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HANNAH L. BUXBAUM*

The Interpretation and Effect of Permissive Forum Selection Clauses Under U.S. Law†

INTRODUCTION

A forum selection clause is a form of contractual waiver. By this device, a contract party waives its rights to raise jurisdictional or venue objections if a lawsuit is initiated against it in the chosen court. (If the forum selection is *exclusive*, then that party also promises not to initiate litigation anywhere other than in the chosen forum.) The use of such a clause in a particular case may therefore raise a set of questions under contract law: Is the waiver valid? Was it procured by fraud, duress, or other unconscionable means? What is its scope? And so on.

Unlike most contractual waivers, however, a forum selection clause affects not only the private rights and obligations of the parties, but something of more public concern: the jurisdiction of a court to resolve a dispute. The enforcement of such a clause therefore raises an additional set of questions under procedural law. For instance, if the parties designate a court in a forum that is otherwise unconnected to the dispute, must (or should) that court hear a case initiated there? If one of the parties initiates litigation in a non-designated forum that is connected to the dispute, must (or should) that court decline to hear the case?

This Report analyzes the approach to these questions in the United States.¹ Part I provides a brief background on the general attitude toward forum selection clauses. Part II surveys current state law on their use, in consumer as well as commercial contracts. Part III addresses the interpretation of forum selection clauses as either permissive or exclusive. Part IV analyzes the effect of permissive clauses in state and federal courts. Finally, Part V turns to choice of law problems, particularly as they arise in the course of litigation in federal courts.

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1. Outside the United States, permissive forum selection clauses are generally referred to as “optional choice of court agreements.” The version of this Report published here uses the U.S. terminology.

I. BACKGROUND

Historically, forum selection clauses were viewed as contrary to public policy and therefore invalid.² The most frequently invoked justification for this rule, relevant only in connection with exclusive clauses, was that parties should not be able to deprive a court of jurisdiction it would otherwise have over a dispute.³ However, other explanations for the traditional approach—relevant in connection with permissive as well as exclusive clauses—appear in the case law as well. Some courts rejected forum selection clauses out of suspicion that the parties' intent in selecting a particular forum was to circumvent otherwise applicable substantive policies. Others worried that permitting parties to choose their forum would "bring the administration of justice into disrepute" by highlighting considerations such as the relative intelligence or impartiality of particular judges.⁴ Overall, the sense was that "[t]he jurisdiction of our courts is established by law, and is not to be diminished, any more than it is to be increased, by the convention of the parties."⁵

Over time, and given increasing recognition of the need for certainty and predictability in interstate and international commerce, adherence to the traditional view diminished. This shift manifested itself in the case law⁶ and elsewhere. For example, in 1968, the National Conference of Commissioners on Uniform State Laws adopted a Model Choice of Forum Act⁷ based on the Hague Conference's 1964 Convention on the Choice of Court. Although the model law gave courts considerably more discretion than the Convention did in enforcing forum selection clauses, its starting point was that the use of such clauses was desirable.⁸ And the Restatement (Second) of Conflict of Laws, adopted

2. See generally Arthur Lenhoff, *The Parties' Choice of a Forum: "Prorogation Agreements,"* 15 RUTGERS L. REV. 414, 430–31 (1961); Michael Gruson, *Forum Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 138–39 (1982) (describing the traditional approach).

3. See *Home Ins., Co. v. Morse*, 20 Wall. 445, 451 (1874); see also Lenhoff, *supra* note 2, at 431 (describing the "almost proverbial" status of the rule that parties cannot "oust" a court of jurisdiction).

4. See *Nute v. Hamilton Mut. Ins., Co.*, 6 Gray 174, 184 (1856), *overruled by* *W.R. Grace & Co. v. Hartford Accident and Indem., Co.*, 407 Mass. 572 (1990).

5. *Meacham v. Jamestown, F. & C.R., Co.*, 211 N.Y. 346, 352 (1914) (Cardozo, J., concurring). See also Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643, 648 (2015) (under the traditional approach, "it was for the sovereign to decide what the sovereign's courts could or could not do; it was not for the parties to make private agreements as to the availability of public remedies").

6. See, e.g., *Krenger v. Pa. R.R.*, 174 F.2d 556, 561 (2d Cir. 1949) (Hand, J., concurring) (rejecting the notion of an "absolute taboo" against forum selection clauses, and stating that they are "invalid only when unreasonable" under the circumstances); *Wm. H. Muller & Co. v. Swedish Am. Line, Ltd.*, 224 F.2d 806, 808 (2d Cir. 1955) (summarizing the new rule as follows: "[T]he parties by agreement cannot oust a court of jurisdiction otherwise obtaining; notwithstanding the agreement, the court has jurisdiction. But if in the proper exercise of its jurisdiction . . . the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented.").

7. See Willis L.M. Reese, *The Model Choice of Forum Act*, 17 AM. J. COMP. L. 292 (1969).

8. *Id.* at 292.

in 1971, included a section stating that a forum selection clause will be given effect “unless it is unfair or unreasonable.”⁹

The real turning point in U.S. doctrine was the Supreme Court’s 1972 decision in *The Bremen v. Zapata Off-Shore, Co.*¹⁰ The case involved a forum selection clause included in a contract for towage negotiated by the U.S. owner of a drilling rig and a German towing company. The agreement designated the London Court of Justice as the exclusive forum for litigation; however, when its rig was damaged, the U.S. company brought suit in the United States District Court in Tampa, Florida. The defendant moved to dismiss or stay the action on the basis of the forum selection clause. Holding that such agreements were unenforceable, the court denied this motion, and its decision was upheld upon appeal. The U.S. Supreme Court then vacated and remanded, holding that the forum selection clause was entitled to a presumption of enforcement.

To make the discussion that follows as clear as possible, I want to separate strands of the Court’s holding that have been frequently intertwined in subsequent cases and commentary.

- First, the holding rejected the notion that contractual provisions affecting matters of jurisdiction and venue were invalid as against public policy.¹¹ (The Court did suggest that the validity of a particular forum selection clause could be challenged on the basis of defects in contract formation, such as “fraud or overreaching,” or lack of “free negotiation” by the parties.¹²)
- Second, the holding introduced a rule of presumptive enforceability of exclusive (mandatory) forum selection clauses—meaning that, as a general matter, where the parties had agreed that any litigation would take place exclusively in the designated court, any other court should refuse to hear the case.¹³
- Third, the holding discussed two bases on which a court other than the designated court could refuse to enforce an otherwise valid and exclusive forum selection clause: (a) if enforcement would be “unreasonable” under the circumstances (by which the Court meant that the nominated forum would be so seriously inconvenient that the plaintiff would “for all practical purposes be deprived of his day in court”) or (b) if enforcement would violate a strong public policy of the forum in which suit was brought.¹⁴

9. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (AM. LAW INST. 1971).

10. 407 U.S. 1 (1972).

11. *Id.* at 10.

12. *Id.* at 12, 15.

13. *Id.* at 15.

14. *Id.* at 16–18.

The *Bremen* decision might have had limited effect for two reasons. To begin with, it involved an international contract. In justifying its adoption of a rule of presumptive enforceability, the Court referred repeatedly to the needs of international commerce; thus, the rule might have been limited to the international context. Moreover, the case involved the exercise of admiralty jurisdiction, and the decision was therefore binding neither on federal courts exercising different forms of jurisdiction nor on state courts.¹⁵ Nevertheless, the *Bremen* rule quickly sprang these limits. Federal courts exercising jurisdiction in nonadmiralty cases adopted the *Bremen* approach, applying it even in cases involving domestic contracts. State courts too began to apply the *Bremen* analysis, again in domestic as well as international cases.¹⁶ In short, the decision has framed the modern U.S. approach to forum selection clauses.

The portions of the *Bremen* rule addressing the presumptive enforceability of forum selection clauses apply only to exclusive forum selection clauses, and so this Report treats them only in passing. The first part of the Court's holding, though, relating to the general validity of private agreements as to forum choice, applies equally to permissive clauses. The following Part addresses the treatment of such agreements under current law.

II. THE VALIDITY OF PERMISSIVE FORUM SELECTION CLAUSES UNDER U.S. LAW

A. *In General*

In the vast majority of U.S. states, forum selection clauses, both permissive and exclusive, are viewed with approval. A few states have enacted statutes governing the treatment of such agreements,¹⁷ based on the Model Choice of Forum Act mentioned above.¹⁸ In most states, however, the validity and enforceability of forum selection clauses are governed by common law. Often that law explicitly adopts the *Bremen* rule; sometimes, it integrates the reasoning of that case

15. Indeed, the Court more or less suggested that the rule it articulated was applicable only in the admiralty context. *Id.* at 10.

16. In a two-part article published in the early 1990s, Walter Heiser provides an overview of the effect of the *Bremen* decision on analysis in both state courts and federal courts in the years following that case. See 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) [hereinafter Heiser, *Forum Selection Clauses in State Courts*]; Walter W. Heiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement After Stewart and Carnival Cruise*, 45 FLA. L. REV. 553, 565 (1993).

