <i>Bremen</i>
Kentucky	Modified <i>Bremen</i>	Tennessee	<i>Bremen</i>
Louisiana	Consent Plus	Texas	<i>Bremen</i>
Maine	Minimum Contacts	Utah	Rational Nexus
Maryland	<i>Bremen</i>	Vermont	<i>Bremen</i>
Massachusetts	<i>Bremen</i>	Virginia	<i>Bremen</i>
Michigan	Model Act	Washington	<i>Bremen</i>
Minnesota	Modified <i>Bremen</i>	West Virginia	N/A
Mississippi	N/A	Wisconsin	Unconscionability
Missouri	<i>Bremen</i>	Wyoming	N/A
Totals: <i>Bremen</i> (26); Modified <i>Bremen</i> (5); Model Act (4); Consent Plus (2); Minimum Contacts (2); Rational Nexus (1); Unconscionability (1); N/A (9)			

B. Targeted Rules

The legislatures in every state have enacted laws that modify the rules outlined above for determining whether inbound clauses are enforceable.¹⁴⁸ The laws affecting inbound clauses generally apply to two types of contracts. First, some states have enacted laws directing their courts to *enforce* such clauses when they appear in business contracts or high-dollar-value contracts selecting the courts of the enacting state. The goal of such statutes is to attract litigation and other business to the state. Second, some states have enacted laws directing their courts *not to enforce* such clauses when they appear in certain consumer contracts. The goal of such statutes is to protect consumers against being sued in states other than the one in which they reside.

1. Enforcing Inbound Clauses in Business and High-Dollar-Value Contracts

The reliable enforcement of inbound forum selection clauses by courts in a given state has the potential to attract litigation business to that state. A state legislature seeking to attract litigation business, therefore, may choose to enact a statute guaranteeing that clauses selecting the courts of that state will be enforced.¹⁴⁹

The first state to act on this insight was New York. In 1984, its legislature enacted a statute directing its courts to enforce inbound clauses consenting to jurisdiction in New York when each of the following criteria are satisfied: (1) the contract contains a choice-of-law clause selecting New York law; (2) the contract is not an employment contract, a consumer contract, or a contract governed by a specific provision in the Uniform Commercial Code; and (3) the contract is for at least \$1 million.¹⁵⁰ A second statute directs the state's courts not to dismiss a case on the basis of *forum non conveniens* when these requirements are met.¹⁵¹ The combined effect of these provisions is to guarantee that certain inbound clauses selecting New York will always be enforced, even when the parties and the transaction have no other connection

148. We discuss state statutes directed towards *outbound* clauses in other work. See Coyle & Richardson, *supra* note 3 (manuscript at 26 tbl.3) (listing 190 state statutes that direct courts not to enforce outbound forum selection clauses).

149. See Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT'L L. 227, 227–32 (2020); John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1959–65 (2012).

150. Act of July 19, 1984, ch. 421, § 1, 1984 N.Y. Laws 2583, 2583 (codified as amended at N.Y. GEN. OBLIG. LAW § 5-1402 (Consol. 2021)).

151. *Id.* § 2, 1984 N.Y. Laws at 2583–84 (codified at N.Y. C.P.L.R. 327 (CONSOL. 2021)).

to New York, thereby generating business for lawyers in the state. As a report that preceded the enactment of the New York legislation explained:

It is the recommendation of this Committee that parties to significant commercial contracts should be encouraged to submit to the jurisdiction of the New York courts and to choose New York law as their governing law. Under present law, however, such parties cannot be certain that the New York courts will enforce their submission to New York jurisdiction or their choice of New York law. In order to add a quantum of certainty and predictability to the negotiation process, New York law must be amended to provide for mandatory enforcement of forum-selection clauses and choice-of-law provisions in large international commercial contracts.¹⁵²

The reliable enforcement of inbound forum selection clauses was seen as vitally important for New York to retain its status as an international business center.¹⁵³

In the years after 1984, California, Delaware, Florida, Illinois, North Carolina, and Ohio all enacted similar statutes.¹⁵⁴ While the details varied from state to state—some states set a minimum dollar threshold, for example,¹⁵⁵ while others simply stated that the legislation would only apply to business contracts regardless of their value¹⁵⁶—the basic motivation was generally the same. Their goal was to convey the impression that the enacting

152. Comm. on Foreign & Compar. L., *Proposal for Mandatory Enforcement of Governing-Law Clauses and Related Clauses in Significant Commercial Agreements*, 38 REC. ASS'N BAR CITY N.Y. 537, 549 (1983).

153. *Id.* at 548–49 (“New York is undoubtedly one of the world’s major financial and commercial centers. New York’s position, however, is by no means unchallenged. In recent years, other international business centers have taken affirmative measures to attract foreign business by providing ready access to a competent forum for dispute resolution. New York law does not afford such certainty, and New York lawyers consequently face problems in giving opinions that do not restrain attorneys in other international capitals.” (footnote omitted)).

154. Act of Sept. 8, 1992, ch. 615, § 5, 1992 Cal. Stat. 2739, 2741 (codified at CAL. CIV. PROC. CODE § 410.40 (Deering 2021)); Act of July 12, 1993, ch. 127, § 1, 69 Del. Laws 302, 302 (codified as amended at DEL. CODE ANN. tit. 6, § 2708 (2021)); Act of June 27, 1989, ch. 89-135, § 2, 1989 Fla. Laws 383, 384 (codified at FLA. STAT. § 685.102 (2021)); Choice of Law and Forum Act, Pub. Act 90-0421, § 5-10, 1997 Ill. Laws 4693, 4693 (codified at 735 ILL. COMP. STAT. 105/5-10 (2021)); Act of July 18, 2017, Sess. L. 2017-123, § 1, 2017 N.C. Sess. Laws 907, 908 (codified at N.C. GEN. STAT. § 1G-4 (2021)); Act of July 22, 1991, H.B. No. 221, § 1, 1991 Ohio Laws 3675, 3705–06 (codified as amended at OHIO REV. CODE ANN. § 2307.39 (LexisNexis 2021)).

155. *E.g.*, DEL. CODE ANN. tit. 6, § 2708 (2021) (setting a minimum dollar amount of \$100,000); 735 ILL. COMP. STAT. 105/5-10 (2021) (setting a minimum dollar amount of \$500,000).

156. *E.g.*, N.C. GEN. STAT. § 1G-4 (2021).

state was a favorable place in which to do business and to litigate business disputes.¹⁵⁷

The process that led to the enactment of such a statute in Florida warrants special attention in light of that state's unwillingness to assert jurisdiction solely on the basis of an inbound forum selection clause. In 1989, Florida enacted a statute that bears a strong resemblance to the one enacted by New York.¹⁵⁸ That statute directs the Florida courts to enforce forum selection clauses when written into business contracts for more than \$250,000 so long as the contract also contains a Florida choice-of-law clause.¹⁵⁹ In contrast to New York, however, the Florida statute is only applicable where the contract has some connection to Florida.¹⁶⁰ The goal of the Florida statute, therefore, was not to attract litigation business from parties with no connection to Florida. Instead, the statute appears to have been intended to partially overturn the Florida Supreme Court decision in *McRae* holding that a consent-to-jurisdiction clause (by itself) was insufficient to confer personal jurisdiction under state law.¹⁶¹ While the scope of this legislative override was limited—it applied only to high-dollar-value business contracts—it provided reassurance to Florida businesses that they could require out-of-state defendants who otherwise lacked minimum contacts with Florida to consent to jurisdiction there if certain conditions were met.¹⁶²

Table 2 surveys the similarities and differences between the various state statutes that address the enforceability of inbound clauses in business and high-dollar-value contracts.

157. See, e.g., *Quanta Comput. Inc. v. Japan Commc'ns Inc.*, 230 Cal. Rptr. 3d 334, 345 (Ct. App. 2018) (Baker, J., dissenting) (“[O]ur Legislature, in enacting [the statute], has said our courts should be generally open for business when it comes to this type of foreign dispute.”). See generally Larry E. Ribstein, *Delaware, Lawyers, and Contractual Choice of Law*, 19 DEL. J. CORP. L. 999 (1994).

158. See § 2, 1989 Fla. Laws at 384.

159. FLA. STAT. § 685.102 (2021).

160. See Edward M. Mullins & Douglas J. Giuliano, *Contractual Waiver of Personal Jurisdiction Under F.S. § 685.102: The Long-Arm Statute's Little-Known Cousin*, FLA. BAR J., May 2006, at 36, 36–37 (observing that the Florida statute “only applies if either 1) the contract bears a substantial or reasonable relation to Florida, or 2) at least one of the parties is either a resident or citizen of Florida (if a person), or is incorporated or organized under the laws of Florida or maintains a place of business in Florida (if a business)”).

161. *McRae v. J.D./M.D., Inc.*, 511 So. 2d 540, 544 (Fla. 1987).

162. See *Jetbroadband WV, LLC v. MasTec N. Am., Inc.*, 13 So. 3d 159, 162–63 (Fla. Dist. Ct. App. 2009).

Table 2: State Statutes Relating to Consent-to-Jurisdiction Clauses in Business and High-Dollar-Value Contracts						
State	Year Enacted	Contract Type	Minimum \$\$\$	Choice of Law Clause	Forum Non Conveniens	Other
New York	1984	Business	\$1m	Required	Unavailable (by statute)	
Florida	1989	Business	\$250k	Required	Unavailable (by case law)	Contract must have connection to Florida
Ohio	1991	Business	None	Required	Unavailable (by statute)	
California	1992	Any	\$1m	Required	Available (by case law)	
Delaware	1993	Any	\$100k	Required		
Illinois	1997	Business	\$500k	Required	Unavailable (by case law)	
North Carolina	2017	Business	None	Required	Unavailable (by statute)	

In 2015, Delaware became the first state to enact a statute that expressly blessed the use of forum selection clauses in a corporation's certificate of incorporation or bylaws.¹⁶³ By its terms, this statute directs courts to enforce these clauses when they select the Delaware courts to resolve disputes relating to the internal affairs of the corporation.¹⁶⁴ The statute does not require outbound forum selection provisions that select the courts of another state (or an arbitral forum) to be enforced.¹⁶⁵ Like the statutes discussed above, the Delaware statute helps to attract litigation business to the state.¹⁶⁶

163. Act of June 24, 2015, ch. 40, § 5, 80 Del. Laws 1, 2 (codified as amended at DEL. CODE ANN. tit. 8, § 115 (2021)).

164. DEL. CODE ANN. tit. 8, § 115 (2021).

165. Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485, 489 (2016).

166. F. Troupe Mickler IV, *Significant Fee-Shifting and Forum Selection Amendments Proposed to the DGCL*, DEL. BANKR. INSIDER (Mar. 25, 2015), <https://blog.ashbygeddes.com/significant-fee-shifting-and-forum-selection-amendments->

2. Not Enforcing Inbound Clauses in Consumer Contracts

There is a long and sordid history in the United States of companies suing their customers in jurisdictions other than the place of the customer's residence. In the 1970s, companies such as Marathon Oil and Montgomery Ward routinely brought collections cases against their customers in forums far removed from the places where those customers were domiciled.¹⁶⁷ In the 1980s, J.C. Penney was accused of engaging in similar practices.¹⁶⁸ This sort of behavior occurred so frequently that scholars coined a name for the phenomenon—"distant forum abuse."¹⁶⁹ The term refers to the practice of suing people in courts that are so distant or inconvenient that they are highly unlikely to appear, thereby allowing the plaintiff to obtain a default judgment.¹⁷⁰ While the problem of distant forum abuse predates the widespread use of the consent-to-jurisdiction clause, the advent of such clauses has made it much easier for companies to engage in this practice. In the early 2010s, for example, one company relied on such a clause to assert jurisdiction over out-of-state defendants in more than three thousand actions

proposed-to-the-dgcl/ [<https://perma.cc/56DB-SYKL>] (describing the statute as a "protectionist measure designed to funnel litigation into Delaware"); see also Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate "Contracts,"* 93 WASH. L. REV. 265, 316 (2018); Matthew D. Cain et al., *The Shifting Tides of Merger Litigation,* 71 VAND. L. REV. 603, 637 (2018).

167. For examples of this practice, see *Marathon Oil Co.*, 92 F.T.C. 422, 424 (1978); *Montgomery Ward & Co.*, 84 F.T.C. 1337, 1339–40 (1974); *S. S. Kresge Co.*, 90 F.T.C. 222, 224 (1977); *W. Coast Credit Corp.*, 84 F.T.C. 1328, 1330–31 (1974); *Schubach v. Household Fin. Corp.*, 376 N.E.2d 140, 140–42 (Mass. 1978); *Santiago v. S.S. Kresge Co.*, 2 Ohio Op. 3d 54 (C.P. 1976) (holding that the practice of suing in a forum distant from consumers' homes was unconscionable and violated Ohio UDAP statute). See also *Paragon Homes, Inc. v. Carter*, 288 N.Y.S.2d 817, 818–19 (Spec. Term), *aff'd*, 295 N.Y.S.2d 606 (App. Div. 1968) (mem.); Jeff Govern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1695 (2006).

168. *J.C. Penney Co.*, 109 F.T.C. 54, 55–57 (1987); see also *Celebrezze v. United Rsch., Inc.*, 482 N.E.2d 1260, 1262 (Ohio Ct. App. 1984) (holding that a bookseller's practice of suing in a forum distant from consumers' homes was unfair and unconscionable).

169. John J. Sampson, *Distant Forum Abuse in Consumer Transactions: A Proposed Solution*, 51 TEX. L. REV. 269 (1973) (presenting empirical evidence of forum abuse in intrastate consumer transactions).

170. See *Moore v. Fein, Such, Kahn & Shepard, P.C.*, No. 12-1157, 2012 U.S. Dist. LEXIS 83428, at *17–18 (D.N.J. June 13, 2012) ("Congress adopted [§ 1692i(a)(2)] to address 'the "problem of forum abuse, an unfair practice in which debt collectors file suit against consumers in courts which are so distant or inconvenient that consumers are unable to appear," hence permitting the debt collector to obtain a default judgment.'" (quoting *Hess v. Cohen & Slamowitz LLP*, 637 F.3d 117, 120 (2d Cir. 2011), in turn quoting S. REP. NO. 95-382, at 5 (1977)).

in Illinois.¹⁷¹ In response, a number of states have enacted legislation that invalidates consent-to-jurisdiction clauses under certain circumstances.¹⁷²

We identified ninety-one state statutes stating that consent-to-jurisdiction clauses are not enforceable in certain contexts.¹⁷³ Virtually every state has enacted a statute that invalidates inbound clauses in consumer leases. These leases are the subject of Article 2A of the Uniform Commercial Code, which was first promulgated by the Uniform Law Commission in 1987. Section 106 of Article 2A provides that “[i]f the judicial forum chosen by the parties to a consumer lease is a forum that *would not otherwise have jurisdiction* over the lessee, the choice is not enforceable.”¹⁷⁴ The official comment to this provision makes clear that its purpose is to ensure that consumer lessees may only be sued in the place where they reside:

There is a real danger that a lessor may induce a consumer lessee to agree that . . . the applicable forum will be a forum that is inconvenient for the lessee in the event of litigation. As a result, this section invalidates these . . . forum clauses, except where . . . the

171. *Johnson v. Pushpin Holdings, LLC*, 821 F.3d 871, 874 (7th Cir. 2016) (observing that Pushpin “between 2010 and 2014 filed, in reliance on the forum-selection clause, suits in small-claims courts in Cook County against more than 3000 of the guarantors of leases that the lessees had defaulted on” and further observing that “[t]he class argues that in invoking the forum-selection clause Pushpin was hoping to induce default judgments by members of the class, the vast majority of whom live outside of Illinois and so would find it inconvenient to defend given the low stakes, most being below \$5000 and many below \$3000”).