17. See, e.g., NEB. REV. STAT. §§ 25-414, 415; N.H. REV. STAT. ANN. § 508-A; N.D. CENT. CODE § 28-04.1.

18. See *supra* note 8 and accompanying text. The Model Choice of Forum Act, approved in 1968 by the National Conference of Commissioners on Uniform State Laws, was loosely modeled on the 1964 Hague Convention on the Choice of Court. The Model Act was ultimately withdrawn in 1975.

into rules that achieve the same result. In New York, for example, courts have adopted a four-step test that analyzes (1) whether the forum selection clause was reasonably communicated to the resisting party, (2) whether it should be classified as exclusive or permissive, (3) whether it covers the parties and the claims in question, and (4) whether the presumption in favor of enforcement has been rebutted by a showing that it is unreasonable under the circumstances or invalid for reasons such as fraud or overreaching.¹⁹ Some states have also adopted specific legislation to permit (or attract) litigation involving high-value contracts. These statutes are discussed below.²⁰

A handful of states maintain the traditional hostility to forum selection clauses. In one state, this position is reflected in the case law.²¹ In others, legislation has been enacted that invalidates forum selection clauses.²² Idaho's statute, for example, provides that "every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals . . . is void as it is against the public policy of Idaho."²³ In some cases, however, courts have construed these statutes quite narrowly, reflecting the recent movement toward the more liberal enforcement of forum selection clauses.²⁴ It is important to emphasize that, as the Idaho statute quoted above indicates, the focus of these general policies is on *exclusive* forum selection clauses that purport to deprive local courts of jurisdiction they would otherwise enjoy.

B. *In Particular Business Settings*

In addition, many states have enacted legislation invalidating the use of forum selection clauses in certain types of contracts where the risk of bargaining inequality is particularly significant.²⁵

19. See, e.g., *Phillips v. Audio Active, Ltd.*, 494 F.3d 378, 383–84 (2d Cir. 2007); see also *APR Energy, Ltd. v. Greenhill & Co., L.L.C.*, 220 F. Supp. 3d 427, 430–31 (S.D.N.Y. 2016); *Moose Toys Pty, Ltd. v. Creative Kids Far East, Inc.*, 195 F. Supp. 3d 599, 602–03 (S.D.N.Y. 2016).

20. See *infra* note 78 and accompanying text.

21. See *Davenport Mach. & Foundry, Co. v. Adolph Coors, Co.*, 314 N.W.2d 432, 437 (Iowa 1982) ("[C]lauses purporting to deprive Iowa courts of jurisdiction they would otherwise have are not legally binding in Iowa.").

22. MONT. CODE ANN. § 28-2-708; IDAHO CODE § 29-110; N.C. GEN. STAT. § 22B-3; S.C. Code § 15-7-120(A).

23. IDAHO CODE § 29-110. See also *Cerami-Kote, Inc. v. Energywave Corp.*, 773 P.2d 1143, 1147 (Idaho 1989) (applying this provision).

24. See, e.g., *Frontline Processing Corp. v. Merrick Bank Corp.*, No. 2:13cv00020, 2013 WL 12130638, at *4 (D. Mont. May 29, 2013) (enforcing a forum selection clause despite Montana's legislation); see also *Shelter Mut. Ins., Co. v. Rimkus Consulting Grp.*, 148 So. 3d 871, 881 (La. 2014) (holding that a rule of Louisiana procedure stating that venue objections could not be waived prior to litigation did not prohibit the use of forum selection clauses).

25. See generally Symeon C. Symeonides, *What Law Governs Forum Selection Clauses*, 78 LA. L. REV. (forthcoming 2018) (manuscript at 8), <https://ssrn.com/abstract=3014070> (noting the use of such legislation to address "consumer contracts, employment contracts, agency contracts, franchise contracts, and construction contracts").

For instance, a number of states, including New Jersey, Illinois, Minnesota, Wisconsin, and Washington, have adopted statutes designed to provide franchisees with a variety of substantive protections. Some include specific anti-waiver provisions relating to choice of court. Illinois's Franchise Disclosure Act, for instance, explicitly makes void "[a]ny provision in a franchise agreement that designates jurisdiction or venue in a [judicial] forum outside of this State."²⁶ Others include general anti-waiver language prohibiting any contractual provision that would operate as a waiver of the rights enjoyed by the franchisee under the law.²⁷ Provisions of the latter type require courts to analyze whether and to what extent a forum selection clause might operate as a waiver of any of the franchisee's rights.

Laws treating certain kinds of contracts are common. For example, New York's alcohol control law voids any contractual provision that operates as a waiver of any of the rights provided in the law.²⁸ A Virginia district court found the forum selection clause included in a distribution agreement to be unenforceable because it restricted the distributor's right to move for transfer, a right guaranteed by a local statute.²⁹ The Hawaii Motor Vehicle Industry Licensing Act generally prohibits any agreement that "requires that the dealer bring an action against the manufacturer or distributor in a venue outside of Hawaii."³⁰ And in Texas, forum selection clauses included in certain construction contracts are void.³¹

In the Reporter's view, these sorts of policies must be differentiated from a general policy of hostility toward forum selection clauses. Here, the target of regulation is not the power of private parties to affect matters of jurisdiction and venue. Rather, it is certain contractual relationships between parties of unequal bargaining power.³² The effect of such policies on choice of court is incidental to the overall goal of protecting local residents from particular forms of unfair business practice.³³

26. 815 ILL. COMP. STAT. ANN. 705/4.

27. *E.g.*, MINN. STAT. ANN. § 80C.21.

28. N.Y. ALCO. BEV. CONT. LAW § 55-c(11) (Consol. 2014).

29. *Coors Brewing, Co. v. Oak Beverage, Inc.*, 549 F. Supp. 2d 764, 771 (E.D. Va. 2008).

30. HAW. REV. STAT. ANN. § 437-52(1).

31. TEX. BUS. & COM. CODE ANN. § 272.001.

32. *See generally* Jason Webb Yackee, *Choice of Law Considerations in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 UCLA J. INT'L L. & FOREIGN AFF. 43, 48-49 (2004) (discussing the effect of protective legislation of this kind on the freedom of parties to choose a forum in advance). This distinction becomes important in the choice of law context; *see infra* Part V.

33. *See Verdugo v. Alliantgroup, L.P.*, 237 Cal. App. 4th 141, 150, 154 (Ct. App. 2015) (stating that both California's Franchise Investment Law and its Consumer Legal Remedies Act "share the common purpose of protecting California residents from unfair or deceptive business practices, and include a provision invalidating any waiver of the protections those laws provide," and further, stating that California's securities law "articulate[s] a strong public policy aimed at protecting the public from fraud and deception in securities transactions," and that a "cornerstone" of that law is an anti-waiver provision).

C. *In Contracts of Adhesion*

Like any clause in a contract, a forum selection clause can be challenged as invalid on the basis of formal defects (for instance, the absence of a required writing) or defects in the consent of one of the parties (for instance, that it was procured by duress, fraud, mistake, or the like). Formal validity is rarely an issue in practice, and allegations of duress and other similar practices are rare. However, parties frequently challenge the validity of forum selection clauses contained in adhesion contracts on the basis of unconscionability, arguing that it would be unconscionable to hold them to a clause that had not been freely negotiated.³⁴ *Bremen* itself recognized this potential limitation, focusing on the “freely negotiated” character of the clause at issue in that case.³⁵ And subsequent Supreme Court decisions did the same. In a 1985 case, for example, the Court echoed the position that where forum selection clauses “have been obtained through ‘freely negotiated’ agreements,” their enforcement does not violate constitutional norms.³⁶

In 1991, however, in *Carnival Cruise Lines v. Shute*,³⁷ the Supreme Court undertook to “refine the analysis of *The Bremen* to account for the realities of form [maritime] passage contracts.”³⁸ The case involved an exclusive forum selection clause included among the terms printed on a ticket for passage on a cruise ship. A federal court of appeals had concluded that the forum selection clause was “not freely bargained for,” and on that basis declined to enforce it, permitting the plaintiffs to sue in a court other than the one nominated.³⁹ The Supreme Court reversed. The Court analyzed the forum selection clause the same way it would any clause in a contract offered on a “take it or leave it” basis: it scrutinized it for “reasonableness.”⁴⁰ It concluded that both parties to the contract received benefit from an exclusive forum selection clause: the cruise line in the form of a limitation on the fora in which it could be sued by its passengers, and the passengers themselves “in the form of reduced fares” passing on the resulting cost savings.⁴¹ Thus, the Court concluded, the clause was “reasonable” (i.e., not unconscionable). Although the clause was clearly not “freely negotiated,” and although the parties had unequal

34. See, e.g., *Tucker v. Cochran*, 341 P.3d 673, 687 (Okla. 2014) (party argues “that the forum-selection clause was never negotiated, bargained for, or discussed by the parties, and . . . there was no place for his initials to show agreement with the [clause]”).

35. *Bremen v. Zapata Off-Shore, Co.*, 407 U.S. 1, 12, 16 (1972).

36. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985).

37. 499 U.S. 585 (1991).

38. *Id.* at 593.

39. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 389 (9th Cir. 1988).

40. 499 U.S. at 593. The question here is not the reasonableness of the chosen forum, but rather the reasonableness of the “bargain” reflected in the contract provision.

41. *Id.* at 593–94.

bargaining power, the clause was therefore entitled to the *Bremen* presumption.

Like *Bremen*, *Carnival Cruise* was an admiralty case, and therefore binding on lower federal courts and state courts only in that setting. Like *Bremen*, however, the decision has had a much broader impact, and it is now followed in all types of contract litigation. It is true that some courts have pulled back somewhat on the breadth of its holding in a number of ways. For instance, some lower courts have refused to enforce forum selection clauses included in consumer contracts on the basis of insufficient notice. (In *Carnival Cruise*, the plaintiffs conceded that they had notice of the forum selection clause.⁴²) This is clearly a minority position, however. Most courts conclude that parties receive adequate notice of forum selection clauses if the relevant clauses are in capital letters, bold type, or otherwise set apart from other provisions in the contract—even if the parties did not in fact read the contract.⁴³ Similarly, some courts, reviewing forum selection clauses contained in agreements between parties of disparate economic and bargaining power, have held them to be invalid for overreaching.⁴⁴ This too is clearly a minority position. Overall, the general rule that such agreements are presumptively valid in the consumer as well as the commercial context is by now well established.⁴⁵

D. *In Asymmetrical Agreements*

Under U.S. law, as long as each party's obligation is supported by consideration, mutuality of obligation is not required for a contract to be enforceable. Thus, as a general matter, the fact that a forum selection clause binds only one party does not render it unenforceable. And, indeed, courts are willing to enforce clauses that waive objections to jurisdiction and venue by only one of the

42. In other words, in the Court's view, the plaintiffs had the opportunity after receiving the tickets in the mail to reject the contract if they objected to the forum selection clause. The dissenting opinion objected to this inference, questioning the effectiveness of notice contained in "the fine print on the back of the ticket." *Id.* at 597 (Stevens, J., dissenting).

43. *See, e.g.*, *Campbell v. Marriott Ownership Resorts, Inc.*, No. E064139, 2016 WL 817876, at *4 (Cal. Ct. App. 4th Dist. Mar. 2, 2016).

44. *See, e.g.*, *Kubis & Perszyk v. Sun Microsystems.*, 680 A.2d 618, 627 (N.J. 1996) (holding "that forum-selection clauses in franchise agreements are presumptively invalid, and should not be enforced unless the franchisor can satisfy the burden of proving that such a clause was not imposed on the franchisee unfairly on the basis of its superior bargaining position").

45. *See Heiser, Forum Selection Clauses in State Courts*, *supra* note 16, at 375–76 (concluding that the vast majority of states enforce valid and reasonable forum selection clauses); Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 *HASTINGS L.J.* 719, 751 (2015) ("[T]he doctrinal bar to prevailing on an unconscionability objection to a forum-selection . . . clause is so great as to render that challenge practically moot.").

contract parties.⁴⁶ The same is true of clauses that make the choice of court permissive for one party and exclusive for the other.

E. Conclusion

Overall, throughout the United States, there is a strong policy in favor of enforcing forum selection clauses. As many courts put it, “a party opposing enforcement of a forum-selection clause ‘bears a heavy burden of proof.’”⁴⁷

III. DISTINGUISHING EXCLUSIVE FROM PERMISSIVE AGREEMENTS

Forum selection clauses can raise a number of questions of interpretation. These include whether the parties intended to cover only contractual claims arising out of their agreements or all claims, including statutory claims, relating to their relationship; whether they intended to select federal as well as state courts in a named location; and whether they intended the choice of court to be exclusive or merely permissive. This Part focuses on the last of these questions.⁴⁸

The general rule in the United States is that a forum selection clause will be construed as permissive unless it contains “language of exclusion.”⁴⁹ In most cases, the presence or absence of such language is clear. A typical permissive forum selection clause simply indicates the parties’ submission to jurisdiction, venue, or both, in an identified forum.⁵⁰ Conversely, a typical exclusive agreement not only

46. See, e.g., *Gen. Elec. Capital Corp. v. John Carlo, Inc.*, No. 5:10cv11868, 2010 WL 3937313, at *2 (E.D. Mich. Oct. 5, 2010) (giving effect to such a clause); *Superior Nut & Candy, Co., v. TDG Brands, Inc.*, No. 1:16-CV-10650, 2017 WL 319149, at *2 (N.D. Ill. Jan. 23, 2017) (asymmetrical clauses enforceable under Arizona law).

47. See, e.g., *Mount Carmel Ministries v. Seaway Bank & Tr., Co.*, No. 2:14-CV-00184, 2015 WL 13375901, at *1 (S.D. Miss. Sept. 3, 2015).

48. For a recent empirical study of this and other questions of interpretation, see John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA LAW REV (forthcoming 2019), <https://ssrn.com/abstract=3047989>.

49. See, e.g., *Converting/Biophile Labs., Inc. v. Ludlow Composites Corp.*, 722 N.W.2d 633, 641 (Wis. Ct. App. 2006) (“Absent specific language of exclusion, an agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere.”); *Golf Scoring Sys. Unlimited, Inc. v. Remedio*, 877 So. 2d 827, 829 (Fla. Dist. Ct. App. 2004) (“Generally, a forum selection clause will be considered permissive where it lacks words of exclusivity.”); *Mark Grp. Int’l, Inc. v. Still*, 566 S.E.2d 160, 162 (N.C. Ct. App. 2002) (“[T]he general rule is when a jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties’ intent to make jurisdiction exclusive.”).

50. See, e.g., *Michaluk v. Credorax (USA), Inc.*, 164 So. 3d 719, 721 (Fla. Dist. Ct. App. 2015) (“[E]ach party hereby submits to the jurisdiction of the Courts of Malta as regards any claim, dispute or matter arising out of or in connection with this Agreement, its implementation and effect.”); *Mark Grp. Int’l, Inc.*, 566 S.E.2d at 161 (“[T]he undersigned hereby submits itself to the jurisdiction of the 13th Judicial District Court of Hillsborough County Florida U.S.A. in order to resolve any such dispute.”).

identifies a forum but uses the word “exclusive” or “sole” in order clearly to foreclose litigation elsewhere.⁵¹

When a clause falls between these two poles, interpretation is more complicated. There is no uniform approach to determining what constitutes sufficiently exclusionary language.⁵² Courts in most states have adopted what appears to operate as a presumption *against* exclusivity, perhaps as a vestige of the old prohibition against “ouster.”⁵³ In one case illustrating this approach, the court stated that “the normal construction of the jurisdiction rules includes a presumption that, where jurisdiction exists, it cannot be ousted or waived absent a clear indication of such a purpose,” thus supporting a requirement of “specific language of exclusion.”⁵⁴ Courts in this camp require language that clearly excludes the jurisdiction of any other court: thus, for instance, clauses stating that the “place of jurisdiction shall be Dresden”⁵⁵ and “contract shall be governed by the law of the State of Florida, with proper venue in Palm Beach County”⁵⁶ were viewed as merely permissive, for lack of words such as “exclusive,” “sole,” or “only.”

Other courts, though, are less restrictive, and interpret phrases like “shall be” as sufficient to create exclusivity.⁵⁷ Some are also willing to infer exclusivity even in the absence of such terms when they gather the parties’ intent from the overall clause. In one illustrative case, for example, the court found a forum selection clause in which the parties consented to “Broward County, Florida, as the proper venue for all actions” to be exclusive because the definite article “the” operated as a venue limitation.⁵⁸

51. See, e.g., *Halpern Eye Assocs., P.A. v. E.A. Crowell & Assocs., Inc.*, C.A. No. 07-06-0009, 2007 WL 3231617, at *1 (Del. Ct. Com. Pl. Sept. 18, 2007) (“Each party hereto consents to the exclusive jurisdiction of the courts in the State of North Carolina.”).

52. See 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, 1015 (2010).

53. See 7 WILLISTON ON CONTRACTS § 15:15 (Richard A. Lord ed., 4th ed. 2010) (1920) (relating the presumption in favor of permissive clauses to “the traditional reluctance of some courts to surrender their jurisdiction too readily”).

54. *John Boutari & Son, Wines and Spirits, S.A. v. Attiki Imp. & Dist., Inc.*, 22 F.3d 51 (2d Cir. 1994) (quoting *City of New York v. Pullman, Inc.*, 477 F. Supp. 438, 443 (S.D.N.Y. 1979)).

55. *Hull 753 Corp. v. Elbe Flugzeugwerke GmbH*, 58 F. Supp. 2d 925, 927 (N.D. Ill. 1999).

56. *Regal Kitchens, Inc. v. O’Connor & Taylor Condo. Constr., Inc.*, 894 So. 2d 288, 290 (Fla. Dist. Ct. App. 2005).