172. Some states provide consumers with a cause of action against a counterparty that sues them in a jurisdiction other than their place of residence. Texas has enacted legislation that states the term

TEX. BUS. & COM. CODE ANN. § 17.46(b)(23) (West 2021). The Ohio courts have similarly concluded that “suing consumers in a jurisdiction other than where the consumer resides or signed the contract is an unfair or deceptive practice in violation of [an Ohio statute prohibiting unfair or deceptive practices in consumer sales].” *Celebrezze*, 482 N.E.2d at 1261.

173. A complete list of these statutes, organized by state, appears in the Appendix.

174. U.C.C. § 2A-106(2) (AM. L. INST. & UNIF. L. COMM’N 1987) (emphasis added). A consumer lease is “a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family, or household purpose.” *Id.* § 2A-103(1)(e).

forum chosen is one that otherwise would have jurisdiction over the lessee.¹⁷⁵

To date, forty-nine states have written Article 2A into their respective commercial codes. The fiftieth state—Louisiana—has enacted a standalone statute that invalidates consent-to-jurisdiction clauses in leases for *all* movable property.¹⁷⁶ Consequently, forum selection clauses in consumer leases are generally unenforceable to the extent they require the lessee to consent to jurisdiction in a state that is not the state of his or her residence.

The Uniform Consumer Credit Code—which has been enacted by eleven states—also contains language that directs courts not to enforce consent-to-jurisdiction clauses. It invalidates any provision in a consumer credit agreement whereby “the consumer consents to the jurisdiction of the court that does not otherwise have jurisdiction.”¹⁷⁷ This language seeks to protect consumers against being sued outside of their home state when they enter into a loan agreement with an out-of-state lender. Other states have enacted similar statutes that apply to other types of contracts. Washington, for example, has a statute that provides that a student loan agreement is voidable if it contains a provision whereby the student “consents to the jurisdiction of another state.”¹⁷⁸ Tennessee has enacted a similar statute that applies to payday lenders.¹⁷⁹ Colorado invalidates contract provisions in foreclosure consulting agreements where the borrower is required to consent to jurisdiction in “a state other than Colorado.”¹⁸⁰ The goal in each instance is the same—to protect in-state residents from being forced to defend themselves in litigation in other states. A complete list of state statutes in this vein appears in the Appendix.

A bit later in the Article, we will explain why many of these and other well-intentioned statutes that seek to protect consumers are sometimes ineffectual. We will also offer some suggestions for ways to better protect consumers, students, and other in-state residents who are the intended

175. *Id.* § 2A-106 cmt.

176. *See* LA. STAT. ANN. § 9:3303(F)(1) (2021) (“The following agreements by Louisiana lessees are invalid with respect to leases of movable property, or any modifications thereof, to which this Chapter applies: [a]greements in which the lessee consents to the jurisdiction of another state.”).

177. UNIF. CONSUMER CREDIT CODE § 1.201(8)(e) (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1974).

178. WASH. REV. CODE § 28B.85.140 (2021).

179. TENN. CODE ANN. § 45-17-112 (2021) (stating that a contract provision whereby the “customer consents to the jurisdiction of another state or foreign country” is void on public policy grounds).

180. COLO. REV. STAT. § 6-1-1106(1)(b) (2021).

beneficiaries of such provisions.¹⁸¹ Before addressing these proposals, however, we must first consider how the various doctrinal rules described above are applied in practice. This is the subject of the next Part.

IV. LAW IN ACTION

Legal scholars have long distinguished between “law on the books” and “law in action.” The law on the books is “the content of statutes, regulations, and judicial decisions,” while the law in action “refers to regularities describing how legal authorities enforce the ‘law on the books.’”¹⁸² In the previous Part, we surveyed the law on the books as it relates to the enforcement of inbound forum selection clauses. In this Part, we turn our attention to how state courts apply and enforce that law. After describing our methodological approach and offering a summary of our empirical findings, we show that regardless of which method states purport to use in deciding whether to give effect to inbound forum selection clauses, they refuse to enforce them for just a handful of reasons that fall into predictable categories.

A. Methods

To assess how state courts behave in practice when asked to enforce inbound forum selection clauses, we set out to find every state case where this issue had been litigated. We began by conducting a search in Lexis Advance for the terms “choice of court clause” or “forum selection clause” or “choice of forum clause” or “consent to jurisdiction clause” or “venue selection clause.” When we searched for these terms in “All State Courts” in April 2020, we received 4,256 hits.

We then used the following criteria to narrow the list of cases. First, we eliminated cases where the forum selection clause selected a jurisdiction other than the one where the suit had been filed, i.e., outbound clauses. Second, we eliminated cases where neither party raised the issue of personal jurisdiction. The primary effect of this screening criteria was to remove cases dealing exclusively with issues relating to venue or *forum non conveniens*. Third, we eliminated cases where one party invoked the inbound clause in an attempt to persuade a court to issue an anti-suit injunction. Fourth, we eliminated cases where the defendant argued that the clause was unenforceable under ordinary rules of contract law, such as lack of

181. See *infra* Part V.A.

182. Rebecca Stone, *Legal Design for the “Good Man,”* 102 VA. L. REV. 1767, 1798 (2016) (citing Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910)).

consideration. Fifth, we eliminated cases where the only issue before the court related to the interpretation of the forum selection clause rather than its enforcement. Sixth, we eliminated cases where neither party argued that the clause was unenforceable. Finally, we eliminated cases where the clause was invoked in an unsuccessful attempt to confer subject-matter jurisdiction upon a particular court. These screening procedures resulted in a dataset of 283 cases. This dataset consists of every modern published and unpublished case decided prior to April 2020 in which a defendant challenged the enforceability of an inbound clause in state court.

We then sorted these 283 cases into two categories. The first category was comprised of original proceedings brought by one contract counterparty against another. If a plaintiff argued that the Georgia court had personal jurisdiction over the defendant because their contract selected Georgia as the forum, for example, this case was sorted into category one. There were 226 cases in this category. The second category was comprised of cases where the plaintiff sought to enforce a default judgment rendered by a court in a jurisdiction named in the clause. If a plaintiff obtained a default judgment against a defendant in Iowa on the basis of an Iowa forum selection clause, for example, and then sought to enforce the resulting judgment against the defendant's assets in North Carolina, this case was sorted into category two.¹⁸³ There were fifty-seven cases in this category.

There are a number of issues with looking to published and unpublished cases in an attempt to understand the law in action. First, there are well-known problems with relying on cases resulting in a published or unpublished decision as evidence of judicial behavior.¹⁸⁴ In an ideal world, we would conduct a review of state court dockets rather than published cases. Unfortunately, such dockets are not accessible to researchers in most states.¹⁸⁵

183. The court will apply the law of the state where the judgment was originally rendered in determining whether to enforce a default judgment.

184. See William H.J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEGAL STUD. 474, 481 (2017) (observing that cases identified through “databases of published judicial opinions” are “not representative of cases as a whole, both because published opinions are not a random sample of all judicial decisions, and because cases with judicial decisions are not a random sample of all cases”).

185. A growing number of scholars have urged empiricists to look to court dockets—rather than judicial opinions—in order to get a more accurate measure of how judges behave. See David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 686–89 (2007). As even these “docketologists” acknowledge, however, looking to court dockets as a source of data is only possible when researching the behavior of the federal district courts. See *id.* at 728–29. In most states, it is simply impossible for researchers to obtain reliable docket information for state trial courts. See *id.* As a practical matter, therefore, empiricists seeking to obtain information about state court practice must continue to rely on

Second, looking to cases may provide an affirmatively misleading view of how the law operates in practice. The enactment of clear statutes that direct courts to enforce consent-to-jurisdiction clauses in high-dollar-value contracts, for example, may make it less likely that the parties will object to personal jurisdiction. The ensuing absence of any discussion of this statute in the published cases may give the misleading impression that the statute is not having any impact when, in fact, it discourages litigants from raising the issue in the first place. Third, it is difficult to isolate the effect of the consent-to-jurisdiction clause in our sample. In some cases, the clause was the sole and exclusive basis for the assertion of personal jurisdiction. In other cases, the court likely would have had jurisdiction over the defendant on the basis of minimum contacts, even in the absence of the clause. Since not every case discusses these jurisdictional facts, we included every case where a court was asked to enforce a consent-to-jurisdiction clause in our dataset. If we could have screened for cases where the clause was the sole basis for jurisdiction with perfect accuracy, then our empirical results may have looked somewhat different.

We acknowledge all of these methodological issues. Nevertheless, we believe that the data generated by this search—though imperfect—may prove useful to scholars, judges, and litigants who regularly interact with these clauses. Our findings are set forth below.

B. Findings

The overall enforcement rate for consent-to-jurisdiction clauses in the cases in our dataset was 80%.¹⁸⁶ When the clause was challenged in the original suit, the enforcement rate was 81%. When the clause was challenged in an enforcement action, the enforcement rate was 75%. This finding suggests that there may be a slightly greater likelihood of success when a defendant challenges the enforceability of a clause in an enforcement action. However, the small number of enforcement-action cases in our dataset—just fifty-seven—provides reason to be cautious about assigning too much significance to this difference.

judicial opinions. *See id.* While this is lamentable in many respects, there is an upside. Although published and unpublished cases may not be “representative” in a statistical sense, they are “representative” in that they are for most scholars, judges, and lawyers the “full population . . . of the cases shaping perceptions of the legal system. Published opinions are all most of us ever work from.” Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1195 (1991).

186. This number undoubtedly understates the “true” enforcement rate for these clauses. If we were to include cases where neither party argued that the clause was unenforceable, for example, the enforcement rate would rise to 85%.

There were an insufficient number of cases in most states to allow for meaningful comparisons between them. However, we have listed the enforcement rate in each state with at least ten dataset cases in Table 3.

Table 3: Enforcement Rate of Inbound Forum Selection Clauses, by State (min. 10 cases)		
State	Number of Cases	Enforcement Rate
Massachusetts	12	92%
Delaware	11	91%
Texas	21	90%
New York	25	84%
Michigan	12	83%
All States	283	80%
Ohio	21	76%
Florida	19	58%

The below-average enforcement rate in Ohio (76%) is attributable to a 2007 Ohio Supreme Court case where the court refused to enforce a floating forum selection clause in a lease agreement drafted by NorVergence.¹⁸⁷ NorVergence was a leasing company that was ultimately adjudged to have defrauded thousands of its customers.¹⁸⁸ Its contracting practices with respect

187. See *Preferred Cap., Inc. v. Power Eng'g Grp., Inc.*, 112 Ohio St. 3d 429, 2007-Ohio-257, 860 N.E.2d 741, at ¶¶ 12–16.

188. NorVergence leased specialized telecommunications equipment to its customers on the promise that the equipment would lower the customers' phone bills. See Peter R. Silverman & James H. O'Doherty, *Float Like a Butterfly, Sting Like a Bee: The Lure of Floating Forum Selection Clauses*, 27 *FRANCHISE L.J.* 119, 120 (2007). This equipment, however, was no more than a firewall and a router that were incapable of delivering the promised cost savings. *Id.* In many cases, customers ceased making lease payments on the equipment when it failed to deliver the promised cost savings or (in many cases) failed to operate at all. *FTC v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 932 (N.D. Ill. 2008). When these payments ceased, NorVergence would assign the contract to a party located in a state geographically removed from the lessor. See *Studebaker-Worthington Leasing Corp. v. New Concepts Realty, Inc.*, 887 N.Y.S.2d 752, 753

to forum selection clauses were singled out for special criticism by the Federal Trade Commission.¹⁸⁹ The Ohio Supreme Court's decision not to enforce the floating clause in a NorVergence lease was partially based on the company's checkered history.¹⁹⁰ Three lower courts in Ohio subsequently followed the precedent laid down by the state supreme court and refused to enforce identical clauses.¹⁹¹ When the four NorVergence decisions are excluded from the case count in Ohio, that state's enforcement rate rises to 94%.¹⁹²

The markedly lower enforcement rate in Florida (58%) is attributable to that state's rule that a forum selection clause may not provide a valid basis for the assertion of personal jurisdiction absent some other contact between the defendant and the state.¹⁹³

In other work, we deployed a similar methodological approach to learn more about the enforcement rate for *outbound* forum selection clauses in state court.¹⁹⁴ In that paper, we found that the overall enforcement rate for outbound clauses was 77%.¹⁹⁵ The overall enforcement rate for inbound clauses using the same screening criteria, as noted above, is 80%.

C. Bases for Non-Enforcement

There were fifty-five cases in our dataset where the court refused to enforce a consent-to-jurisdiction clause and assert personal jurisdiction over the defendant. A review of these cases provides useful insights into what the courts actually *do* rather than what they *say* they are doing. In practice, state courts refuse to enforce these clauses for just a handful of predictable reasons:

(App. Term 2009). The assignee would then bring a lawsuit against the lessee to recover the entire balance due on the lease in the courts of that state. *See id.* The goal was to obtain a default judgment. Indeed, the NorVergence Screening Manager Training Manual contained "a copy of the proposed default judgment and order for permanent injunctive relief" that were to be filed after the lessor stopped making payments. *Id.* at 753–54. The basis for obtaining a valid default judgment, in turn, was the consent-to-jurisdiction clause written into each NorVergence lease agreement.

189. *IFC Credit Corp.*, 543 F. Supp. 2d at 949.

190. *See Preferred Cap., Inc.*, 112 Ohio St. 3d 429, 2007-Ohio-257, 860 N.E.2d. 741, at ¶ 4.

191. *Nat'l City Com. Cap. Corp. v. Bullard*, 12th Dist. Butler No. CA2010–10–276, 2011-Ohio-5780, at ¶¶ 39–42; *Nat'l City Com. Cap. Corp. v. All About Limousines Corp.*, 12th Dist. Butler No. CA2005–08–226, 2009-Ohio-1159, at ¶¶ 24–25; *Nat'l City Com. Cap. Corp. v. Page*, 12th Dist. Butler No. 2005–09–381, 2009-Ohio-1161, at ¶¶ 10–11.

192. Similarly, when one excludes three NorVergence lease cases from the numbers from New York, the enforcement rate in that state jumps to 91%.

193. *See supra* Part III.A.4.

194. *See Coyle & Richardson, supra* note 3.

195. *Id.* (manuscript at 5).