57. See, e.g., *Sterling Forest Assocs., Ltd. v. Barnett-Range Corp.*, 840 F.2d 249, 251–52 (4th Cir. 1988) (holding that the language “shall be” created a mandatory forum selection clause); *Gen. Elec., Co. v. G. Siempelkamp & Co.*, 29 F.3d 1095, 1099 (6th Cir. 1994) (holding that the language “all” and “shall” was mandatory). See also GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 462–63 (5th ed. 2011) (collecting cases).

58. *Golf Scoring Sys. Unlimited, Inc. v. Remedio*, 877 So. 2d 827, 828 (Fla. Dist. Ct. App. 2004); *Intershop Commc’ns v. Super. Ct.*, 104 Cal. App. 4th 191, 197 (Ct. App. 2002) (accord).

IV. THE EFFECT OF PERMISSIVE FORUM SELECTION CLAUSES

Disputes arising from cross-border contracts, whether interstate or international, are typically subject (or at least arguably subject) to the jurisdiction of more than one forum. By selecting one of those fora in advance as the exclusive forum for eventual litigation, parties are able to minimize the possibility of inefficient parallel proceedings as well as the costs of litigating jurisdictional matters. However, it is not uncommon for parties to deviate from such agreements. Most of the U.S. case law and commentary on forum selection clauses focuses on that situation, analyzing the effect of *exclusive* agreements when a party to such an agreement has contravened it by initiating litigation elsewhere. In other words, they focus on the role of forum selection agreements in derogating from the jurisdiction of a court. Permissive agreements play no such role, since they “constitute nothing more than a consent to jurisdiction and venue in the named forum”⁵⁹ without limiting either party’s right to sue elsewhere.

However, all forum selection clauses, including permissive clauses, may serve a prorogation function as well, in that the parties may nominate a forum that is not otherwise connected with the dispute.⁶⁰ In such cases, the question arises whether the consent of the parties also has the effect of *conferring* jurisdiction on a court that would not otherwise have it. Part IV.A below considers that function.

Part IV.B turns to the effect of permissive forum selection clauses on venue. In the U.S. system, courts have the discretion to decline jurisdiction on the basis that litigation in another forum would be more convenient. Dismissal or transfer on this basis may be sought by the defendant or initiated by the court itself. The factors to be considered include not only the convenience of the parties, but a number of other private- and public-interest factors as well. Another effect of a permissive forum selection clause, then, is to waive the defendant’s objection to the laying of venue in the nominated court, on the grounds that another court would have been more convenient. Here, the question is how much weight the court will give the parties’ forum selection clause in considering whether to decline exercise of its jurisdiction.

A. *The Effect of a Permissive Forum Selection Clause on Personal Jurisdiction*

The outer limits of judicial jurisdiction over nonresident defendants derive from the right to due process guaranteed by the United

59. *Garcia Granados Quinones v. Swiss Bank Corp. (Overseas), S.A.*, 509 So. 2d 273, 274–75 (Fla. 1987).

60. This is common where the parties seek a neutral forum or a forum with particular expertise in the subject matter of the contract.

States Constitution.⁶¹ Both state and federal courts have repeatedly confirmed that the requirement of personal jurisdiction “recognizes and protects an individual liberty interest,” and can therefore be waived by a defendant.⁶² As a result, consent has long been recognized as a valid basis for the exercise of personal jurisdiction over a nonresident defendant.⁶³ The traditional rule, however, was that consent could be given only at the time of litigation.⁶⁴ On this basis, courts historically refused to enforce advance waivers by contract. Over time, this limitation eroded, and courts came to accept such waivers, in the form of forum selection clauses, as well.⁶⁵ As discussed above, this is true even with respect to adhesion contracts, although it is difficult to describe those as the knowing and intentional waiver of constitutional rights.⁶⁶

Consistent with this view of the jurisdictional requirement as a purely individual right, courts generally conclude that asserting jurisdiction on the basis of consent is within constitutional limits even when the forum is otherwise unconnected with the dispute.⁶⁷ In a few states, courts have held that the designated forum “must bear a reasonable relationship to the transaction,”⁶⁸ but these decisions appear to be anomalous.⁶⁹

The analysis of a forum selection clause’s effect on personal jurisdiction has a statutory dimension as well. Over the course of the twentieth century, as the Supreme Court’s due process jurisprudence expanded the circumstances under which it was viewed as constitutionally

61. The Fifth Amendment applies to federal courts, the Fourteenth to state courts. U.S. CONST. amends. V, XIV.

62. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). *See also* *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985).

63. Until the middle of the 20th century, the jurisdiction of state courts was defined in a strictly territorial fashion to encompass only state residents and other persons served with process while within the state. *See Pennoyer v. Neff*, 95 U.S. 714, 720 (1877). However, even during that period, defendants not falling into either of those categories could consent to jurisdiction.

64. “A man may not barter away . . . substantial rights,” and thus cannot “bind himself in advance by an agreement, which may be specially enforced, thus to forfeit his rights at all times and on all occasions whenever the case may be presented.” *Home Ins., Co. v. Morse*, 87 U.S. 445, 451 (1874).

65. *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315–16 (1964) (“[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court . . .”).

66. *See Overmyer, Co. v. Frick, Co.*, 405 U.S. 174, 185 (1972) (a pre-*Carnival Cruise* case drawing this distinction, and suggesting that a waiver must be “voluntary, knowing, and intelligently made”); *see also* Stephen E. Sachs, *The Forum Selection Defense*, 10 DUKE J. CONST. L. & PUB. POL’Y 1, 4 (2014).

67. *See, e.g., RSR Corp. v. Sigmund*, 309 S.W.3d 686, 704 (Tex. Ct. App. 2010) (“To the extent a party has consented to jurisdiction in a particular forum, the trial court’s exercise of personal jurisdiction over it does not violate due process even in the absence of contacts with Texas.”).

68. *See, e.g., KC Ravens, L.L.C. v. Nima Scrap, L.L.C.*, 369 P.3d 341 (Kan. Ct. App. 2016).

69. *See BORN & RUTLEDGE, supra* note 57, at 115.

acceptable to assert jurisdiction over nonresident defendants, each state enacted a “long-arm statute” authorizing its courts to exercise jurisdiction within those expanded limits. Some of these statutes simply refer to the constitutional limits, and give state courts blanket authorization to exercise jurisdiction on any basis not incompatible with them.⁷⁰ Others, however, enumerate particular categories of cases in which jurisdiction may be authorized over nonresidents. In states that use this form of long-arm statute, a state court may assert personal jurisdiction over a nonresident defendant only on one of the enumerated bases.⁷¹ If a long-arm statute does not explicitly list consent as one of the approved bases of jurisdiction, then the question arises whether the court is authorized to exercise jurisdiction *solely* on that basis if the litigation is otherwise unconnected with the forum. This question presents itself in federal courts as well, because they normally borrow the long-arm statute of the state in which they sit.⁷²

In almost all states using the enumerated-acts type of long-arm statute, courts, in practice, seem to enforce forum selection clauses despite the apparent lack of statutory authorization.⁷³ This is consistent with the general position that long-arm statutes are intended to expand, not restrict, the right to serve process upon nonresidents.⁷⁴ Thus, consent—a basis on which it was always acceptable to assert jurisdiction over nonresidents—should continue to suffice.⁷⁵ In some states, however, the position is that jurisdiction can be exercised only when specific statutory authority is present. If that is

70. See, e.g., ANN. CAL. CODE CIV. PROC. § 410.10 (“A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.”).

71. See 1 ROBERT C. CASAD ET AL., JURISDICTION IN CIVIL ACTIONS 441 (4th ed. 2014) (“[I]t remains a hornbook truism that personal jurisdiction proceeds in two steps, requiring state authorization in addition to satisfaction of due process requirements.”).

72. FED. R. CIV. P. 4(k)(1).

73. See, e.g., GP&W, Inc. v. Daibes Oil, L.L.C., 497 S.W.3d 866, 869–70 (E.D. Mo. Ct. App. 2016) (“Although it is generally necessary to satisfy the Missouri long-arm statute to obtain *in personam* jurisdiction over a nonresident defendant . . . jurisdiction over the person may also be obtained by consent or by waiver; for example, parties to a contract may agree in advance to submit to personal jurisdiction in a given court by means of a forum selection clause.”). See also CASAD ET AL., *supra* note 71, at 446–47 (“[C]ourts in many states that have [enumerated-act] statutes have ruled that the statute is intended, despite its literal words, to authorize reach in all situations to the limits of due process.”).

74. Some statutes say so explicitly: see, e.g., DEL. CODE ANN. tit. 10, § 3104(i): “Nothing herein contained limits or affects the rights to serve process in any other manner now or hereafter provided by law. This section is an extension of and not a limitation upon the rights otherwise existing of service of legal process upon nonresidents.” But see Heiser, *Forum Selection Clauses in State Courts*, *supra* note 16, at 379 (“[A] state may choose to limit its jurisdiction over nonresident defendants to occasions that meet a list of specified factors, many of which are less expansive than what due process would permit . . .”).