(1) insufficient notice, (2) inconvenience, (3) a lack of connection to the chosen forum, and (4) public policy.¹⁹⁶

1. Insufficient Notice

The most common reason why a court refused to enforce a consent-to-jurisdiction clause was insufficient notice.¹⁹⁷ In some cases, the lack of notice led the court to conclude that the defendant had never knowingly consented to jurisdiction in the chosen forum. In other cases, the notice problems stemmed from the lack of specificity as to the identity of the chosen forum. In still other cases, the clause was deemed invalid because the chosen jurisdiction *changed* between the time when the contract was signed and the time when the litigation began. Each of these situations is discussed below.

a. No Knowing Consent

There are a number of cases in our dataset where the court held that the defendant had not knowingly consented to jurisdiction in the chosen forum.¹⁹⁸

In some of these cases, the court concluded that a purported consent-to-jurisdiction clause was ineffective because it did not contain any clear language signaling that the defendant was consenting to jurisdiction

196. This list does not include contract defenses—such as lack of consideration, fraud, or unconscionability—that may lead to the invalidation of a forum selection clause on pure contract law grounds. For cases in which a clause was invalidated on the basis of fraud, see *Studebaker-Worthington Leasing Corp. v. New Concepts Realty, Inc.*, 887 N.Y.S.2d 752, 753–54 (App. Term 2009) (NorVergence); *Sterling Nat'l Bank v. Mid-S. Tooling, Inc.*, No. 108920/10, slip op. at 8 (N.Y. Sup. Ct. Mar. 17, 2011) (NorVergence); *Krell Inv. LLC v. KI, Inc.*, No. 650652/09, slip op. at 10–11 (N.Y. Sup. Ct. Sept. 26, 2011). For cases in which a clause was invalidated on the basis of unconscionability, see *First Fed. Fin. Serv., Inc. v. Derrington's Chevron, Inc.*, 602 N.W.2d 144, 145–46 (Wis. Ct. App. 1999); *Leasefirst v. Hartford Rexall Drugs, Inc.*, 483 N.W.2d 585, 586 (Wis. Ct. App. 1992).

197. Notice of jurisdiction has been used to justify the exercise of personal jurisdiction even outside of the realm of explicit consent to the forum. See Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23, 55–74 (2018) (tracking the use of notice of jurisdiction in minimum contacts analysis).

198. There were, of course, many other cases where this argument failed to carry the day. See *Vanier v. Ponsoldt*, 833 P.2d 949, 959 (Kan. 1992); *DMARC 2006-CD2 Indian Sch., LLC v. Bush Realty at Steele Park, LLC*, No. 1 CA-CV 14-0603, 2016 Ariz. App. Unpub. LEXIS 1557, at *13 (Dec. 13, 2016); *Dynacorp Ltd. v. Aramtel Ltd.*, 56 A.3d 631, 678–79 (Md. Ct. Spec. App. 2012); *Adsit Co. v. Gustin*, 874 N.E.2d 1018, 1023 (Ind. Ct. App. 2007); *Jallali v. Nat'l Bd. of Osteopathic Med. Exam'rs, Inc.*, 908 N.E.2d 1168, 1173 (Ind. Ct. App. 2009); *Blue Bird, LLC v. Nolan*, No. 302920-V, 2009 Md. Cir. Ct. LEXIS 9, at *13–14 (Apr. 28, 2009).

anywhere.¹⁹⁹ In others, the court held that the clause was too inconspicuous to put the defendant on notice of its existence.²⁰⁰ One New Jersey court, for example, emphasized the adhesive nature of the contract in refusing to enforce the clause, finding that “[t]he lease agreement itself was a one page pre-printed form with type on the front and back. . . . The provisions were in fine print under a paragraph labeled ‘Miscellaneous,’ and were never called to defendant’s attention or explained to him.”²⁰¹ The court also found that the enforcing party “made no showing whatsoever that defendant was actually aware or made aware of the significance of the consent to jurisdiction clause,” and it would thus be unjust to enforce the clause against him.²⁰²

In still other cases, courts have held that the clause was invalid because the parties were unaware of the clause or because the clause was only

199. *See, e.g.*, *Falk & Fish, L.L.P. v. Pinkston’s Lawnmower & Equip., Inc.*, 317 S.W.3d 523, 525, 530 (Tex. App. 2010) (“Because the forum selection clause was not clear on its face and required interpretation to give meaning to the language of the provision, we conclude PLE did not consent to personal jurisdiction in Dallas, Texas.”); *see also* *Swindle v. Gen. Motors Acceptance Corp.*, 1984-NMCA-019, ¶ 20, 101 N.M. 126, 129, 679 P.2d 268, 271 (“While it is true that a party may agree in advance to submit to the jurisdiction of the courts of a certain state, such an agreement must be ‘deliberately and understandingly made, and language relied upon to constitute such a waiver must clearly, unequivocally and unambiguously express a waiver of this right.’ No such waiver appears in either the contract notice provisions, which are required by federal regulation, or in the language of indemnity.” (quoting *Telephonic, Inc. v. Rosenblum*, 1975-NMSC-067, ¶ 19, 88 N.M. 532, 537, 543 P.2d 825, 830)); *Telephonic*, 1975-NMSC-067 at ¶ 19, 88 N.M. 532 at 537, 543 P.2d at 830 (“[A] contractual agreement by a nonresident of this State, [stating] that the contract ‘shall be governed by the laws of New Mexico’ and that the nonresident is ‘transacting business within New Mexico’ by entering into the contract, is not sufficiently definite, or so unequivocal upon the issue of submission to the jurisdiction of our courts, to constitute an effective waiver of the constitutional right of due process with respect to the right to be sued in a forum wherein in personam jurisdiction may clearly and properly be obtained in accordance with traditional notions of fair play and substantial justice.”); *Lindsey v. Trinity Commc’ns, Inc.*, 275 S.W.3d 411, 416–17 (Tenn. 2009) (“The trial court found that Texas Mutual consented to personal jurisdiction in Tennessee based on a provision in Broadband’s coverage contract that states, ‘Jurisdiction over [insured] is jurisdiction over us for purposes of workers’ compensation law. . . .’ It is undisputed that the trial court had jurisdiction over Broadband, Texas Mutual’s insured. We are unpersuaded, however, that this provision shows Texas Mutual’s consent to jurisdiction in Tennessee.”).

200. *See, e.g.*, *Bell Atl. Tricon Leasing Corp. v. Johnnie’s Garbage Serv., Inc.*, 439 S.E.2d 221, 224–25 (N.C. Ct. App. 1994) (“Considering all of these factors, we find that defendant did not knowingly and intelligently consent to the jurisdiction of the New Jersey courts.”); *see also* *Frontier Leasing Corp. v. Shah*, 2007 PA Super 225, ¶ 17, 931 A.2d 676, 682; *Tandy Comput. Leasing v. Terina’s Pizza, Inc.*, 784 P.2d 7, 8 (Nev. 1989); *Sec. Credit Leasing, Inc. v. D.J.’s of Salisbury, Inc.*, 537 S.E.2d 227, 232 (N.C. Ct. App. 2000). A few states have enacted legislation that imposes a “conspicuousness” requirement on forum selection clauses. *See, e.g.*, IND. CODE § 15-15-6-9 (2021) (“The forum selection provision of a seed contract must be printed conspicuously in immediate proximity to the space reserved for the signature of the farmer.”).

201. *Bell Atl. Tricon Leasing Corp.*, 439 S.E.2d at 224–25.

202. *Id.* at 225.

discoverable by following a long string of references and cross-references in an extremely long contract.²⁰³ In each of these cases, the courts held the defendant had failed to knowingly consent to jurisdiction in the chosen forum and that the exercise of personal jurisdiction would therefore be unreasonable or unfair.²⁰⁴

b. Lack of Specificity

The courts have also sometimes declined to enforce consent-to-jurisdiction clauses where the clause does not name a particular state as the jurisdiction in which litigation may proceed.²⁰⁵ In one case, the court refused to uphold a clause whereby the parties consented to jurisdiction in the “applicable jurisdiction” without further specifying where that jurisdiction was.²⁰⁶ In another case, the court refused to uphold a clause consenting to jurisdiction in “Pasadena, California Small Claims Court” because the chosen forum did not exist.²⁰⁷ In still another case, the court refused to uphold a clause whereby the parties agreed to litigate their dispute “in seller’s county and state of choice.”²⁰⁸ Such a clause was invalid, the court held, because it did not “tie the selection of a forum to any mutable and identifiable fact, only to the whim of the [drafter’s] choice.”²⁰⁹ A different court declined to give effect to a clause giving the drafter “the option of pursuing any action under this agreement in any court of competent jurisdiction and the customer . . . consents to jurisdiction in the state of our choice.”²¹⁰ The court concluded that the clause was “unreasonable and

203. *Ins. Co. of the W. v. Smith*, No. D047717, 2007 Cal. App. Unpub. LEXIS 1942, at *13 (Mar. 9, 2007) (unaware); *Paul Ryan Assocs. v. Dorvin D. Leis Co.*, No. A134235, 2013 Cal. App. Unpub. LEXIS 3062, at *29–36 (Apr. 30, 2013) (cross-references).

204. It is worth noting here that courts also sometimes refuse to enforce *outbound* clauses for lack of notice. This issue arises in the outbound context in three scenarios: on cruise ship tickets, in online contracts, and in contracts where the clause was extremely inconspicuous. *See* Coyle & Richardson, *supra* note 3 (manuscript at 49–52).

205. For cases where the court rejected a challenge to the specificity of the clause, see *Wildcat Mins., LLC v. Superior Silica Sands, LLC*, No. 15CV32123, 2016 Colo. Dist. LEXIS 1886, at *6 (Mar. 23, 2016); *DeLage Landen Fin. Servs., Inc. v. Leighton K. Lee L. Off.*, No. A-3148-10T2, 2011 N.J. Super. Unpub. LEXIS 3059, at *11 (App. Div. Dec. 19, 2011).

206. *Hunt v. Superior Ct.*, 97 Cal. Rptr. 2d 215, 219–20 (Ct. App. 2000); *see also* *May v. Figgins*, 607 P.2d 1132, 1138 (Mont. 1980) (refusing to enforce a clause calling for litigation to proceed in “a proper county”).

207. *Aviation Publ’g Corp. v. Morgan*, 12th Dist. Warren No. CA2017-12-169, 2018-Ohio-3224, at ¶ 14.

208. *Lopez v. United Cap. Fund, LLC*, 88 So. 3d 421, 423, 426 (Fla. Dist. Ct. App. 2012).

209. *Id.* at 425–26.

210. *Cent. Ohio Graphics, Inc. v. Alco Cap. Res., Inc.*, 472 S.E.2d 2, 3 (Ga. Ct. App. 1996).

unjust” because it was “overbroad and so lacking in specificity that it fails to provide any indicia of the parties’ intent.”²¹¹

On the other hand, courts routinely enforce so-called “service of suit” clauses in insurance contracts. In the typical service of suit clause, the insurance company agrees to “submit to the jurisdiction of a Court of competent jurisdiction within the United States.”²¹² State courts have held that such clauses operate to confer personal jurisdiction.²¹³ At first glance, this pattern of practice is surprising because these clauses would seem to exhibit many of the same deficiencies as the clauses above. In particular, service of suit clauses (1) do not specify a particular forum and (2) consent to jurisdiction in *any* state where the policyholder wishes to bring suit. The most likely explanation for this disparity is that such clauses are less objectionable when the stronger contracting party—the insurance company—voluntarily consents to jurisdiction wherever the weaker contracting party—the insured—wishes to sue. The fact that the service of suit clause was originally developed by Lloyd’s of London, an insurance market based in the United Kingdom, “as a response to competitor’s arguments that Lloyd’s was not amenable to process in the United States and that the potential customer should therefore place its business with a domestic company that was subject to service of process” may also help to explain the courts’ willingness to enforce these provisions.²¹⁴ It is also worth noting that insurance companies are unlikely to challenge the validity of a provision that they themselves put into their contracts as a way of attracting customers.

c. Floating Clauses

Another scenario where courts sometimes refuse to enforce clauses involves a so-called “floating” forum selection clause. A floating forum

211. *Id.* at 4.

212. *See* *Buto v. Sirius Int’l Ins. Co.*, 807 So. 2d 674, 675 (Fla. Dist. Ct. App. 2001).

213. *See, e.g.,* *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 948 A.2d 1285, 1287 (N.J. 2008) (“We hold that a service of suit clause is an agreement by the insurer to do what is necessary to submit to personal jurisdiction in the court in which the insured has chosen to file a coverage dispute.”); *Ace Ins. Co. v. Zurich Am. Ins. Co.*, 59 S.W.3d 424, 429 (Tex. App. 2001). Although the courts recognize that service of suit clauses may confer personal jurisdiction on a court, the courts still reserve the right to dismiss such suits on the grounds of *forum non conveniens*. *See* *W.R. Grace & Co. v. Hartford Accident & Indem. Co.*, 555 N.E.2d 214, 220–22 (Mass. 1990); *Ace Ins. Co.*, 59 S.W.3d at 427; *Cannelton Indus., Inc. v. Aetna Cas. & Sur. Co. of Am.*, 460 S.E.2d 1, 17–18 (W. Va. 1994); *Brooke Grp. Ltd. v. JCH Syndicate* 488, 663 N.E.2d 635, 638 (N.Y. 1996); *Whirlpool Corp. v. Certain Underwriters at Lloyd’s London*, 662 N.E.2d 467, 472 (Ill. App. Ct. 1996).

214. *Price v. Brown Grp., Inc.*, 619 N.Y.S.2d 414, 417 (App. Div. 1994) (citing *Appalachian Ins. Co. v. Superior Ct.*, 208 Cal. Rptr. 627, 629–30 (Ct. App. 1984)); *see also* 7 DANIEL W. GERBER ET AL., *NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION* § 80.03 (2020).

selection clause is a clause that names a specific forum but acknowledges that the choice may change at some point in the future. A typical floating clause reads:

This 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 . . . and all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within that State²¹⁵

Under the terms of this clause, the forum is initially fixed in the state where the lessor's principal offices are located. If the contract is assigned to a third party, however, or if the lessor's office changes location, the chosen forum will change to that state instead.

Clauses with very similar language to the one quoted above were litigated in state and federal courts across the United States over a fifteen-year period beginning in 1996.²¹⁶ In many instances, the courts upheld these clauses as valid.²¹⁷ In other cases, however, the courts refused to enforce them. In 2000, for example, the New Jersey Court of Appeals refused to enforce a floating clause because "a prospective lessee cannot identify the jurisdiction in which an action will be brought."²¹⁸ Since the clause failed to provide proper notice to the defendant as to the forum in which he was consenting to suit, it was deemed "unfair and unreasonable."²¹⁹ In 2011, the Ohio Court of Appeals invalidated a similar clause 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."²²⁰ In each case, the court held that the lack of proper notice as to the identity of the chosen forum meant that the

215. Preferred Cap., Inc. v. Power Eng'g Grp., Inc., 112 Ohio St. 3d 429, 2007-Ohio-257, 860 N.E.2d 741, at ¶ 2.

216. See Paul Hartman Cross & Hubert Oxford, IV, "Floating" Forum Selection and Choice of Law Clauses, 48 S. TEX. L. REV. 125, 135-53 (2006).

217. For cases where courts enforced floating forum selection clauses notwithstanding insufficient notice challenges, see, for example, OFC Cap. v. Colonial Distribs., Inc., 648 S.E.2d 140 (Ga. Ct. App. 2007); OFC Cap. v. Schmidtlein Elec., Inc., 656 S.E.2d 272, 273-74 (Ga. Ct. App. 2008); Pro. Sols. Fin. Servs. v. Richard Yeager & Assocs., D.D.S., P.A., 722 S.E.2d 212 (N.C. Ct. App. 2012) (unpublished table decision); Susquehanna Patriot Com. Leasing Co. v. Holper Indus., Inc., 2007 PA Super 173, ¶ 13, 928 A.2d 278, 283.

218. Copelco Cap., Inc. v. Shapiro, 750 A.2d 773, 775 (N.J. Super. Ct. App. Div. 2000).

219. *Id.* at 776.

220. Nat'l City Com. Cap. Corp. v. Bullard, 12th Dist. Butler No. CA2010-10-276, 2011-Ohio-5780, at ¶ 25; see also Preferred Cap., Inc. v. Check Mate Priority Servs., 8th Dist. Cuyahoga No. 89894, 2008-Ohio-2657, at ¶¶ 7-9; Nat'l City Com. Cap. Corp. v. S & S Overseas, Inc., No. CV2004-08-2545, 2010 Ohio Misc. LEXIS 22524, at *7 (C.P. Sept. 24, 2010).

clause did not provide a valid basis for the exercise of personal jurisdiction over the defendant.

2. Inconvenience

The second category where inbound forum selection clauses sometimes go unenforced relates to the convenience of the chosen forum for the litigants. The courts apply two different standards to resolve this question. The first derives from *The Bremen*. The second derives from the Model Choice of Forum Act.

In *The Bremen*, the U.S. Supreme Court held that a forum selection clause should not be enforced if “trial in the contractual forum will be so gravely difficult and inconvenient that [the party challenging the clause] will for all practical purposes be deprived of his day in court.”²²¹ This is a stringent standard. In our review of state cases, we identified just a single instance where a court invoked this standard and then went on to invalidate a clause partly on the basis of inconvenience.²²² Apart from this one case, we were unable to identify any state cases where the court applied the high standard for inconvenience set forth in *The Bremen* to invalidate a clause. This finding suggests that, as a practical matter, the standard is so demanding that it will virtually never be satisfied.

The statutory test set forth in the Model Choice of Forum Act provides that a court should refuse to enforce an inbound clause where the chosen forum is not a “reasonably convenient place for the trial of the action.”²²³ This standard is less demanding than the standard set forth in *The Bremen*. It is one thing to show that a forum is not “reasonably convenient.” It is quite another to show that litigation in the chosen forum is “so gravely difficult and inconvenient that [the challenger] will for all practical purposes be deprived

221. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972).

222. See *InVentiv Health Commc'ns, Inc. v. Rodden*, 2018-Ohio-945, 108 N.E.3d 605, at ¶¶ 35–36 (1st Dist.). In the two other cases where the court expressly cited convenience as a factor in declining to enforce a clause, it did not reference the *Bremen* standard. See *Fairfield Lease Corp. v. Liberty Temple Universal Church of Christ, Inc.*, 535 A.2d 563, 566–67 (N.J. Super. Ct. Law Div. 1987); see also *Pennhurst Med. Grp. v. Johnson*, 29 Pa. D. & C.4th 475, 480 (C.P. 1995). In cases where the courts did reference the *Bremen* standard, they virtually always enforced the clause against an inconvenience argument. For cases where courts enforced these clauses notwithstanding an inconvenience argument, see, for example, *Morgan Bank v. Wilson*, 794 P.2d 959, 963 (Ariz. Ct. App. 1990); *SD Leasing, Inc. v. Al Spain & Assocs.*, 640 S.W.2d 451, 452 (Ark. 1982); *Juch-Tech v. Bentley-Walker, Ltd.*, No. HHDCV136045600S, 2014 Conn. Super. LEXIS 1227, at *7 (May 16, 2014); *Carlyle Inv. Mgmt. L.L.C. v. Nat'l Indus. Grp. Holding*, No. 5527-CS, 2012 Del. Ch. LEXIS 238, at *22–24 (Oct. 11, 2012), *aff'd*, 67 A.3d 373 (Del. 2013).

223. MODEL CHOICE OF FORUM ACT, *supra* note 112, at 294.

of his day in court.”²²⁴ Unsurprisingly, the preponderance of cases where the courts have refused to enforce consent-to-jurisdiction clauses on the grounds that the chosen forum is inconvenient come from cases where the judge was applying the Model Act.²²⁵

3. Lack of Connection to Chosen Jurisdiction

A third reason why state courts occasionally refuse to enforce consent-to-jurisdiction clauses is that neither the parties nor the transaction have any connection to the chosen forum.²²⁶ While this argument carried the day in a few cases, it proved unavailing in many others.²²⁷

One example of a case where this argument was successful is *Kaser USA, LLC v. Seabreeze Trading Corp.*, which was decided by the Vermont Supreme Court in 2012.²²⁸ In that case, the contracting parties had agreed “that the courts of [Kaser]’s place of business shall have non-exclusive jurisdiction to settle any dispute arising out this Agreement.”²²⁹ At the time the contract was executed, Kaser was headquartered in Vermont.²³⁰ In the years between signing and the onset of litigation, however, all of Kaser’s

224. *The Bremen*, 407 U.S. at 18.

225. See *Banc of Am. Leasing & Cap., LLC v. Bortolotti Constr., Inc.*, No. 119309, 2011 Mass. Super. LEXIS 365, at *8 (Jan. 13, 2011) (applying Michigan law); *Lease Acceptance Corp. v. Abel*, 767 N.W.2d 656, 657 (Mich. 2009); *Applied Underwriters, Inc. v. O’Connell Landscape Maint., Inc.*, No. A-18-709, 2019 Neb. App. LEXIS 317, at *4–5 (Oct. 22, 2019); *Applied Underwriters Inc. v. Dinyari Inc.*, No. A-07-058, 2008 Neb. App. LEXIS 101, at *15 (May 20, 2008); *Applied Underwriters Captive Risk Assurance Co. v. E.M. Pizza, Inc.*, 923 N.W.2d 789, 800 (Neb. Ct. App. 2019); *Woodmen of World Life Ins. Soc’y v. Puccio*, 499 N.W.2d 85, 88 (Neb. Ct. App. 1993). In Nebraska, the courts put the burden on the *plaintiff* to show that the chosen forum is reasonably convenient. See *Dinyari Inc.*, 2008 Neb. App. LEXIS 101, at *8. In other states, the burden is on the *defendant* to show that the chosen forum is not reasonably convenient. This difference helps to explain why there are so many cases in Nebraska where the courts refused to enforce a clause on the basis of convenience.

226. See *Lectric’s & Inc. v. Power Controls, Inc.*, No. 94-2564, 1995 Mass. Super. LEXIS 476, at *7 (Feb. 24, 1995) (concluding that “the lack of contacts between the present dispute and the selected forum renders the forum selection clause in this case ‘unreasonable’ and unenforceable”); *Econ. Steel Bldg. Techs., LLC v. E. W. Constr., Inc.*, No. S19C-07-040, 2020 Del. Super. LEXIS 169, at *7 (Apr. 14, 2020) (“Where the parties do business in California, sign the Agreements in California, and perform the Agreements in California, neither choice of law nor forum selection principles permit litigation of a dispute arising therefrom in Delaware.”).

227. See *U.S. Tr. Co. v. Bohart*, 495 A.2d 1034, 1040 (Conn. 1985); *Desarrollo Inmobiliario y Negocios Industriales de Alta Tecnologia de Hermosillo, S.A. de C.V. v. Kader Holdings Co.*, 276 P.3d 1, 6–7 (Ariz. Ct. App. 2012); *Lux Tan, Inc. v. Jk Prods. & Servs., Inc.*, 2013 Ark. App. 275, at 2–3, 2013 Ark. App. LEXIS 290, at *2–4.

228. *Kaser USA, LLC v. Seabreeze Trading Corp.*, No. 11-261, 2012 Vt. Unpub. LEXIS 4 (Jan. 26, 2012) (unpublished table decision).

229. *Id.* at *2.

230. *Id.* at *1.

assets were transferred to another state.²³¹ When Kaser subsequently sued its counterparty in Vermont state court, it argued that the clause provided a valid basis for the assertion of personal jurisdiction.²³² The Vermont Supreme Court disagreed.²³³ It observed that “any connection between this litigation and this state ceased when Kaser . . . was administratively dissolved and its interests were assigned to another company.”²³⁴ The court further observed that “[u]nder these circumstances, Vermont has become essentially alien to this dispute—all connections that may have existed when the agreement was negotiated having been extinguished through unanticipated changes.”²³⁵ Since the chosen forum lacked any ongoing connection to the parties, the court concluded that a consent-to-jurisdiction clause selecting that forum was unenforceable.²³⁶

An example of a case where this argument was unsuccessful is *Retail Investors, Inc. v. Henzlik Investment Co.*²³⁷ In that case, parties domiciled or headquartered outside of North Carolina all agreed to adjudicate any disputes relating to the lease of property located in a Florida shopping center in the “state or federal courts in North Carolina.”²³⁸ When suit was initiated in North Carolina, the defendants argued that the clause was unenforceable because neither the parties nor the transaction had any connection to North Carolina.²³⁹ The court disagreed. It reasoned that “the parties were fully aware, at the time the contract was made, that the transaction was unrelated to North Carolina and that the parties had no substantial relationship with North Carolina.”²⁴⁰ The court then went on to conclude that “the basis of the defendants’ claim of unreasonableness and unfairness was within the original contemplation of the parties and cannot now be used to support an argument that the consent to jurisdiction provision is unreasonable or unfair.”²⁴¹

231. *Id.* at *2.

232. *Id.* at *3.

233. *Id.* at *4.

234. *Id.*

235. *Id.*

236. *Id.* The outcome in *Kaser* notwithstanding, there were other cases in our dataset where the courts enforced inbound clauses even though the parties and the transaction lacked any meaningful connection to the chosen forum. See *Pirs Cap. LLC v. Wilkins*, No. 655764/2019, slip op. at 4 (N.Y. Sup. Ct. June 4, 2020) (enforcing inbound clause even though parties and transaction had no other connection to New York); *Desarrollo Inmobiliario y Negocios Industriales de Alta Tecnologia de Hermosillo, S.A. de C.V. v. Kader Holdings Co.*, 276 P.3d 1, 6–7 (Ariz. Ct. App. 2012) (enforcing inbound clause even though parties and transaction had no other connection to Arizona).

237. *Retail Invs., Inc. v. Henzlik Inv. Co.*, 439 S.E.2d 196, 198 (1994).

238. *Id.* at 197–98.

239. *Id.* at 198.

240. *Id.*

241. *Id.*

4. Public Policy

The final basis upon which the courts sometimes refuse to enforce inbound clauses is public policy.²⁴² At first blush, the use of public policy as a basis for non-enforcement may seem straightforward. When a state legislature passes a statute invalidating consent-to-jurisdiction clauses in certain types of contracts, the courts in that state must decline to enforce the clause on public policy grounds. These are easy cases. The harder cases arise when the statute invalidating the clause was enacted by a legislature in a *different* state, i.e., the state where the defendant is domiciled. Should the court hearing the case give effect to the public policy of a different state? Or should the court's public policy analysis begin and end with the statute enacted by the legislature of the state in which it sits?

The courts have answered these questions in different ways. Some courts classify the question of whether a forum selection clause is enforceable as procedural for choice-of-law purposes.²⁴³ These courts will always apply the law of the forum to decide whether to enforce a clause and consequently will not consider the public policy of other states. Other states classify the question of whether a clause is enforceable as substantive for choice-of-law purposes.²⁴⁴ These states will conduct a choice-of-law analysis to determine which state's law should be applied to the enforceability question.²⁴⁵ If that

242. For a sampling of cases where the court rejected the defendant's argument that a clause was invalid on public policy grounds, see *Desarrollo Inmobiliario y Negocios Industriales de Alta Tecnologia de Hermosillo, S.A. de C.V. v. Kader Holdings Co.*, 276 P.3d 1, 6–7 (Ariz. Ct. App. 2012); *Bvcibc Funding v. La Jolla Texaco*, No. 2001-1584-C, 2001 Mass. Super. LEXIS 488, at *9–10 (Sept. 26, 2001); *Tri-State Bldg. Specialties, Inc. v. NCI Bldg. Sys., L.P.*, 184 S.W.3d 242, 249 (Tex. App. 2005).

243. *See, e.g.*, *Carson v. Obor Holding Co.*, 734 S.E.2d 477, 480–81 (Ga. Ct. App. 2012) (“Because forum selection clauses involve procedural and not substantive rights, we apply Georgia law to determine the enforceability of the clause here, even though it contains a choice of law provision requiring that the laws of Florida shall govern.”); *Golden Palm Hosp., Inc. v. Stearns Bank Nat'l Ass'n*, 874 So. 2d 1231, 1235 (Fla. Dist. Ct. App. 2004) (“[I]t is generally appropriate for a court in Florida, as a procedural issue, to determine the validity and enforceability of a forum selection clause despite a choice of law provision in the agreement.”). *See generally* Symeon C. Symeonides, *What Law Governs Forum Selection Clauses*, 78 LA. L. REV. 1119, 1124–25 (2018) (“A review of cases in which the action was filed in a court chosen in the [forum selection] clause has not revealed any instances in which the court undertook a choice-of-law inquiry in determining the enforceability of the clause.”).

244. *See, e.g.*, *Dancor Constr., Inc. v. FXR Constr., Inc.*, 2016 IL App (2nd) 150839, ¶¶ 69–83, 64 N.E.3d 796, 811–15 (conducting a choice-of-law analysis and applying New York public policy notwithstanding choice-of-law clause selecting Illinois); *Gen. Med. of La., P.C. v. Singletary*, No. 340298, 2019 Mich. App. LEXIS 240, at *6–17 (Feb. 12, 2019) (conducting a choice-of-law analysis and applying Louisiana public policy notwithstanding choice-of-law clauses selecting Michigan).