75. Additional support for this position is found in *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990), which suggests that the exercise of jurisdiction on any of the traditional bases must be *per se* constitutional. See *id.* at 619.

true, then a party to a forum selection clause may argue that despite its waiver of objections, the court lacks jurisdiction over it. In other words, if the statute of the chosen state does not include “contractual agreement” as one of the bases, then a forum selection clause should not be enforced unless there is some other statutory basis for the assertion of personal jurisdiction. This is the position in Florida.⁷⁶

A number of states have enacted specific legislation under which they explicitly agree to accept jurisdiction on the basis of a forum selection clause. A few of these are based on the Model Choice of Forum Act, one section of which applies in situations where the court would lack jurisdiction but for the consent of the parties.⁷⁷ Others are designed to attract high-value disputes to the state in question. These statutes require that the contract in question also include a choice of law in favor of local law, and that the transaction involve a significant amount of money.⁷⁸ In these states, one assumes, consent in other types of contract disputes would *not* be sufficient to confer jurisdiction on the nominated court.

B. The Effect of a Permissive Forum Selection Clause on Venue

Even if the court in which the plaintiff initiates litigation enjoys jurisdiction over the claim and the parties, the defendant may argue that venue is either *improper* or *inconvenient*, and that the suit belongs in another court. The existence of a forum selection clause may affect the resulting procedural analysis.

1. In State Court

a. Removal

If a plaintiff initiates, in state court, a claim that also falls within the original jurisdiction of a federal district court located in that state, the defendant has a right to remove the case to the

76. See *C.R. McRae v. J.D./M.D., Inc.*, 511 So. 2d 540, 543 (Fla. 1987) (“The legislature has set forth in our long arm statute the policy of this state concerning when Florida courts can exercise in personam jurisdiction over non-resident defendants. Conspicuously absent from the long arm statute is any provision for submission to in personam jurisdiction merely by contractual agreement.”). See also *Maschino v. Val-Pak Direct Mktg. Sys., Inc.*, 902 So. 2d 196, 197 (Fla. Dist. Ct. App. 2005) (“In Florida, the mere execution of a forum selection clause is insufficient to confer long-arm jurisdiction over out-of-state defendants. There must be an independent basis for conferring long-arm jurisdiction.”); *Jetbroadband WV, L.L.C. v. Mastec N. Am., Inc.*, 13 So. 3d 159, 161 (Fla. Dist. Ct. App. 2009) (confirming that Florida courts have personal jurisdiction only over cases that fall within the parameters of Florida’s long-arm statute). This situation led to the enactment of a new provision explicitly authorizing jurisdiction on the basis of consent in certain types of contracts. See *Steffan v. Carnival Corp.*, No. 1:16-CV-25295, 2017 WL 4182203 (S.D. Fla. Aug. 1, 2017).

77. See *supra* note 8 and accompanying text.

78. CAL. CIV. PROC. CODE § 410.40; DEL. CODE, tit. 6, § 2708(b); FLA. STAT. ANN. tit. XXXIX, §§ 685.101–.102; 735 ILL. COMP. STAT. ANN. 105/5-5, 5-10; N.Y. GEN. OBLIG. LAW §§ 5-1401 to -1402; TEX. CIV. PRAC. & REM. CODE § 15.020.

federal court.⁷⁹ When the defendant has agreed to a forum selection clause identifying the state court as a suitable venue, the question arises whether that agreement constitutes a waiver of the removal right. In answering this question, courts have adopted a requirement that such a waiver be “clear and unequivocal.” That standard is met by explicitly waiving the right to remove, or by designating a particular state court as the exclusive forum for eventual litigation.⁸⁰ A permissive forum selection clause does not meet this standard and therefore does not affect a defendant’s right to remove.⁸¹

b. *Forum Non Conveniens*

There is no procedural mechanism by which a state court can transfer a case to a more convenient forum in another state (or another country).⁸² However, a defendant can move to dismiss a case on the basis of inconvenience, under the doctrine of *forum non conveniens*.⁸³ Almost all states adhere to this common law doctrine, and some have incorporated it in procedural legislation. Although there is some variation among the states, in essence they follow the same approach that was announced as a rule of federal common law in *Gulf Oil Corp. v. Gilbert*.⁸⁴ In order to obtain dismissal on the basis of *forum non conveniens*, two conditions must be met. First, an adequate alternative forum must be available.⁸⁵ Second, because there is ordinarily a strong presumption in favor of the plaintiff’s choice of forum,⁸⁶ the balance of private and public interests at stake in the case must weigh clearly in favor of dismissal.⁸⁷ The private interests of the litigants to be considered include ease of access to evidence, the availability of witnesses, and all the other elements that go into “mak[ing] trial of a case easy, expeditious, and inexpensive.”⁸⁸ The public-interest factors include the state of the court’s docket, the

79. 28 U.S.C.A. § 1441.

80. *See, e.g.*, *Valspar Corp. v. Sherman*, 211 F. Supp. 3d 1209, 1213 (D. Minn. 2016). This can raise the question of interpretation whether the designation of a particular location as the forum is intended to encompass federal as well as state courts there. *See Coyle, supra* note 48, at 2–3.

81. *See, e.g.*, *Carmen Grp., Inc. v. Xavier Univ.*, 41 F. Supp. 3d 8, 13 (D.D.C. 2014).

82. There is a mechanism for transferring a case from one state court to a more convenient forum within the same state, which this Report does not address.

83. Many states also recognize the authority of courts to raise this basis for dismissal *sua sponte*.

84. 330 U.S. 501 (1947). *See generally* Heiser, *Forum Selection Clauses in State Courts, supra* note 16, at 394–95 (discussing the application of the doctrine in state courts). The operation of this doctrine in federal courts is discussed *infra* Part IV.B.2.

85. At a minimum, this means an alternative forum with jurisdiction over the defendant and the claim.

86. *Piper Aircraft v. Reyno*, 454 U.S. 235, 255 (1981).

87. *Gulf Oil Corp.*, 330 U.S. at 508.

88. *Id.*

burden on jurors in a community that is not related to the dispute, and the familiarity of the court with the law to be applied.⁸⁹

As discussed above, some states have adopted legislation that directs their courts to exercise jurisdiction over certain high-value contracts that contain forum selection clauses designating those courts. That kind of legislation is usually accompanied by companion clauses foreclosing the possibility of dismissal on the basis of inconvenience.⁹⁰ Otherwise, a court may always consider dismissal on that ground. This is true even when an exclusive forum selection clause is involved. While a forum selection clause may operate as a waiver of a party's own objection to the convenience of the designated forum, it does not affect the other relevant considerations. And permissive forum selection clauses, which by definition do not constrain the plaintiff's choice of forum, may be even less relevant to the analysis. The question, then, is how much weight a permissive forum selection clause should be given in a *forum non conveniens* analysis.

i. Where Litigation Is Initiated in the Designated Forum

In this circumstance, the plaintiff has chosen to initiate litigation in the contractually designated forum, and the defendant moves to dismiss the claim in favor of some other forum. In practice, such a motion is highly unlikely to succeed. There is considerable variation, though, in the route that state courts take to this conclusion. Some courts have held that a permissive forum selection clause "becomes mandatory" once suit is filed in the designated forum, and thus is entitled to "enforcement" under the *Bremen* standard.⁹¹ On that view, assuming that the clause was valid as a matter of contract law, a party seeking to resist litigation there would need to establish that the designated forum was "unreasonable" under that standard.

Most courts simply apply the traditional *forum non conveniens* analysis, but place a significant burden on the defendant who seeks to dismiss from a forum to which it previously agreed. This is generally achieved on the theory that the defendant has waived its right to object to that forum on the basis of its own inconvenience, which is traditionally one of the most significant factors in the analysis. Finally, some courts seem to conduct the usual analysis with no

89. *Id.*

90. *See, e.g.*, N.Y. C.P.L.R. 327(b) (McKinney 2012) (stating that New York courts will not dismiss an action arising out of a contract to which section 5-1402 applies on the basis of inconvenient forum). *See also* Quanta Comput., Inc. v. Japan Commc'ns, Inc., 230 Cal. Rptr. 3d 334, 343 (Ct. App. 2018) (discussing the expiration of that provision).