245. *See Dancor Constr.*, 2016 IL App (2nd) 150839, ¶¶ 69–83, 64 N.E.3d at 811–15.

analysis calls for the application of the law of another state, then the courts may apply that state's public policy to invalidate the clause.²⁴⁶

Somewhat surprisingly, there were no “easy” cases in our dataset. There were no cases, in other words, where a court cited local public policy to invalidate an inbound clause. This is surprising because, as we discussed in Part II, nearly every state has enacted at least some statutory restrictions on the use of inbound forum selection clauses. There were, however, several “hard” cases where the court cited the public policy of a different state in invalidating an inbound clause. One of these cases was *Dancor Construction, Inc. v. FXR Construction, Inc.*²⁴⁷ In that case, two construction companies had entered into an agreement relating to a construction project in New York.²⁴⁸ This agreement contained a clause specifying that any claims were to be litigated in Illinois under Illinois law.²⁴⁹ When one company sued the other in Illinois, the defendant argued that the consent-to-jurisdiction clause was contrary to New York public policy.²⁵⁰ The defendant cited a New York statute invalidating any forum selection clause written into a contract for a construction project in New York.²⁵¹ The question presented to the Illinois Court of Appeals was whether a forum selection clause consenting to jurisdiction in Illinois should be invalidated on the basis of a New York statute when the contract contained a choice-of-law clause selecting Illinois law.²⁵²

In answering this question, the court first concluded that the choice-of-law clause was invalid because the “application of Illinois law would be contrary to a fundamental New York policy, and New York has a materially greater interest than Illinois in the determination of this issue.”²⁵³ Having disposed of the choice-of-law clause, the court then conducted a choice-of-law analysis and concluded that New York law should be applied.²⁵⁴ It next noted that the New York statute specifically invalidated forum selection clauses in contracts for construction projects in New York.²⁵⁵ Accordingly, the court concluded that the clause was unenforceable and dismissed the case.²⁵⁶

246. *See id.*

247. *Id.*

248. *Id.* ¶ 1, 64 N.E.3d at 799.

249. *Id.* ¶ 7, 64 N.E.3d at 800.

250. *Id.* ¶ 10, 64 N.E.3d at 800–01.

251. *Id.* ¶ 25, 64 N.E.3d at 802–03.

252. *See id.* ¶ 67, 64 N.E.3d at 811.

253. *Id.* ¶¶ 76–78, 64 N.E.3d at 813–14.

254. *Id.* ¶¶ 69–83, 64 N.E.3d at 811–15.

255. *Id.* ¶¶ 78–80, 64 N.E.3d at 814.

256. *Id.* ¶ 91, 64 N.E.3d at 816.

While unusual, the outcome in this case is not without precedent. There are at least three other recent instances where state courts invoked similar reasoning to invalidate an inbound clause.²⁵⁷ It is important to note, however, that this particular path to invalidation is not available in every state. As noted above, a number of states classify the question of whether a forum selection clause is enforceable as procedural for choice-of-law purposes.²⁵⁸ In these states, there is no reason for the court to conduct a choice-of-law analysis and hence no basis for invalidating a clause on the basis of a statute enacted by another state.²⁵⁹ Instead, the courts in these states will look exclusively to the statutes enacted by their own legislature to determine whether an inbound clause is void on public policy grounds.

V. PROPOSALS FOR REFORM

In the preceding Parts, we reviewed the constitutional framework for evaluating whether the enforcement of inbound clauses offends due process. We surveyed state case law and state statutes that explain when such clauses should and should not be enforced. And we looked at the actual practice of state courts and how these doctrinal rules are applied in practice. With the insights derived from this descriptive account in mind, we now turn to the normative question of how the existing regime might be improved.

In this Part, we advance three proposals for reform keyed to specific issues raised by inbound clauses. First, we argue that it is unreasonable to enforce consent-to-jurisdiction clauses written into contracts of adhesion against unsophisticated actors. Second, we argue that it is unreasonable to enforce such clauses when the effect is to allow the drafter to change the forum after the contract is signed. Third, we argue that the *Bremen* standard for refusing to enforce a clause on the grounds of inconvenience is too high. In advancing each of these arguments, we do not argue that they are *constitutionally* mandated. In our view, the relevant Supreme Court precedents relating to jurisdiction by express consent foreclose such an argument. Instead, we argue that each of these proposals represents *good policy*. If the states were to adopt

257. See *Focus Fin. Partners, LLC v. Holsopple*, 241 A.3d 784, 821–22 (Del. Ch. 2020); *Gen. Med. of La., P.C. v. Singletary*, No. 340298, 2019 Mich. App. LEXIS 240, at *6–17 (Feb. 12, 2019); *Adex Int'l, Inc. v. Ross*, No. 2015-015409 CA 01, 2015 Fla. Cir. LEXIS 44935, at *1–2 (Nov. 11, 2015). There is also at least one federal case that has invalidated a clause on this basis, though that court appears to have subsequently had second thoughts. See *Salesforce.com, Inc. v. GEA, Inc.*, 462 F. Supp. 3d 1004 (N.D. Cal. 2020).

258. See sources cited *supra* note 243.

259. See sources cited *supra* note 243.

these reforms, in other words, the rules relating to consent jurisdiction would operate in a more transparent, more predictable, and more equitable manner.

A. Adhesion Contracts + Unsophisticated Parties

A contract of adhesion is an agreement that is “drafted unilaterally by the dominant party and then presented on a take it or leave it basis to the weaker party, who has no real opportunity to bargain about its terms.”²⁶⁰ More than fifty years ago, several Justices on the U.S. Supreme Court expressed concerns about the propriety of enforcing contractual cousins to consent-to-jurisdiction clauses when written into contracts of adhesion.²⁶¹ That critique, distilled to its essence, is that it is unfair to enforce a contract provision that requires the weaker party to travel thousands of miles to defend himself in a lawsuit brought by the stronger party when the provision appears in a take-it-or-leave-it agreement drafted by the stronger party.²⁶²

The force of this critique is amplified when the party against whom the clause is deployed is a consumer, an employee, or a similarly unsophisticated party.²⁶³ Such parties rarely read the boilerplate language in the contracts they sign. Even if they were to read the contract from start to finish, moreover, it is unlikely that individuals without legal training would fully appreciate the significance of a provision by which they consent to jurisdiction in another state. This conclusion holds with particular force with respect to internet contracts. In one experiment, researchers found that 98% of study participants agreed to terms and conditions in an online contract whereby they consented to *give away their first-born child*.²⁶⁴ Another study found that only one or two of every 1,000 retail online shoppers access the license agreement when purchasing items online.²⁶⁵ All of this raises the question of whether courts should enforce inbound clauses written into contracts of adhesion against consumers, employees, and similarly unsophisticated parties.

260. *Adhesion contract*, BALLANTINE’S LAW DICTIONARY (3d ed. 2010).

261. *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 327 (1964) (Black, J., dissenting); *see id.* at 315 (majority opinion).

262. *Id.* at 328–29.

263. In advancing this argument, we do not mean to suggest that forum selection clauses are somehow more objectionable than other troubling provisions that sometimes appear in contracts of adhesion. We simply note that forum selection clauses create unique problems that may be productively addressed by relatively minor doctrinal tweaks that build on existing case law.

264. Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, 23 INFO. COMM’N & SOC’Y 128 (2020).

265. Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 3 (2014).

To be sure, the U.S. Supreme Court held in *Carnival Cruise* that forum selection clauses are presumptively enforceable in consumer contracts.²⁶⁶ There are, however, two reasons why the states can and should ignore *Carnival Cruise* in this context. First, the case was decided by the Supreme Court in its exercise of admiralty jurisdiction.²⁶⁷ It does not bind the states as a matter of common law. The states are therefore free to ignore it in non-admiralty cases. Second, the issue before the Court in *Carnival Cruise* concerned the enforceability of an *outbound* clause. The Court was asked to decide whether a clause required a cruise ship passenger domiciled in Washington to bring her claim against the cruise company in Florida.²⁶⁸ The Court did not consider the question of whether the clause would allow the cruise company to sue the consumer in Florida. If that issue had been presented to the Court, we believe that *Carnival Cruise* would have been decided differently. It is one thing to force a consumer to cross the country to *sue* a large corporation. It is quite another to force a consumer to cross the country to *defend* a suit brought by a large corporation.

If *Carnival Cruise* can be safely disregarded, then there is no compelling argument for enforcing consent-to-jurisdiction clauses in contracts of adhesion against the unsophisticated. It is profoundly unfair to allow large companies to use such provisions to force consumers to consent to jurisdiction in the company's home jurisdiction. This moral intuition has led a number of states to enact laws that expressly invalidate consent-to-jurisdiction clauses in consumer leases and consumer credit agreements.²⁶⁹ In Europe, it has led to the adoption of EU Council Regulation 44/2001, which provides that a consumer, an employee, or an insured may only be sued in the country where she is domiciled.²⁷⁰ A comprehensive review of the scholarship on this topic has uncovered no academic support—none—for the proposition that consent-to-jurisdiction clauses in contracts of adhesion should be regularly enforced against consumers and employees.²⁷¹

And yet. In collecting the cases for our dataset, we came across several cases where such clauses were enforced in precisely these circumstances. In *Adsit Co. v. Gustin*, an Indiana court asserted personal jurisdiction over a Texas resident on the basis of an inbound clause notwithstanding the fact that:

266. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991).

267. *Id.* at 590.

268. *Id.* at 587–88.

269. *See supra* notes 174–175; *see also supra* text accompanying notes 201–204 (explaining the intersection of adhesive contracts and notice).

270. Council Regulation 44/2001, arts. 12, 15–21, 2000 O.J. (L 12) 5–7 (EC); *see also* Scott Dodson, *Personal Jurisdiction in Comparative Context*, 68 AM. J. COMPAR. L. (forthcoming 2021) (comparing U.S. practice to European practice).

271. *See Purcell, Jr., supra* note 9, at 425–26.

(1) the defendant was a consumer, (2) the transaction in question was for only \$1,100, (3) the clause was contained in a contract of adhesion, (4) the contract was concluded through the internet, and (5) neither the plaintiff nor the defendant had any connection to Indiana.²⁷² In *Whelan Security Co. v. Allen*, a Missouri court asserted personal jurisdiction over a Texas resident on the basis of an inbound clause in a non-competition agreement even though: (1) the defendant was an employee of the plaintiff who lived and worked exclusively in Texas, (2) the defendant had no contacts with Missouri apart from the clause, (3) the defendant was forced to sign the employment agreement under threat of dismissal, (4) the defendant was not compensated for signing the agreement, and (5) the agreement was presented to the defendant on a take-it-or-leave-it basis.²⁷³

While *Adsit* and *Whelan* represent the most egregious cases, they are emblematic of other instances where the state courts seem to have collapsed the inquiry into what is *permissible* under the Due Process Clause with the inquiry into what is *reasonable* as a matter of sound policy. The states are not required to assert personal jurisdiction over out-of-state defendants to the fullest extent permitted under the Due Process Clause. As discussed above, a number of states—including Florida, Michigan, Nebraska, Minnesota, New Hampshire, North Dakota, Ohio, and Utah—have chosen to impose limits on the enforcement of such provisions that are more restrictive than those allowed by due process. Other states have passed legislation specifically addressing this issue in consumer contracts. More states should take advantage of this freedom to adopt a bright-line rule that consent-to-jurisdiction clauses written into contracts of adhesion are not enforceable against consumers and employees.

In addition, the courts should generally decline to enforce these clauses in adhesion contracts when the defendant is a so-called “mom-and-pop”

272. *Adsit Co. v. Gustin*, 874 N.E.2d 1018, 1021–24 (Ind. Ct. App. 2007) (“Under these circumstances, we find that [the defendant] had reasonable notice of and manifested assent to the clickwrap agreement containing the forum selection clause. We also find that the contract was not an impermissible contract of adhesion because she was capable of understanding its terms, consented to them, and could have rejected the agreement with impunity. Finally, we note that [the defendant] was not deprived of her day in court, inasmuch as she . . . retained counsel, requested and obtained permission to participate telephonically in hearings, and did, in fact, participate telephonically. Given these facts, we find that the forum selection clause contained in [the plaintiff’s] clickwrap agreement was valid, enforceable, and binding In sum, we find that the trial court properly exercised personal jurisdiction over [the defendant].”). *But see* *Tandy Comput. Leasing v. Terina’s Pizza, Inc.*, 784 P.2d 7, 8 (Nev. 1989) (“It is unrealistic for a consumer to expect to defend himself in Texas under these facts.”).

273. *Whelan Sec. Co. v. Allen*, 26 S.W.3d 592, 594–95 (Mo. Ct. App. 2000).

business.²⁷⁴ To date, state courts have generally declined to draw a distinction between these small businesses and Fortune 500 corporations in evaluating whether an inbound clause should be enforced.²⁷⁵ As one court explained: “If both parties are for-profit, commercial entities, the relative size or sophistication of the parties is not a material factor.”²⁷⁶ Part of this reluctance seems to stem from the perceived difficulties of distinguishing between “sophisticated” and “unsophisticated” small businesses. As another court put it: “[W]e are not inclined to fashion [some] type of business-sophistication standard out of nebulous factors like small, newly minted businesses or a lack of expertise concerning the particular equipment or service leased.”²⁷⁷

While these concerns are entirely reasonable, we believe that it is possible to craft a rule that balances the status of such entities as for-profit businesses with the reality that the proprietors of many such businesses are basically indistinguishable from ordinary consumers. We argue that inbound forum selection clauses should be presumptively unenforceable as against (1) sole proprietorships, and (2) business entities that employ two or fewer people and have just a single owner who is a natural person. In these cases, the business is functionally indistinguishable from the person who owns it. This strengthens the case for treating the businesses in the same manner as an owner who engaged in a transaction in his or her own name. The rule is easy to administer and does not require the courts to fashion a nebulous standard tied to business sophistication or expertise. And it functions as a rebuttable presumption; if the plaintiff presents compelling evidence that it would be inappropriate to treat a business that satisfies the above criteria as a consumer, then the court may weigh that evidence in deciding whether the presumption has been rebutted.

274. See Stephen J. Ware, *Mandatory Arbitration: Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 193–97 (2004) (“If the Due Process Clause does require knowing consent, then this requirement has frequently gone unmet in consent-to-jurisdiction cases between businesses. Again, business people, like consumers, routinely sign form contracts without reading them, so it is simply not true that the line between business and consumer parties is the line between knowing and unknowing consent.”).

275. See *Preferred Cap., Inc. v. Power Eng’g Grp., Inc.*, 112 Ohio St. 3d 429, 2007-Ohio-257, 860 N.E.2d 741, at ¶ 8 (“‘Commercial forum-selection clauses between for-profit business entities are prima facie valid. . . . By contrast, in Ohio, forum-selection clauses are less readily enforceable against consumers.’ Appellants argue that they are ‘mom and pop’ or small businesses and should not be considered sophisticated commercial entities. We reject that argument.” (quoting *Info. Leasing Corp. v. Jaskot*, 151 Ohio App. 3d 546, 2003-Ohio-566, 784 N.E.2d 1192, at ¶ 13)).

276. *Id.*

277. *IFC Credit Corp. v. Rieker Shoe Corp.*, 881 N.E.2d 382, 394 (Ill. App. Ct. 2007).

While we acknowledge that a rule that excludes for-profit businesses altogether would be simpler to administer, our review of the cases turned up a number of cases where inbound clauses were enforced against small business owners in situations that struck us as deeply unfair.²⁷⁸ In virtually all of these cases, a rule for businesses along the lines proposed above would have resulted in the clause being deemed unenforceable. The application of this rule would, importantly, not have left the plaintiffs in these cases without a remedy. It would have merely required each plaintiff to bring suit in the small business's home jurisdiction. In cases involving sole proprietorships and mom-and-pop shops, this outcome is far more equitable than the current rule that treats such enterprises in precisely the same manner as Fortune 500 companies.²⁷⁹

B. Notice

In its decisions relating to the enforceability of inbound clauses, the Supreme Court has never had to grapple with the issue of notice.²⁸⁰ As a result, there has evolved a wide range of practices among the state courts with respect to this issue. As we explained in Part IV, some state courts currently refuse to enforce inbound clauses when the weaker party had no notice of the clause.²⁸¹ In this Section, we urge other states to follow this example and to decline to enforce inbound clauses in cases where the defendant was never given proper notice as to where exactly he was consenting to be sued.

We begin with what we believe to be a relatively uncontroversial proposition—that the primary purpose of a forum selection clause is to provide certainty as to where disputes arising out of the transaction may be

278. *See, e.g.*, *Frontier Leasing Corp. v. Hunt*, No. COA09-275, 2010 N.C. App. LEXIS 1272, at *7 (July 20, 2010).

279. When the contract provision in question is an arbitration clause rather than a forum selection clause, the states are far more constrained in their ability to fashion enforcement rules that protect consumers, employees, and small businesses due to the preemptive effect of the Federal Arbitration Act. *See Dr.'s Assocs., Inc. v. Stuart*, 85 F.3d 975, 979 (2d Cir. 1996) (“When a party agrees ‘to arbitrate in [a state], where the [Federal Arbitration Act] makes such agreements specifically enforceable, [that party] must be deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in [that state]. To hold otherwise would be to render the arbitration clause a nullity.’” (alterations in original) (quoting *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 363 (2d Cir. 1964))); *DePuy Synthes Sales, Inc. v. OrthoLA, Inc.*, 403 F. Supp. 3d 690, 704 (S.D. Ind. 2019) (“[T]he Court finds that . . . because the parties agreed to arbitrate any claims or controversies in Indianapolis, Indiana, this Court has personal jurisdiction over the action to compel said arbitration.”).

280. *Cf. Effron, supra* note 197, at 47 (arguing that in the pre-minimum-contacts era, the Court used nascent notice-of-jurisdiction concepts to bolster the argument that consent to the forum formed a constitutionally valid basis for personal jurisdiction).

281. *See supra* Part IV.C.1.

litigated. It follows logically from this proposition that a clause should not be enforced if a person cannot identify this jurisdiction at the time the contract is executed. A clause should only be given effect when the chosen forum is identifiable to the non-drafting party at the time of signing and that party may reasonably anticipate being sued in that particular place. We first explore how this argument plays out in the context of a clause that does not name a state. We then discuss how it operates in the context of a clause that names more than one state as the chosen jurisdiction.

1. Specificity

In most instances, a forum selection clause will choose the courts of a specific state, e.g., the courts of New York. Occasionally, however, the clause will not reference a state by name. Instead, it may provide that disputes must be resolved in the courts in the state where the drafter's "principal place of business is located." The latter type of clause is generally enforceable, in our view, when the other party is able to identify the chosen state with minimal effort. To illustrate how this rule might operate in practice, consider the following clause:

This Lease shall be governed by the laws of the state in which the Building is located, and all legal action arising from this Lease shall be tried in the county where the Building is located.²⁸²

Since real property is by definition non-movable, the identity of the chosen jurisdiction may be ascertained with minimal effort by the non-drafting party. Accordingly, such a clause should generally be enforced. Other clauses present slightly more difficult cases:

Any actions, claims or suits (whether in law or equity) arising out of or relating to this Contract, or the alleged breach thereof, shall be brought only in courts located *in the State where Seller's principal place of business is located*.²⁸³

282. *In re Morice*, No. 01-11-00541-CV, 2011 Tex. App. LEXIS 7504, at *1 (Sept. 15, 2011).

283. *Shelter Sys. Grp. Corp. v. Lanni Builders, Inc.*, 622 A.2d 1345, 1346–47 (N.J. Super. Ct. App. Div. 1993) (emphasis added) ("It is clear, however, that defendants were in possession of facts that should have alerted them that New Jersey was involved. For example, defendants executed a credit application and guarantee on plaintiff's letterhead, which showed addresses for five offices. The first one listed was the New Jersey location. The remaining four were in other states, and they all related to differently named local subsidiaries or divisions of plaintiff. No one who merely glanced at the letterhead would be surprised to find that plaintiff's principal place of

Unlike a piece of real property, the seller's principal place of business is movable. It may also be more difficult to identify. Nevertheless, clauses drafted in this manner should generally be enforced because the contract counterparty will typically be able to identify the chosen jurisdiction with minimal effort. However, if the seller should *move* its principal place of business to a new jurisdiction after the contract is signed, the clause is not enforceable with respect to the new jurisdiction. To enforce the clause under such circumstances is to allow the seller to unilaterally change the place where the buyer has consented to jurisdiction after the fact, an act that undermines the certainty that forum selection clauses are intended to provide.

A version of this issue arises in the context of a floating forum selection clause. A typical floating clause provides:

This 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 the Rentor, the State in which the assignee's principal offices are located* . . . and all legal actions relating to this Lease shall be venued exclusively in the state or federal court located within that State.²⁸⁴

In applying our proposed approach to this agreement, we argue that the lessee is subject to personal jurisdiction in the place where the lessor's principal place of business is located at the time the contract is signed. The lessor is not, however, subject to personal jurisdiction in the state of any assignee because there is no way for the lessor to identify this jurisdiction at the time of the signing.²⁸⁵ This inability to know precisely where one is consenting to jurisdiction dooms the clause under the second scenario.

A more extreme version of this issue is presented by a clause whereby the counterparty consents to jurisdiction in "any state chosen by the drafter" or

business was in New Jersey."); *see also* Danka Funding, L.L.C. v. Page, Scramton, Sprouse, Tucker & Ford, P.C., 21 F. Supp. 2d 465, 472 (D.N.J. 1998) ("[W]here a forum-selection clause professing consent to jurisdiction in the state where a party's or its assignee's principal place of business lies is part of an agreement in a sophisticated business transaction, and one party to the agreement is a law firm, the forum-selection clause is valid absent fraud, serious inconvenience, or a violation of public policy, notwithstanding that the law firm was unaware of the assignee's principal place of business at the time of signing the agreement.").

284. John C. Kilgannon, *NorVergence Maelstrom Rolls On: Floating Forum Clause Invalidated as Unreasonable*, LJM'S EQUIP. LEASING NEWSL. (ALM Media, New York, N.Y.), May 2007, at 1 (alteration in original) (emphasis added), http://www.stevenslee.com/files/Resources/Articles/JCK_LJM_0507.pdf [https://perma.cc/SJ7Y-G3B5].

285. *See, e.g.*, Preferred Cap., Inc. v. Power Eng'g Grp., Inc., 112 Ohio St. 3d 429, 2007-Ohio-257, 860 N.E.2d 741, at ¶12 ("[W]e hold 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.").

in drafter's "county and state of choice."²⁸⁶ Such clauses are similarly unenforceable under our approach because they do not identify any state where litigation must occur. Instead, such a clause gives the contract drafter the unilateral power to sue its counterparty wherever it wants. Such a clause provides no certainty as to where litigation must occur at the time the contract is signed. The chosen jurisdiction is not identifiable to the non-drafting party at the time of signing such that that party may reasonably anticipate being sued in that particular place. Accordingly, clauses drafted in this manner should not be enforced by the courts.

2. Numerosity

Most forum selection clauses choose just a single jurisdiction. A few clauses, however, expressly contemplate the possibility that suit could be brought in one of several places.²⁸⁷ Perhaps the most common version of such a clause is one stating that in the event of litigation, the seller promises to sue the buyer in the buyer's home jurisdiction, and the buyer agrees to sue the seller in the seller's home jurisdiction. The effect of such a clause is to ensure that the defendant will have a home court advantage no matter where the suit is brought. Such clauses are enforceable because they provide each party with a reasonable degree of certainty as to where any litigation may occur.

There are, however, other clauses selecting multiple jurisdictions that present more difficult issues. Consider the following provision:

Guarantor consents to the jurisdiction of any state or federal court located in California *or in any other state where Lessor has an office*.²⁸⁸

If the Lessor is a nationwide company, then the clause calls for the Guarantor to consent to jurisdiction in each of the fifty states. Such a clause is unreasonable because there is no way for the Guarantor to reasonably

286. *Lopez v. United Cap. Fund, LLC*, 88 So. 3d 421, 425–26 (Fla. Dist. Ct. App. 2012); *see also Cent. Ohio Graphics, Inc. v. Alco Cap. Res., Inc.*, 472 S.E.2d 2, 3 (Ga. Ct. App. 1996) (holding a forum selection clause authorizing the lessor to pursue "any action under this agreement in any court of competent jurisdiction" unenforceable due to its broadness and lack of specificity).

287. *See, e.g., Warren Env't, Inc. v. Source One Env't, Ltd.*, No. 18-11513, 2020 U.S. Dist. LEXIS 124580, at *4 (D. Mass. July 15, 2020) ("The Parties agree to submit to the exclusive jurisdiction of the Courts of the United States of America or the Courts of England, whichever is relevant as noted above, in regards to any claim or matter arising under or in connection with this agreement.").

288. *Parrot-Ice Drink Prods. of Am., Ltd. v. K & G Stores, Inc.*, No. 14-09-00008-CV, 2010 Tex. App. LEXIS 2345, at *2 (Mar. 30, 2010) (emphasis added).

anticipate being sued in any particular place.²⁸⁹ Under our proposed approach, the Guarantor would be subject to personal jurisdiction in California because that state is specifically named in the clause. If the Guarantor dealt with a specific office operated by Lessor, then it would also be subject to personal jurisdiction in the state where the office is located. The Guarantor would not, however, be subject to personal jurisdiction in any *other* state where the Lessor may have an office.²⁹⁰ To hold otherwise would be contrary to the central purpose of forum selection clauses, i.e., to provide certainty ex ante as to where any litigation will occur ex post.

We are generally of the view that any clause by which a particular party consents to more than two jurisdictions is presumptively unenforceable because it fails to provide proper notice to the defendant as to where exactly he is consenting to suit. There is, however, an important exception to this general rule. This exception is the service of suit clause that is routinely written into insurance contracts.

3. Service of Suit Clauses

A service of suit clause is a contract provision whereby an insurance company consents to jurisdiction in any state where the insured wishes to bring suit.²⁹¹ A typical clause provides:

289. *Preferred Cap., Inc.*, 112 Ohio St. 3d 429, 2007-Ohio-257, 860 N.E.2d. 741, at ¶12 (“It is one thing for a contract to include a waiver of personal jurisdiction and an agreement to litigate in a foreign jurisdiction. It is quite another to contract to litigate the same contract in any number of different jurisdictions, located virtually anywhere.”).

290. *IFC Credit Corp. v. Aliano Brothers Gen. Contractors, Inc.*, 437 F.3d 606, 612 (7th Cir. 2006) (“Aliano argues that to be ‘clear and specific’ the forum selection clause must name the state in which the suit must be brought. The district judge agreed, as have the other first-instance judges who have held the clause invalid. But the argument ignores the fact that naming names is not the only method of dispelling ambiguity. Aliano’s lawyer acknowledged at argument that if the contract had said that suit could be brought in New York or Vermont, or in a federal district court in the First Circuit, or in a federal district court in either the First or Second Circuit, or in any state that George W. Bush carried in the 2004 presidential election, the forum selection clause would be valid because it would be clear and specific. Yet in none of those hypothetical cases would Aliano have known when it signed the contract with NorVergence where suit would be brought against it. The purpose of requiring that a forum selection clause be ‘clear and specific’ is to head off disputes over where the forum selection clause directs that the suit be brought. There was no possibility of such a dispute here, because the forum selection clause designates the state of suit unequivocally: it is the headquarters state of either NorVergence or, if the contract has been assigned, of the assignee.”).

291. Pieter Van Tol, *Service of Suit Clauses: Do They Also Dictate the Applicable Law in Reinsurance Disputes?*, ARIAS•U.S. Q., June 16, 2017, at 16, https://www.hoganlovells.com/~media/hogan-lovells/pdf/2017/2017_june_service_of_suit_clause_article.pdf [<https://perma.cc/D85N-MJUM>].

It is agreed that in the event of the failure of the Underwriters to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States.²⁹²

A service of suit clause does not consent to jurisdiction in a specific place. Instead, the insurer agrees to consent to the jurisdiction of any court of competent jurisdiction in the United States.²⁹³ This formulation presents significant concerns from both a specificity and numerosity perspective, as discussed above. Ultimately, however, we believe that it is enforceable because the party drafting the contract—the insurance company—is the only one who is consenting to jurisdiction. Our concerns about specificity and numerosity are felt more acutely when such clauses are used as weapons against the non-drafting party. We also derive comfort from the fact that such clauses are frequently used by foreign insurance companies who would, absent the clause, be subject to jurisdiction nowhere in the United States and who write these clauses into their agreements to attract business from U.S. customers. In these unique circumstances, we believe the equities cut in favor of allowing insureds to utilize service of suit clauses to assert personal jurisdiction over the insurance companies.²⁹⁴

C. Inconvenience

The existing doctrine relating to inconvenience is difficult to defend. Most state courts follow the test laid down in *The Bremen* and hold that a clause is unenforceable only when “trial in the contractual forum will be so gravely

292. *Ace Ins. Co. v. Zurich Am. Ins. Co.*, 59 S.W.3d 424, 426 (Tex. App. 2001).

293. If a service of suit clause is deemed enforceable, the tricky question is whether the insurance company can move to dismiss a case filed pursuant to a service of suit clause on the grounds of *forum non conveniens*. Our general view, as discussed above, is that the existence of a valid consent-to-jurisdiction clause is a factor to consider in a motion to dismiss on *forum non conveniens* grounds but is not dispositive. If the insured were to sue the insurance company in a court of competent jurisdiction with no connection to either party, for example, the court should have the discretion to dismiss on *forum non conveniens* if the facts warrant.

294. In evaluating whether an insurance company that has agreed to a service of suit clause may subsequently seek dismissal or transfer on the basis of *forum non conveniens* or 28 U.S.C. § 1404, the court should apply the usual rules of contract interpretation to determine whether the clause is exclusive or non-exclusive. *See Brooke Grp. Ltd. v. JCH Syndicate* 488, 663 N.E.2d 635, 638 (1996). In evaluating whether an insurance company that has agreed to a service of suit clause may subsequently seek to remove to federal court or to remand to state court, the court should apply the usual rules of contract interpretation to determine whether the defendant has waived its right to remove or to remand. *See Southland Oil Co. v. Miss. Ins. Guar. Ass’n*, 182 F. App’x 358, 361 (5th Cir. 2006).

difficult and inconvenient that [the party challenging the clause] will for all practical purposes be deprived of his day in court.”²⁹⁵ As discussed above, this standard sets the bar so high that only one defendant has managed to convince a court that an inbound clause should be invalidated solely on this basis in the past fifty years. The fact that the standard was originally articulated in the context of a case involving the enforcement of an outbound clause helps to explain this outcome. If a *plaintiff* must file a suit in a distant court on the basis of an outbound clause, it is conceivable that this requirement may lead him to abandon the suit altogether, thereby “depriving” him of his day in court. If a *defendant* must defend a suit in a distant court on the basis of an inbound clause, then that defendant is going to have his day in court whether he wants it or not. He may either appear and defend the suit or stay away and accept a default judgment. To apply the “deprived of his day in court” standard to evaluate the enforceability of an inbound clause, therefore, is to try to fit a square peg into a round hole.