91. *See, e.g.*, Paradise Enters., Ltd. v. Sapir, 811 A.2d 516, 528 (N.J. Super. Ct. 2002) ("Once plaintiff filed suit [in the designated forum], defendant was bound by that choice, whether the agreement's language be considered mandatory or permissive."); *see also* ICICI Bank, Ltd. v. Essar Global Fund, Ltd., 565 B.R. 241, 253 (S.D.N.Y. 2017); Mount Carmel Ministries v. Seaway Bank & Tr., Co., No. 2:14-CV-00184, 2015 WL 13375901, at *3 (S.D. Miss. Sept. 3, 2015) (accord).

special adjustment for the forum selection clause at all. Even these, however, tend to decline to dismiss.⁹²

Although it appears to be highly unusual, a court that has been designated in a valid and exclusive forum selection clause (and thus, a fortiori, in a permissive clause) may also invoke *forum non conveniens* on its own motion. In one recent case, a California court considered a breach of contract claim brought by a Taiwanese plaintiff against a Japanese defendant.⁹³ The contract included an exclusive forum selection clause in favor of California. The defendant moved to dismiss the claim on the basis of *forum non conveniens*. The court denied that motion, instead applying the *Bremen* standard and concluding that the defendant had failed to establish that enforcing the clause would be unfair or unreasonable.⁹⁴ However, it then went on to consider *forum non conveniens* on its own motion. Reasoning that the dispute had no connection to California, and that California had no interest in retaining the action, the court concluded that it would be unreasonable “to require California courts to accept the burden of litigation” and dismissed the claim.⁹⁵

ii. Where Litigation Is Initiated in a Non-designated Forum

Here the equities look different. The plaintiff initiates litigation somewhere other than the designated forum, and the defendant moves to dismiss in favor of the nominated forum.⁹⁶ Under U.S. law, great deference is given to a plaintiff’s choice of forum,⁹⁷ and accordingly, in this type of case the general rule is that dismissal will not be granted unless the traditional *forum non conveniens* analysis weighs in favor of declining jurisdiction. On that theory, some courts give no special weight to a permissive forum selection clause when considering these motions.⁹⁸ Other courts, however, recognize a few ways in which the existence of a permissive forum selection clause might affect the analysis. First, it may lead the court to give less deference to the plaintiff’s choice of forum.⁹⁹ Second, it establishes the designated forum as an “adequate alternative forum,” in the sense

92. *But see* Patel v. Patel, No. 06AP-1260, 2007 WL 3293379 (Ohio Ct. App. Nov. 8, 2007) (applying the traditional *forum non conveniens* analysis and dismissing a claim brought in the designated forum).

93. *Quanta Comput., Inc.*, 230 Cal. Rptr. 3d.

94. *Id.* at 340.

95. *Id.* at 342.

96. It is theoretically possible but practically unlikely for a defendant to move to dismiss in favor of an adequate alternative forum in a third location.

97. *See supra* notes 86–87 and accompanying text.

98. *See, e.g.*, *Animal Film, L.L.C. v. D.E.J. Prods., Inc.*, 193 Cal. App. 4th 466, 471 (Ct. App. 2011) (“The existence of a permissive forum selection clause is one factor considered along with the other *forum non conveniens* factors in applying the traditional analysis.”).

99. *See, e.g.*, *Networld Commc’ns Corp. v. Croatia Airlines*, No. 2:13cv04770, 2014 WL 4724625, at *5 (D.N.J. Sept. 23, 2014).

that the plaintiff has consented to jurisdiction there, thus satisfying the first prong of the *forum non conveniens* test.¹⁰⁰ And third, it shows that the plaintiff has waived its right to object to the convenience of that alternative forum.¹⁰¹ In these courts, permissive forum selection clauses are in fact accorded substantial, although not determinative, weight.

2. In Federal Court

Venue in U.S. federal courts is regulated primarily by a general provision¹⁰² that “govern[s] the venue of all civil actions brought in [federal] district courts,” except as otherwise provided by law.¹⁰³ It sets forth the circumstances under which a plaintiff may initiate litigation in a particular district—including, for example, if a substantial part of the events giving rise to the claim occurred there.¹⁰⁴ A number of additional rules establish the procedures by which a defendant can challenge venue. Two of them apply when venue is *improper*—that is, when a case is filed in the “wrong” court.¹⁰⁵ Under Federal Rule of Civil Procedure 12(b)(3), a defendant can move to dismiss a case on this basis; and under 28 U.S.C. § 1406(a), the district court in which a case is wrongly filed can either dismiss it or transfer it to another district or division in which it could have been brought. Two additional rules apply when venue is proper but *inconvenient*: the doctrine of *forum non conveniens*, under which a case will be dismissed in favor of an alternative forum in a state or foreign court, and 28 U.S.C. § 1404(a), under which a case will be transferred to a more convenient court within the federal system.¹⁰⁶

In a case decided in 2013, *Atlantic Marine Construction v. U.S. District Court*,¹⁰⁷ the Supreme Court addressed the interplay between these rules and a forum selection clause. In that case, the plaintiff had initiated litigation in a forum other than that designated in an exclusive forum selection clause. Seeking to enforce that

100. See, e.g., *Waste Mgmt. of La., L.L.C. v. Jefferson Parish*, 48 F. Supp. 3d 894, 913 (E.D. La. 2014) (a federal court decision recognizing that effect).

101. See, e.g., *Cohn v. TrueBeginnings, L.L.C.*, No. B205319, 2009 WL 793925, at *3 (Ct. App. Mar. 27, 2009) (noting that “the parties expressly contemplated Texas as the appropriate forum pursuant to the permissive forum selection clause” and dismissing in favor of the designated forum).

102. 28 U.S.C.A. § 1391(a).

103. A number of federal statutes creating causes of action in particular substantive areas, including insurance regulation and securities regulation, contain specific venue provisions that displace § 1391 in those contexts.

104. 28 U.S.C.A. § 1391(b).

105. In other words, when the case does not fall within one of the categories laid out in § 1391(b).

106. Section 1404(a) provides that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any district or division where it might have been brought or to any district or division to which all parties have consented.”

107. 134 S. Ct. 568 (2013).

agreement, the defendant moved to dismiss the suit for improper venue under Rule 12(b)(3) and § 1406(a). The Court rejected this motion. It reasoned that the exclusive basis for concluding whether venue is proper or improper are the federal venue statutes; in other words, as long as the requirements of those statutes are met, venue is proper, whether or not the parties have agreed in advance to litigate in another court.¹⁰⁸ As a consequence, the Court held, the only appropriate pathway to use in effectuating a forum selection clause is an inconvenience-based argument: transfer to another federal court under § 1404(a), or, in the case of an agreement designating a state or a foreign court, dismissal under *forum non conveniens*.

The Court went on to analyze the effect of an *exclusive* forum selection clause on these forms of inconvenience-based analysis. The defendant in *Atlantic Marine* sought transfer to another court within the U.S. federal system, and so the Court discussed the weight that should be accorded a forum selection clause in § 1404(a) analysis. It reasoned that the enforcement of valid forum selection clauses protects party expectations and “furthers vital interests of the justice system.”¹⁰⁹ As a result, “[o]nly under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion [in favor of the nominated court] be denied.”¹¹⁰ The Court identified three particular implications of a forum selection clause for venue analysis. First, when a plaintiff has agreed to bring suit only in a particular forum, its choice of any other forum should, contrary to the ordinary rule, be given no weight.¹¹¹ Second, in evaluating the possibility of transfer, the court should ignore arguments about the parties’ private interests, considering only public-interest factors (which, as the Court points out, are rarely enough to defeat a transfer motion).¹¹² Third, when a party files suit in a non-nominated forum in disregard of a forum selection clause, a subsequent transfer to the nominated forum will not carry with it the original venue’s choice of law rules.¹¹³ As commentators have recognized, this decision altered the traditional § 1404(a) analysis quite significantly, giving nearly dispositive weight to exclusive forum selection clauses.¹¹⁴

Although *Atlantic Marine* involved a transfer between federal courts, the opinion also addressed the weight to be given a forum

108. *Id.* at 577 (“§ 1391 makes clear that venue in ‘all civil actions’ must be determined in accordance with the criteria outlined in that section. That language cannot reasonably be read to allow judicial consideration of other, extrastatutory limitations on the forum in which a case may be brought.”).

109. *Id.* at 581 (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988)).

110. *Id.*

111. *Id.*

112. *Id.* at 582.

113. *Id.* This is an exception from the general rule that after a § 1404 transfer, the transferee court must apply the state law that would have been applied in the transferor court. See *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964); *Ferens v. John Deere, Co.*, 494 U.S. 516 (1990) (establishing this rule for transfer motions made by defendants and plaintiffs, respectively).

114. See, e.g., Mullenix, *supra* note 45, at 728.

selection clause in a motion to dismiss on the basis of *forum non conveniens*, in cases involving the designation of a foreign (or state-court) forum. Like the state cases discussed above, the federal cases have not been uniform in the weight they give a forum selection clause when applying *forum non conveniens*. And some have proceeded on the assumption that the analysis under *forum non conveniens* should be more rigorous than under § 1404, since the former leads to outright dismissal of the claim rather than to transfer.¹¹⁵ In *Atlantic Marine*, however, the Supreme Court echoed some previous cases in stating that § 1404(a) was a “codification” of the common law doctrine.¹¹⁶ It went on to state that “the same standards should apply to motions to dismiss for *forum non conveniens* in cases involving valid forum-selection clauses pointing to state or foreign forums.”¹¹⁷

There has already been a significant amount of litigation under *Atlantic Marine* considering whether its holding extends to permissive forum selection clauses. It is clear that the first and third of the specific implications the Court identified are relevant only when an exclusive forum selection clause is involved. And, indeed, on that basis, many lower courts have simply declined to extend the holding of *Atlantic Marine* in cases involving permissive forum selection clauses, proceeding instead with “traditional” transfer analysis.¹¹⁸ Some courts, however, have adopted the “logic” of *Atlantic Marine*’s reasoning with respect to the second implication—both in cases initiated in the designated forum and in those initiated elsewhere. In one representative case, the defendant moved to transfer the case out of the forum designated in a permissive forum selection clause. The court stated that because the defendant had expressly waived its right to challenge the convenience of that forum, the private factors “automatically [fell] in favor of keeping the case” in the designated court, and that transfer would be appropriate only “if the public factors fall strongly in favor of a transfer.”¹¹⁹

115. See *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) (noting this distinction); *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 313 (5th Cir. 2008) (accord).