In theory, one could address this problem by adopting a less demanding standard. The courts could, for example, apply the “reasonably convenient” standard set forth in the Model Act as part of their inquiry into whether the clause is enforceable.²⁹⁶ Under this approach, a court would import its regular test for *forum non conveniens* into the enforcement inquiry. The problem with this approach, however, is that it is more complicated than it needs to be. There is no need to “import” the doctrine of *forum non conveniens* into the enforcement inquiry when that doctrine is perfectly capable of resolving the question on its own.

In our view, a better approach is for the courts to simply eliminate convenience as a factor to be considered as part of the enforcement inquiry. Under our proposed approach, a court would first consider whether it has personal jurisdiction over the defendant without evaluating whether the chosen forum is a convenient one. If the court answers this question in the affirmative, it would then proceed to evaluate whether the case should nevertheless be dismissed on the basis of *forum non conveniens*.²⁹⁷ This

295. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972).

296. MODEL CHOICE OF FORUM ACT, *supra* note 112, at 294.

297. *See* 3H Enters. v. Bennett, 276 A.D.2d 965, 996 (N.Y. App. Div. 2000) (“In the instant matter, the parties’ controversy has no substantial nexus with New York. The property securing the note and purchase money mortgage is located in Florida and the agreement was completely executed in that State. All the parties and witnesses, with the exception of plaintiff’s president, are located in Florida. Significantly, both defendants are senior citizens who suffer from health problems which make it difficult and inadvisable to travel. In order to facilitate jurisdiction in Florida, they have agreed to admit to service of the complaint and stipulate to procedural matters. Enforcement of the forum selection provision would be unreasonable under the particular

approach is, in our view, far more intellectually coherent than the current approach. There is no compelling reason to incorporate the *forum non conveniens* inquiry into the test of whether an inbound forum selection clause is enforceable in the first place.

This proposal naturally raises the question of what role, if any, the existence of a valid inbound forum selection clause should play in a *forum non conveniens* inquiry. Some states take the position that an exclusive consent-to-jurisdiction clause operates as a waiver of the defendant's right to argue for dismissal on the basis of *forum non conveniens*.²⁹⁸ Other states reserve the right to dismiss a case on *forum non conveniens* even when they have personal jurisdiction over the defendant on the basis of a valid forum selection clause.²⁹⁹ We believe the latter position is the sounder one. While

circumstances presented and, in light of the substantial contacts with Florida, we cannot say that Supreme Court abused its discretion in granting defendants' motion.”).

298. See, e.g., *Telemundo Network Grp., LLC v. Azteca Int'l Corp.*, 957 So. 2d 705, 713–14 (Fla. Dist. Ct. App. 2007) (“Where a defendant has contractually agreed to a specific forum and waived the right to object to it, a court may not dismiss claims against that defendant on forum non conveniens grounds.”); *Paradise Enters., Ltd. v. Sapir*, 811 A.2d 516, 523 (N.J. Super. Ct. App. Div. 2002) (“Settled principles of New Jersey law with respect to forum selection agreements provide adequate protection for private and public interests, so that where such an agreement exists it is unnecessary to rely on forum non conveniens doctrine.”); *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 234 (Tex. 2008) (“By entering into an agreement with a forum-selection clause, the parties effectively represent to each other that the agreed forum is not so inconvenient that enforcing the clause will deprive either party of its day in court, whether for cost or other reasons.”); *Hogan v. McAndrew*, 131 A.3d 717, 726 (R.I. 2016) (“[A]n enforceable forum-selection clause . . . settles the proper venue for the case and prevents ‘a party that has agreed to be bound . . . [from] assert[ing] *forum non conveniens* as a ground for dismissing a suit brought in the chosen forum.’” (alterations in original) (quoting *Sidell v. Sidell*, 18 A.3d 499, 507 (R.I. 2011))).

299. See, e.g., *Life of Am. Ins. Co. v. Baker-Lowe-Fox Ins. Mktg., Inc.*, 873 S.W.2d 537, 539 (Ark. 1994) (“We have been cited to no authority which holds that forum selection . . . clauses control the *forum non conveniens* doctrine.”); *Appalachian Ins. Co. v. Superior Ct.*, 208 Cal. Rptr. 627, 635 (Ct. App. 1984) (“The principle that the doctrine of forum non conveniens protects the public interest as well as that of the litigants is paramount in our determination that the forum selection clause in this contract does not preclude the application of the doctrine of forum non conveniens.”); *Bongo Int'l, LLC v. Bernstein*, No. CV136038740S, 2013 Conn. Super. LEXIS 2942, at *15–16 (Dec. 20, 2013) (“[T]he court finds that despite the strong presumption of allowing a plaintiff to proceed in its chosen forum, and despite the existence of a forum selection clause that validly confers personal jurisdiction over the defendants, the court will exercise its discretion and apply the doctrine of forum non conveniens.”); *Oxford Glob. Res., LLC v. Hernandez*, 106 N.E.3d 556, 568 (Mass. 2018) (“Even if the forum selection provision had specifically included language waiving *any* objection to the choice of forum, we would not construe that contractual provision to deprive a defendant of his or her ability to move to dismiss on the ground of forum non conveniens.”); *Home S&L Co. v. Leslie*, No. 11CVH05-5965, 2011 Ohio Misc. LEXIS 2010, at *5–6 (C.P. Aug. 10, 2011) (“[T]he only [] tie that this case has to Franklin County is that the guarantee signed by Harold contains a forum selection clause listing

an exclusive inbound forum selection clause should *generally* result in the case being heard in the chosen forum, the courts should have the flexibility to decide whether dismissal on the basis of *forum non conveniens* is warranted on a particular set of facts. A *per se* rule that the existence of a clause always precludes dismissal on the basis of *forum non conveniens* is undesirable because it disregards public interest factors that may bear on the issue of whether dismissal is appropriate.

D. Implementation

There are a number of different ways by which the reform proposals set forth above could be implemented. Each possibility is discussed below.

1. State Implementation

First, and most simply, state courts could rely on the common-law-making process to give effect to our proposed reforms. The best model for such an approach is Utah. In 2000, the Utah Supreme Court stated that it would henceforth apply a “rational nexus” test to determine whether to enforce an inbound clause.³⁰⁰ The court was careful to state that this was *not* a test grounded in state or federal due process.³⁰¹ It was merely a prudential, common-law rule that sought to ensure that Utah courts would not be required to adjudicate cases with no connection to Utah on the basis of a consent-to-jurisdiction clause.³⁰²

Franklin County as a forum for suit. While Ohio courts will not normally go against such clauses, this is one case where it is warranted. In light of all the factors listed above, the Court must grant Defendant’s motion.”); *Package Express Ctr., Inc. v. Snider Foods, Inc.*, 788 S.W.2d 561, 562 (Tenn. Ct. App. 1989) (dismissing suit based upon the doctrine of *forum non conveniens* even though the contract contained a clause consenting to jurisdiction in Tennessee); *Quanta Comput. Inc. v. Japan Commc’ns Inc.*, 230 Cal. Rptr. 3d 334, 336 (Ct. App. 2018) (concluding that the trial court did not abuse its discretion in dismissing a suit on the basis of *forum non conveniens* notwithstanding forum selection clause naming California).

300. *Phone Directories Co. v. Henderson*, 2000 UT 64, ¶ 14, 8 P.3d 256, 261.

301. *Id.* (“Although the rational nexus element does require *some* connection between Utah and either the parties to or the actions contemplated by the contract, *it need not rise to the level required under* [the long-arm statute].” (second emphasis added)); *see also id.* at 262–63 (Wilkins, J., concurring).

302. It is worth noting that the Utah long-arm statute—like Florida’s—does not refer to any state or constitutional due process standard. Instead, that statute contains a list of enumerated acts that may give rise to personal jurisdiction in Utah. *See* UTAH CODE ANN. § 78B-3-205 (West 2021).

Alternatively, state courts could interpret their state's long-arm statute to limit the scope of consent jurisdiction.³⁰³ The best model for such an approach is Florida. In 1987, the Florida Supreme Court held that since the state's long-arm statute made no mention of consent, it violated due process for the state's courts to rely solely on a consent-to-jurisdiction clause as the basis for asserting personal jurisdiction over an out-of-state defendant.³⁰⁴

Still another option is for state courts to interpret the due process clause in their state constitution to limit the scope of consent jurisdiction.³⁰⁵ To date, it does not appear that any state has chosen this path.³⁰⁶ There is, however, no federal constitutional barrier to their doing so. So long as the limits placed on the ability to assert personal jurisdiction on the basis of consent do not exceed the limits of the Due Process Clause of the Fourteenth Amendment, the states are free to do what they want so long as they comply with state law. If a court were to base its decision on the due process clause in the state constitution, moreover, the state legislature would not be able to override the court's decision by enacting a statute proposing a more expansive view of consent jurisdiction.

Finally, state legislatures could enact a long-arm statute for consent jurisdiction.³⁰⁷ This statute could incorporate the best elements of the Model Choice of Forum Act and the various proposals outlined above to craft a modern instrument that balances the rights and interests of plaintiffs and defendants. As discussed above, a number of states have already enacted statutes that limit the enforceability of consent-to-jurisdiction clauses when

303. There are three different types of state long-arm statutes. The first sets forth a list of enumerated acts that may give rise to personal jurisdiction in the state. *See, e.g.*, COLO. REV. STAT. § 13-1-124 (2021). The second provides that the courts may assert jurisdiction on any basis not inconsistent with the state constitution or the federal constitution. *See, e.g.*, NEV. REV. STAT. § 14.065 (2021). The third provides that the courts of the state may assert jurisdiction on any basis not inconsistent with the federal constitution. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (Deering 2021). Interpreting the state long-arm statute to limit the scope of consent jurisdiction is most easily done with respect to the first type, particularly when consent is not listed as one of the enumerated acts. It appears that the only state whose long-arm statute specifically mentions consent as a basis for jurisdiction is Oregon's. *See* OR. REV. STAT. § 110.518 (2021).

304. *McRae v. J.D./M.D., Inc.*, 511 So. 2d 540, 543–44 (Fla. 1987).

305. Interpreting the due process clause in the state constitution is most easily justified with respect to the first and second types of state long-arm statutes.

306. *See* Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 618 n.295 (2007) ("[D]espite the willingness of many state courts to offer greater constitutional protections under their own state constitutions, not one has employed a state constitutional provision to provide additional limitations on the jurisdictional reach of its courts.").

307. *Cf.* Rhodes & Robertson, *supra* note 17, at 437 (urging states to adopt a "modernized jurisdictional-consent statute that works in tandem with other constitutional protections" that would allow courts to assert personal jurisdiction over out-of-state persons where the litigants are not party to an agreement containing a consent-to-jurisdiction clause).

written into certain types of consumer contracts. Under this implementation method, the states would enact a statute that addressed the enforceability of such clauses in a wider range of contract types and situations.

2. Federal Implementation

If the states are unwilling or unable to carry out the proposed reforms, these reforms could also be implemented by federal actors. Congress could enact a federal statute that establishes a uniform set of rules for consent jurisdiction across the United States. The enactment of a federal statute would obviate the need to persuade fifty different state legislatures to enact such legislation. So far as we are aware, there is no historical precedent for a federal statute specifically addressing the issue of consent jurisdiction. However, Congress has on occasion enacted “mandatory” venue provisions that require suits to be brought in certain jurisdictions and nowhere else.³⁰⁸ These statutes could serve as models for future legislation to limit the enforceability of inbound forum selection clauses.

Alternatively, the U.S. Supreme Court could revisit its earlier decisions on consent jurisdiction and take a stricter view of what is permissible under the Due Process Clause. The Court could, for example, hold that it is inconsistent with due process to use a consent-to-jurisdiction clause written into a contract of adhesion to obtain personal jurisdiction over consumers and other unsophisticated parties. Given the current composition of the Court, we do not view this outcome as particularly likely. In principle, however, the Court has the power to transform the policy recommendations set forth above into rules required under the Due Process Clause.

3. Private Implementation

Last but not least, several of the reforms set forth above could be realized if private actors chose to redraft the forum selection clauses in their standard-form contracts. As things currently stand, some companies require their consumers to consent to jurisdiction where the company is

308. See *Dabecca Nat. Foods, Inc. v. RD Trucking, LLC*, No. 14 C 6100, 2015 U.S. Dist. LEXIS 65680, at *19 (N.D. Ill. May 20, 2015) (“[T]he court finds that the Carmack Amendment’s special venue provision, 49 U.S.C. § 14706(d), means that the forum selection clause is not enforceable.”); *Asset Grp. v. Corrugated Erectors*, No. CIV-14-0435-F, 2015 U.S. Dist. LEXIS 198881, at *19 (W.D. Okla. Apr. 15, 2015) (declining to transfer on the basis of the Miller Act’s venue provision); see also 15 U.S.C. § 1692i.

headquartered.³⁰⁹ Other companies merely require their customers to *sue* them in the jurisdiction. The forum selection clause in American Airlines' terms and conditions, for example, states that “*any lawsuit brought by you related to your access to, dealings with, or use of the [website] must be brought in the state or federal courts of Tarrant County, Texas.*”³¹⁰ This clause requires plaintiffs to bring suit against American Airlines in Texas. It does not, however, give American Airlines the power to sue their customers who lack any connection to Texas in that state.³¹¹ If courts and legislatures prove unwilling to implement the reforms outlined above, therefore, there is the possibility that private actors may take it upon themselves to modify their contracts to achieve some of these ends as a way of generating goodwill.

VI. IMPLICATIONS FOR FEDERAL PRACTICE

Up to this point, we have focused almost exclusively on state law and state doctrine. It is worth asking, however, if implementing the reforms outlined above at the state level would have any impact on federal practice. The answer, in a nutshell, is yes.

In diversity cases brought against U.S. defendants, the Federal Rules of Civil Procedure provide that a federal court may assert personal jurisdiction over an out-of-state defendant to the same extent as a state court of general jurisdiction where the federal court is located.³¹² A federal court must therefore apply state law to determine whether it has personal jurisdiction.³¹³ This rule explains why the federal district courts in Florida refuse to assert personal jurisdiction over defendants whose only contact with Florida is a

309. The forum selection clause in Verizon's terms and conditions, for example, states that “you and we agree to submit to the personal jurisdiction of the courts located within the county of New York, New York or the Southern District of New York.” *Verizon Media Terms of Service*, VERIZON, <https://www.verizonmedia.com/policies/us/en/verizonmedia/terms/otos/index.html> [<https://perma.cc/DDG6-RQ9D>] (Feb. 2021). This clause is formally reciprocal but one-sided in practice; Verizon is already subject to personal jurisdiction in New York because that is where it is headquartered. The purpose of the clause is to allow Verizon to force plaintiffs to sue it there *and* to initiate suits against counterparties there.