116. *Atlantic Marine*, 134 S. Ct. at 580 (stating that “because both § 1404(a) and the *forum non conveniens* doctrine from which it derives entail the same balancing-of-interests standard, courts should evaluate a forum-selection clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause pointing to a federal forum”).

117. *Id.* at 583 n.8. For an analysis of this approach, see generally Robin Effron, *Atlantic Marine and the Future of Forum Non Conveniens*, 66 HASTINGS L.J. 693 (2015).

118. See, e.g., *Found. Fitness Prods., L.L.C. v. Free Motion Fitness*, 121 F. Supp. 3d 1038, 1043 (D. Or. 2015); *RELCO Locomotives, Inc. v. AllRail, Inc.*, 4 F. Supp. 3d 1073, 1085 (S.D. Iowa 2014).

119. *United Am. Healthcare Corp. v. Backs*, 997 F. Supp. 2d 741, 750 (E.D. Mich. 2014). See also *Perficent, Inc. v. Priore*, Case No. 4:16 CV 249 CDP, 2016 WL 866090, at *4 (E.D. Miss. Mar. 7, 2016) (“[T]he forum selection clause, even though permissive, is determinative in the analysis of the first [*forum non conveniens*] factor—the convenience of the parties—and weighs against transfer.”); *AAMCO Transmissions, Inc. v. Romano*, 42 F. Supp. 3d 700, 713 (E.D. Pa. 2014) (“[T]he Supreme Court has explained [in *Atlantic Marine*] that the existence of a forum selection clause of any kind significantly undercuts any argument that the preselected forum is inconvenient for the parties or their witnesses.”).

V. CHOICE OF LAW

As the foregoing discussion demonstrates, there are many points relating to the validity, enforceability, and interpretation of forum selection clauses on which applicable laws may differ. In both interstate and international disputes, choice of law is therefore an important threshold determination. There are a variety of laws that might potentially be chosen to determine such matters: (a) the law of the forum; (b) the law chosen to govern the contract, either by the parties, in the case of contracts that also contain a choice of law clause, or through application of the forum's choice of law rule, in the case of contracts that do not; and (c) in a case in which the forum is *not* the nominated forum, the law of the nominated forum.

A. *Practice in State Courts*

In the United States, choice of law is normally a matter of state rather than federal law, and state conflicts regimes differ. Nevertheless, there is one principle relevant to this analysis on which all states agree: a court will always apply forum law to matters of procedure. As discussed in the previous Part, the effect of a permissive forum selection clause is on matters of procedure, including jurisdiction and venue. Accordingly, that effect is determined by forum law. A state court will apply its own long-arm statute when considering a forum selection clause's effect on its jurisdiction, for instance, and its own procedural rules when considering its effect on venue. Likewise, where a local statute sets forth the circumstances under which a forum selection clause shall be given effect, a court in that state will simply apply that law.¹²⁰

Before considering the effect of a forum selection clause, however, a court must consider two antecedent questions: whether the agreement is valid, and whether it should be characterized as permissive or exclusive. These issues implicate substantive contract law and therefore do require initial choice-of-law analysis.

1. Choosing the Law that Governs the Validity and Enforceability of Forum Selection Clauses

When a lawsuit is filed in a state other than that whose law governs the contract, it is possible for a conflict of laws problem to arise. For example, the forum state might have adopted a *Bremen*-like rule favoring the presumptive enforceability of a forum selection clause, while the state whose law governs the contract might have enacted legislation invalidating such agreements in order to protect parties

120. See generally Symeonides, *supra* note 25, at 4–8 (discussing the application of such statutes in state courts).

with weaker bargaining power. While such conflicts are most problematic with respect to exclusive forum selection clauses, they can affect permissive ones as well. Consider a permissive forum selection clause that is valid under forum law but invalid, as against public policy, in the state whose law governs the contract. In that case, if the litigation is otherwise unconnected to the forum, applying the law that governs the contract to the question of validity would invalidate the forum selection clause, and thereby eliminate the basis for jurisdiction over the defendant in the forum. Applying the law of the forum to the question of validity, by contrast, would yield the opposite result. Choice-of-law problems can also arise in considering the effect of a forum selection clause on a motion to dismiss on the basis of inconvenience. For instance, in a state that would consider a permissive forum selection clause as a salient factor in *forum non conveniens* analysis, applying foreign law to invalidate the agreement would change the subsequent procedural analysis.

Challenges to the validity of a forum selection clause come in a variety of forms. Some are clearly contractual challenges: for example, challenges based on fraud or duress, or the absence of a required writing. Others, though, relate more directly to the effect of a forum selection clause: for instance, challenges based on a policy of general hostility to private agreements affecting jurisdiction or venue. These are frequently characterized as procedural, and resolved pursuant to forum law. As one court put it, “as a general rule, whether the forum selection clause is valid and enforceable is a procedural issue that must be determined in accordance with the law of the forum state. . . . [T]he general rule prevails despite a choice of law provision in the contract.”¹²¹ In between, in the Reporter’s view, are challenges based on anti-waiver provisions attached to specific substantive protections of contract parties.¹²² However, under current practice, challenges based on such provisions are generally also treated as procedural and addressed under the law of the forum.¹²³ Overall, recent reviews of the case law conclude that the vast majority of U.S. courts apply *lex fori* to questions of validity.¹²⁴

2. Choosing the Law that Governs the Interpretation of Forum Selection Clauses

Even in addressing questions of interpretation, which are quite clearly a purely contractual matter, state courts are divided. Some

121. *Golden Palm Hosp., Inc. v. Stearns Bank Nat’l Ass’n*, 874 So. 2d 1231, 1234–35 (Fla. Ct. App. 2004).

122. See *supra* notes 32–33 and accompanying text.

123. For a critique of this practice, see Symeonides, *supra* note 25, at 26–27.

124. See Clermont, *supra* note 5, at 653; Symeonides, *supra* note 25, at 21. For an example of an exception to this rule, see *Hearst v. Calfund, L.L.C.*, No. FST-CV-16-5015483-S, 2016 WL 7661386 (Conn. Super. Ct. Nov. 17, 2016) (applying the law selected by the parties to determine the enforceability of a forum selection clause).

simply skip over choice of law analysis entirely, and begin with generally accepted principles of contract interpretation (such as “this court initially determines whether the ‘language of the contract is clear and unambiguous; if it is, the contract will be enforced as written’”¹²⁵). In interpreting forum selection clauses when the contract in question also includes a choice of law, many courts apply the chosen law to questions of interpretation.¹²⁶ Others do not, however, particularly but not exclusively in the context of international conflicts.¹²⁷ In these cases, the courts simply apply forum law in ascertaining the scope of a forum selection clause.

In interpreting forum selection clauses when the contract in question does *not* include a choice of law, courts are even more likely simply to apply forum law to questions of interpretation. Relatively few will go through the process of applying the forum’s choice of law rules in an effort to identify the law governing the contract. Some courts justify this approach by concluding that the choice of court was implicitly also a choice of the forum’s law.¹²⁸ Other courts may simply be avoiding complicated conflicts analysis.¹²⁹

This tendency to apply forum law in interpreting the scope of forum selection clauses may lead to inappropriate outcomes. This is true particularly in international cases, where the U.S. approach to one critical issue—applying a presumption in favor of permissive rather than exclusive forum selection clauses in interpreting ambiguous clauses—is so different from that of other legal systems.¹³⁰

B. *Practice in Federal Courts*

The subject-matter jurisdiction of U.S. federal courts is not limited to claims arising under federal law.¹³¹ When there is diversity of citizenship between the parties to a lawsuit, the federal courts also have the authority to adjudicate claims based entirely on state law—including contract law. As a result, federal courts frequently hear disputes arising out of interstate and international

125. *Am. First Fed. Credit Union v. Soro*, 359 P.3d 105, 106 (Nev. 2015).

126. *See, e.g., EnQuip Techs. Grp. v. Tycon Technoglass*, 986 N.E.2d 469 (Ohio Ct. App. 2012) (applying the law chosen to govern the contract to determine whether the choice of court was mandatory or permissive).