310. *Legal Information*, AM. AIRLINES (emphasis added), <https://www.aa.com/i18n/customer-service/support/legal-information.jsp> [<https://perma.cc/Q6F8-Q36E>].

311. See *Luxury Travel Source v. Am. Airlines, Inc.*, 276 S.W.3d 154, 165 (Tex. App. 2008).

312. FED. R. CIV. P. 4(k)(1)(A) (“Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”).

313. See *Matus v. Premium Nutraceuticals, LLC*, 715 F. App'x 662, 662 (9th Cir. 2018) (“We apply California law in conducting the personal jurisdiction analysis . . .”); *Ariel Invs., LLC v. Ariel Cap. Advisors LLC*, 881 F.3d 520, 521 (7th Cir. 2018) (“A plaintiff . . . must secure personal jurisdiction under state law.”).

consent-to-jurisdiction clause.³¹⁴ It explains why the federal courts in New York look to laws enacted by that state's legislature for guidance as to whether jurisdiction is proper.³¹⁵ It explains why the federal courts in Utah apply the rational nexus test.³¹⁶ And it explains why the federal courts in Michigan look to the Model Choice of Forum Act to determine the enforceability of an inbound clause.³¹⁷ Under the applicable rules, a federal district court sitting in diversity must look to state law—not federal law—to determine whether an inbound forum selection clause provides a valid basis for the exercise of personal jurisdiction over an out-of-state defendant. If the states were to adopt the reforms set forth above as a matter of state law, therefore, these changes would necessarily alter the jurisdictional reach of any federal district court sitting in that state.

In a number of cases, however, the federal courts have failed to recognize this fact. The confusion stems from a failure to recognize the difference between outbound and inbound forum selection clauses.³¹⁸ In *Stewart Organization, Inc. v. Ricoh Corp.*, the U.S. Supreme Court held—or at least strongly implied—that the enforceability of an *outbound* clause in a diversity action is procedural under *Erie* and hence governed by federal law.³¹⁹ The Court reasoned that the federal statute relating to change of venue—28 U.S.C. § 1404—controlled the issue of whether the court should give effect to an outbound clause and to transfer the case to another court, and that federal law preempted state law.³²⁰ When a federal court is called upon to enforce an *inbound* clause, however, 28 U.S.C. § 1404 is inapplicable. The defendant is not invoking the clause in an attempt to transfer the case to another court; rather, the defendant is arguing that the court named in the clause lacks personal jurisdiction. In the inbound context, therefore, the holding in *Ricoh*

314. See *Omega IM Grp., LLC v. Louidar, LLC*, No. 17-22141-CIV, 2018 U.S. Dist. LEXIS 26849, at *14 (S.D. Fla. Feb. 16, 2018).

315. See *GE Oil & Gas, LLC v. Turbine Generation Servs., LLC*, No. 18-CV-7555, 2019 U.S. Dist. LEXIS 76885, at *27 (S.D.N.Y. May 7, 2019).

316. See *Colt Builders Corp. v. Maille*, No. 2:18cv861, 2019 U.S. Dist. LEXIS 27752, at *8–9 (D. Utah Feb. 20, 2019).

317. See, e.g., *FCA US LLC v. Bullock*, No. 17-cv-13972, 2018 U.S. Dist. LEXIS 65692, at *7 (E.D. Mich. Apr. 19, 2018).

318. For cases where courts relied on outbound cases to hold that enforceability of an inbound clause is governed by federal law, see *Payment All. Int'l, Inc. v. Deaver*, No. 17-CV-693, 2018 U.S. Dist. LEXIS 16516, at *9 (W.D. Ky. Feb. 1, 2018); *De Lage Landen Fin. Servs., Inc. v. Rasa Floors, LP*, No. 08-00533, 2008 U.S. Dist. LEXIS 91427, at *15 (E.D. Pa. Nov. 4, 2008); *Microseismic, Inc. v. TRAC Charitable Remainder Tr.*, No. H-12-0118, 2012 U.S. Dist. LEXIS 101108, at *20 (S.D. Tex. July 20, 2012); *United Rentals (N. Am.), Inc. v. Myers*, No. 03cv589, 2003 U.S. Dist. LEXIS 25274, at *4 (D. Conn. May 22, 2003); *ACS Constr. Co. v. Chamberlin Co.*, No. 99CV18, 1999 U.S. Dist. LEXIS 13446, at *6 (N.D. Miss. July 28, 1999).

319. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28–29 (1988).

320. *Id.*

that federal law governs the enforceability of the forum selection clause is irrelevant. In the absence of any other rule on the subject, the Federal Rules of Civil Procedure direct federal courts to state law as developed by the state courts of general jurisdiction in the state in which they sit to determine whether the clause provides a valid basis for the assertion of personal jurisdiction over the defendant.³²¹

CONCLUSION

Historically, courts and commentators have only intermittently drawn a distinction between inbound and outbound forum selection clauses. At first blush, this decision seems sensible. Why develop separate analytical frameworks to analyze the exact same piece of contract language? In this Article, however, we sought to explain why this approach is misguided. We did so first by providing a comprehensive descriptive account of state doctrine and state practice as it relates to inbound clauses. We then drew upon this descriptive account to demonstrate that many of the problems with the doctrine of jurisdiction by express consent stem from a tendency on the part of judges to borrow rules blindly from cases where the enforceability of an outbound clause was at issue to resolve issues relating to inbound clauses.

We have also sought to untangle the complicated relationship between consent jurisdiction and the Due Process Clause of the Fourteenth Amendment. The fact that the U.S. Supreme Court has never squarely addressed the issue of when a consent-to-jurisdiction clause might violate the Due Process Clause means that the relationship between these two provisions has rarely been analyzed in significant detail. We shed useful light on this relationship and, in so doing, helped to distinguish constitutional arguments from arguments based on sound policy. It is difficult to read the Due Process Clause of the Fourteenth Amendment to impose meaningful restrictions on the states with respect to the enforceability of inbound clauses. This does not mean, however, that states should enforce all such clauses as a matter of sound policy. It simply means that the states have extraordinary freedom to develop the law in this area without worrying about whether their actions will run afoul of the Due Process Clause.

321. See *Alexander Proudfoot Co. World Headquarters L.P. v. Thayer*, 877 F.2d 912, 919 (11th Cir. 1989) (“Because the application of federal judge-made law here would encourage forum shopping and promote the inequitable administration of the laws, we must apply state law to decide the issue presented. We now examine the relevant issues of Florida law.”); see also James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 938–39 (1999). But see *Nw. Nat’l Ins. Co. v. Donovan*, 916 F.2d 372, 376 (7th Cir. 1990) (holding that federal law governs this issue).

Finally, we have shown that the current law of jurisdiction by express consent, at least in its current incarnation, is inequitable. It enables distant courts to assert personal jurisdiction over weaker contracting parties on the basis of inbound forum selection clauses. This state of affairs can and must change. As a matter of policy, the courts should stop enforcing inbound clauses against unsophisticated actors in contracts of adhesion. They should also stop enforcing inbound clauses when there is no way for the defendant to identify the chosen jurisdiction at the time of signing. Finally, they should stop enforcing inbound clauses when the chosen forum is not in a reasonably convenient location. Each of these reforms, if enacted, would make the body of law relating to jurisdiction by express consent in the United States fairer, more equitable, and more just.

APPENDIX**ALABAMA**

Consumer Lease – Ala. Code § 7-2A-106(2)

ALASKA

Consumer Lease – Alaska Stat. Ann. § 45.12.106(b)

Student Loan Contract – Alaska Stat. Ann. § 14.48.160(a)(2)

ARIZONA

Consumer Lease – Ariz. Rev. Stat. Ann. § 47-2A106(B)

ARKANSAS

Consumer Lease – Ark. Code Ann. § 4-2A-106(2)

CALIFORNIA

Consumer Lease – Cal. Com. Code § 10106(b)

Low Value Consumer Contracts – Cal. Civ. Proc. Code § 116.225

COLORADO

Consumer Lease – Colo. Rev. Stat. Ann. § 4-2.5-106(2)

Consumer Credit – Colo. Rev. Stat. Ann. § 5-1-201(8)(b)

Foreclosure – Colo. Rev. Stat. Ann. § 6-1-1106(1)(b)

CONNECTICUT

Consumer Lease – Conn. Gen. Stat. Ann. § 42a-2A-106(b)

DELAWARE

Consumer Lease – Del. Code Ann. tit. 6, § 2A-106(2)

Foreclosure – Del. Code Ann. tit. 6, § 2424B

FLORIDA

Consumer Lease – Fla. Stat. Ann. § 680.1061(2)

GEORGIA

Consumer Lease – Ga. Code Ann. § 11-2A-106(2)

HAWAII

Consumer Lease – Haw. Rev. Stat. Ann. § 490:2A-106(b)

Consumer Credit – Haw. Rev. Stat. Ann. § 476-30(f)(5)

IDAHO

Consumer Lease – Idaho Code Ann. § 28-12-106(2)

Consumer Credit – Idaho Code § 28-41-201(8)(b)

ILLINOIS

Consumer Lease – 810 Ill. Comp. Stat. Ann. 5/2A-106(2)

INDIANA

Consumer Lease – Ind. Code Ann. § 26-1-2.1-106(2)

Consumer Credit – Ind. Code Ann. § 24-4.5-1-201(6)(b)

IOWA

Consumer Lease – Iowa Code Ann. § 554.13106(2)

Consumer Credit – Iowa Code Ann. § 537.1201(6)(a)(5)

Motor Vehicle Franchise – Iowa Code Ann. § 322A.19(2)

KANSAS

Consumer Lease – Kan. Stat. Ann. § 84-2a-106(2)

Consumer Credit – Kan. Stat. Ann. § 16a-1-201(8)(b)

KENTUCKY

Consumer Lease – Ky. Rev. Stat. Ann. § 355.2A-106(2)

LOUISIANA

Lease of Movable Property – La. Stat. Ann. § 9:3303(F)(1)

Consumer Transaction – La. Stat. Ann. § 51:1418(C)

Consumer Credit – La. R.S. § 9:3511(C)(1)

MAINE

Consumer Lease – Me. Rev. Stat. tit. 11, § 2-1106(2)

Consumer Credit – Me. Rev. Stat. tit. 9-A, § 1-201(8)(B)

MARYLAND

Consumer Lease – Md. Code Ann., Com. Law § 2A-106(2)

Foreclosure – Md. Code Ann., Real Prop. § 7-310(b)

MASSACHUSETTS

Consumer Lease – Mass. Gen. Laws Ann. ch. 106, § 2A-106(2)

MICHIGAN

Consumer Lease – Mich. Comp. Laws Ann. § 440.2806(2)

MINNESOTA

Consumer Lease – Minn. Stat. Ann. § 336.2A-106(2)

MISSISSIPPI

Consumer Lease – Miss. Code. Ann. § 75-2A-106(2)

MISSOURI

Consumer Lease – Mo. Ann. Stat. § 400.2A-106(2)

Structured Settlement – Mo. Ann. Stat. § 407.1066(4)

MONTANA

Consumer Lease – Mont. Code Ann. § 30-2A-106(2)

NEBRASKA

Consumer Lease – Neb. Rev. Stat. Ann. U.C.C. § 2A-106(2)

Foreclosure – Neb. Rev. Stat. Ann. § 76-2715(2)

Student Loan Contract – Neb. Rev. Stat. Ann § 85-1645(2)

NEVADA

Consumer Lease – Nev. Rev. Stat. Ann. § 104A.2106(2)

Student Loan Contract – Nev. Rev. Stat. Ann. §
394.590(1)(b)

NEW HAMPSHIRE

Consumer Lease – N.H. Rev. Stat. Ann. § 382-A:2A-106(2)

NEW JERSEY

Consumer Lease – N.J. Stat. Ann. § 12A:2A-106(2)

NEW MEXICO

Consumer Lease – N.M. Stat. Ann. § 55-2A-106(2)

Foreclosure – N.M. Stat. Ann. § 47-15-5(G)(2)

NEW YORK

Consumer Lease – N.Y. U.C.C. Law § 2-A-106(2)

NORTH CAROLINA

Consumer Lease – N.C. Gen. Stat. Ann. § 25-2A-106(2)

NORTH DAKOTA

Consumer Lease – N.D. Cent. Code Ann. § 41-02.1-06(2)

OHIO

Consumer Lease – Ohio Rev. Code Ann. § 1310.04(B)

OKLAHOMA

Consumer Lease – Okla. Stat. tit. 12A, § 2A-106(2)

Consumer Credit – Okla. Stat. Ann. tit. 14A, § 1-201(9)(b)

Deferred Deposit Lending Agreement – 59 Okla. Stat. Ann. tit. § 3150.12(E)(1)(b)

OREGON

Consumer Lease – Or. Rev. Stat. Ann. § 72A.1060(2)

Foreclosure – Or. Rev. Stat. Ann. § 646A.710(2)(b)

PENNSYLVANIA

Consumer Lease – 13 Pa. Stat. and Cons. Stat. Ann. § 2A106(b)

RHODE ISLAND

Consumer Lease – 6A R.I. Gen. Laws Ann. § 6A-2.1-106(2)

SOUTH CAROLINA

Consumer Lease – S.C. Code Ann. § 36-2A-106(2)

Consumer Credit – S.C. Code Ann. § 37-1-201(10)(e)

SOUTH DAKOTA

Consumer Lease – S.D. Codified Laws § 57A-2A-106(2)

TENNESSEE

Consumer Lease – Tenn. Code Ann. § 47-2A-106(2)

Deferred Presentment Services Agreement – Tenn. Code Ann. § 45-17-112(s)(1)(B)

Student Loan Contract – Tenn. Code Ann. § 49-7-2015(a)(2)(B)

TEXAS

Consumer Lease – Tex. Bus. & Com. Code Ann. § 2A.106(b)

UTAH

Consumer Lease – Utah Code Ann. § 70A-2a-106(2)

VERMONT

Consumer Lease – Vt. Stat. Ann. tit. 9A, § 2A-106(2)

Credit Card Terminal Finance Lease – Vt. Stat. Ann. tit. 9, § 2482i(5)(A)

Agricultural Finance Lease – Vt. Stat. Ann. tit. 9, § 2389(b)

VIRGINIA

Consumer Lease – Va. Code Ann. § 8.2A-106(2)

WASHINGTON

Consumer Lease – Wash. Rev. Code Ann. § 62A.2A-106(2)

Student Loan Contract – Wash. Rev. Code Ann. § 28B.85.140(2); Wash. Rev. Code Ann. § 28C.10.170(2)

WEST VIRGINIA

Consumer Lease – W. Va. Code Ann. § 46-2A-106(2)

WISCONSIN

Consumer Lease – Wis. Stat. Ann. § 411.106(2)

Consumer Credit – Wis. Stat. Ann. § 421.201(10)(b)

WYOMING

Consumer Lease – Wyo. Stat. Ann. § 34.1-2.A-106(b)

Consumer Credit – Wyo. Stat. § 40-14-120(j)(ii)