127. *See, e.g., Turnkey Projects Res. v. Gawad*, 198 So.3d 1029, 1030–31 (Fla. Ct. App. 2016) (applying forum law to determine whether a forum selection clause covered non-signatories).

128. *See Clermont, supra* note 5, at 661.

129. *Id.*

130. The Hague Choice of Court Convention, for instance, which is now in force in EU member states and elsewhere, adopts the opposite presumption. Hague Convention on Choice of Court Agreements art. 3(b), June 30, 2005, 44 I.L.M. 1294 (2005).

131. *See generally* U.S. CONST. art. III(2) (setting forth the scope of the federal judicial power).

contracts. Under the Rules of Decision Act,¹³² as interpreted in *Erie v. Tompkins*,¹³³ federal courts sitting in diversity must apply the substantive law of the state in which they sit (including that state's choice-of-law rules¹³⁴). However, they apply federal, not state, procedural law. This regime generates complicated questions regarding the proper characterization of the issues that forum selection clauses raise.¹³⁵

1. Choosing the Law that Governs the Validity and Enforceability of Forum Selection Clauses

- a. In the Context of a Motion to Transfer Venue

As discussed above, federal courts frequently confront forum selection clauses in the context of a motion to transfer venue to another federal court. Here, a pair of Supreme Court decisions provides a definitive solution to the choice-of-law problem. In the first, *Stewart Organization, Inc. v. Ricoh Corp.*,¹³⁶ the plaintiff had initiated litigation in a district court in Alabama, in contravention of an exclusive forum selection clause. The defendant moved to transfer the case to the designated forum. The district court denied that motion on the grounds that the effect of the forum selection clause was "controlled by Alabama law," which disfavored such agreements as a matter of public policy.¹³⁷ When the case reached the Supreme Court, it held that the effect of a forum selection clause on the motion to transfer venue was a matter of federal procedural law, governed entirely by § 1404(a).¹³⁸ As a result, the federal courts were obligated to apply that law, to the exclusion of any otherwise applicable state law. This is essentially a holding that federal law, in the form of § 1404(a), has preempted any inconsistent state law regarding the enforceability of a forum selection clause.¹³⁹ (In that case, the Court indicated in a footnote that the federal rule would be applied to the exclusion of state law in cases predicated on federal-question jurisdiction as well.¹⁴⁰) The Supreme Court recently confirmed this

132. 28 U.S.C. § 1652 provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Act of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

133. 304 U.S. 64 (1938).

134. *Klaxon Co. v. Stentor Elec. Mfg., Co.*, 313 U.S. 487, 495-97 (1941).

135. See generally *Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848, 852 (8th Cir. 1986) (noting this complexity). For more thorough background of this issue, see Heiser, *Forum Selection Clauses in State Courts*, *supra* note 16, at 556-63.

136. 487 U.S. 22 (1988).

137. *Id.* at 24.

138. *Id.* at 29.

139. *Id.* at 31 ("This is thus not a case in which state and federal rules 'can exist side by side . . .'" (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1978))).

140. *Id.* at 26 n.3.

approach in the *Atlantic Marine* decision discussed above, effectively federalizing the law governing the enforceability of forum selection clauses in the context of transfer motions.¹⁴¹ The case law reflects this approach: federal courts interpret § 1404(a) to supersede any inconsistent state law disfavoring forum selection clauses.¹⁴²

b. In Other Cases

Outside the context of a motion to transfer venue, it is less clear what law a federal court should apply in determining the enforceability of a forum selection clause. Practice on this point is divided. Most federal courts sitting in diversity have concluded that the validity of a forum selection clause is clearly procedural, and should be controlled by the *Bremen* rule as a matter of federal common law.¹⁴³ By this approach, a federal court simply applies the rule of presumptive validity directly. Other courts have reached the opposite conclusion, characterizing questions of validity as a matter of substantive contract law.¹⁴⁴ This analysis should logically begin by applying local *choice of law* rules. Some courts follow that approach, which generally leads them to determine validity pursuant to the law chosen by the parties.¹⁴⁵ However, here, much like state courts, federal courts often skip over the choice of law analysis. They simply apply the substantive law of the forum in considering the validity of a forum selection clause.

2. Choosing the Law that Governs the Interpretation of Forum Selection Clauses

Although § 1404(a) may have preempted inconsistent state law regarding the effect of a forum selection clause, it did not displace state law on matters of substantive contract law. As noted above, forum selection clauses may present a number of questions under that law, including their construction as exclusive or permissive. Many federal courts sitting in diversity, following *Erie*, apply state law to

141. See Mullenix, *supra* note 45, at 735.

142. See, e.g., *Guest Assocs., Inc. v. Cyclone Aviation Prods., Ltd.*, 30 F. Supp. 3d 1278, 1283 (N.D. Ala. 2014) (“[F]ederal law, not state law, applies to the enforceability of forum-selection clauses on a motion to transfer under § 1404(a).”).

143. See, e.g., *Herr Indus., Inc. v. CTI Sys., SA*, 112 F. Supp. 3d 1174, 1178 (D. Kan. 2015) (“The overwhelming majority of circuit courts consider the enforceability of forum selection clauses under federal law in diversity cases, based on the conclusion that venue presents a question of procedure for purposes of the *Erie* doctrine.”); *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990) (“Questions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature.”). For an exploration of this approach, see Sachs, *supra* note 66, at 17–26.

144. For an early articulation of this approach, see *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. at 36 (Scalia, J., dissenting) (“§ 1404(a) was enacted against the background that issues of contract, including a contract’s validity, are nearly always governed by state law.”). His opinion concludes that “no federal statute or Rule of Procedure governs the validity of a forum-selection clause.” *Id.* at 38.

145. See, e.g., *TH Agric. & Nutrition, L.L.C. v. Ace Eur. Grp., Ltd.*, 416 F. Supp. 2d 1054, 1075 (D. Kan. 2006); *Abbott Labs. v. Takeda Pharms.*, 476 F.3d 421, 423 (7th Cir. 2007).

those questions.¹⁴⁶ That approach is not uniform, however. Some federal courts simply apply federal precedent in interpreting forum selection clauses, without clearly identifying the source of applicable law.¹⁴⁷ Others apply what they describe as “federal common law”¹⁴⁸ to questions regarding interpretation of the contract, generally on the theory that “because enforcement of a forum clause necessarily entails interpretation of the clause before it can be enforced, federal law applies to interpretation of forum selection clauses [in diversity cases].”¹⁴⁹ (The federal law on this point, according to these courts, is that a choice of court must “clearly require” exclusivity in order to be characterized as mandatory.¹⁵⁰) Others reason that although the “overriding framework governing the effect of forum selection clauses in federal courts . . . is drawn from federal law,” questions of interpretation—including whether a clause is exclusive or permissive—must be answered by applying “the body of law selected in an otherwise valid choice-of-law clause.”¹⁵¹ Although less commonly, some courts will, in the absence of a choice-of-law clause, apply the conflicts rules of the state in which they sit in order to select the substantive law governing the contract.¹⁵² Still, others simply duck the question by concluding that there are no “material discrepancies” between federal common law and the relevant state law in matters of contract interpretation.¹⁵³

CONCLUSION

It is easy to articulate a general rule regarding the treatment of forum selection clauses in U.S. courts: almost always, in consumer as well as commercial contracts, they will be given effect. It is far more difficult to navigate the array of substantive, procedural, and conflicts rules whose interplay yields that result. For any lawyer (and particularly for foreign lawyers) seeking to appreciate the complexity of procedural law within the U.S. federal system, there is no better subject of study.

146. See Clermont, *supra* note 5, at 667.

147. For citations to such cases, along with a lengthy critique of that practice, see Sabal, Ltd. LP v. Deutsche Bank AG, 209 F. Supp. 3d 907, 918–19 (W.D. Tex. 2016).

148. See *Wong v. PartyGaming, Ltd.*, 589 F.3d 821 (6th Cir. 2009).

149. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988). See also *Foundation Fitness Prods., L.L.C. v. Free Motion Fitness*, 121 F. Supp. 3d 1038, 1044 (D. Or. 2015) (“To interpret the forum-selection clauses [as either mandatory or permissive], this Court, sitting in diversity, must apply federal law, despite the [contracts’] choice-of-law provisions selecting Utah law.”).

150. *Foundation Fitness Prods.*, 121 F. Supp. 3d at 1044.

151. *Martinez v. Bloomberg LP*, 740 F.3d 211, 217–18 (2d Cir. 2014); see also *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 430 (10th Cir. 2006); *Phillips v. Audio Active, Ltd.*, 494 F.3d 378, 385 (2d Cir. 2007).

152. See, e.g., *Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 770–73 (5th Cir. 2016) (applying the choice-of-law rules of Texas to determine that German law governed the contract, and then holding that under German law the forum selection clause in question was exclusive rather than permissive).

153. See, e.g., *Logic Energy Sols., L.L.C. v. Boulter*, Case No. CIV-14-0011-F, 2014 WL 12588521, at *3 (W.D. Okla. 2014).