

THE PUZZLE OF FLOATING FORUM SELECTION CLAUSES

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This Essay, written for the symposium honoring the work of Professor Linda Silberman, investigates the intricacies of floating forum selection clauses, an innovative development in contract procedure. Floating forum selection clauses link the choice of forum for dispute resolution to a variable factor after contract signing. This Essay categorizes floating forum selection clauses into three types, each with distinct enforceability and influencing factors, and then explores the complex relationship between consent and due process, shedding light on how different courts approach the connection between the two concepts.

I. INTRODUCTION	199
II. THE FLOATING FORUM SELECTION CLAUSE	200
A. <i>Principal Place of Business</i>	200
B. <i>Assignment</i>	201
C. <i>Unilateral Clauses</i>	203
III. THE RELATIONSHIP OF CONSENT TO DUE PROCESS	205
IV. THE PUZZLE OF WAIVER AND SUBMISSION	207
A. <i>Waiver Versus Submission</i>	208
B. <i>Floating Forum Selection Clauses as Conceptual Challenge to the Meaning of Ex Ante Consent</i>	209
V. CONCLUSION	213

I. INTRODUCTION

Among all the recent innovations in the field of contract procedure, the floating forum selection clause is perhaps the most ingenious. Unlike most forum selection clauses, the floating clause does not name a specific jurisdiction in which to resolve disputes. Instead, it ties the choice of forum to a mutable fact that can change after the contract is signed.¹ Floating

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1. Dale Joseph Gilsinger, Annotation, *Enforceability of Floating Forum Selection Clauses*, 39 A.L.R.6th 629 § 2 (2008).

clauses allow businesses to retain their home court advantage when they decide to relocate their headquarters. They facilitate the assignment of contracts to third parties. And they help foreign insurance companies attract U.S. customers. To date, however, these provisions have attracted only sporadic attention in the literature.²

This Essay provides a concise descriptive account of floating forum selection clauses. It examines when U.S. courts will and will not rely on them to obtain personal jurisdiction over parties that otherwise lack minimum contacts with the forum. It then draws upon this descriptive account to explore the tension between the concepts of “waiver” and “submission” and argues that the differing outcomes in cases involving floating clauses may be partially explained by which concept is brought to bear on the question.

II. THE FLOATING FORUM SELECTION CLAUSE

There are, broadly speaking, three different types of floating forum selection clauses. The first ties the choice of forum to one contracting party’s principal place of business. The second ties the choice of forum to the home jurisdiction of a contract assignee. The third ties the choice of forum to the whim of one contracting party. Each is explored below.

A. *Principal Place of Business*

Some floating clauses state that any litigation shall occur in the jurisdiction where one of the contracting parties has its principal place of business.³ These clauses are useful in that

2. See, e.g., Paul Hartman Cross & Hubert Oxford, IV, “Floating” Forum Selection and Choice of Law Clauses, 48 S. TEX. L. REV. 125 (2006) (examining the enforceability of floating forum selection clauses in insurance contracts); 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 (2007) (discussing trends in the law related to floating forum selection clauses).

3. See, e.g., Brock v. Baskin-Robbins USA Co., 113 F. Supp. 2d 1078, 1082 (E.D. Tex. 2000) (“Any dispute arising under or in connection with the Agreement and any claim affecting its validity, construction, effect, performance or termination . . . shall be resolved exclusively by the federal or state courts in the judicial district in which Baskin-Robbins has its principal place of business . . .”).

they allow a party to retain its home court advantage in litigation even if it moves its headquarters to a different jurisdiction after the contract is executed. The identity of this new jurisdiction is typically not foreseeable to the counterparty at the outset of the contractual relationship. That party is, in effect, consenting to personal jurisdiction in the dark. Nevertheless, courts routinely enforce these clauses because they view them as reasonable attempts to protect a contractual right to litigate at home.⁴

B. *Assignment*

Other floating clauses stipulate that litigation shall occur in the home jurisdiction of any person to whom the contract is assigned.⁵ In contrast to clauses that select one party's principal place of business, clauses that select the home jurisdiction of an assignee have generated a fair degree of controversy. Most courts have concluded that such clauses provide a valid basis for the assertion of personal jurisdiction. A few courts have, however, rejected this position.

The courts that enforce these clauses generally hold that they are reasonable, and hence enforceable, for one of four reasons. First, these courts point out that the mere existence of the clause puts the defendant on notice that the identity of the chosen forum might change over the life of the contract.⁶

4. *See id.* at 1088 (dismissing Defendants' arguments to void the forum-selection clause due to unequal bargaining power or convenience of their employees); *GE v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1099 (6th Cir. 1994) (finding no evidence that the Plaintiff was exploited or unfairly treated and therefore upholding the forum selection clause); *ABC Rental Sys. v. Colortyme, Inc.*, 893 F. Supp. 636, 639 (E.D. Tex. 1995) ("Although a plaintiff's choice of forum is traditionally accorded deference, that deference is inappropriate where the plaintiff has already contractually chosen the venue via a forum selection clause.").

5. *See, e.g., Danka Funding, LLC v. Page, Scrantom, Sprouse, Tucker & Ford, P.C.*, 21 F. Supp. 2d 465, 468 (D.N.J. 1998) ("YOU CONSENT TO THE JURISDICTION OF ANY LOCAL, STATE OR FEDERAL COURT LOCATED WITHIN OUR OR OUR ASSIGNEE'S STATE . . .") (internal quotation omitted).

6. *See AFC Franchising, LLC v. Purugganan*, 43 F.4th 1285, 1295–96 (11th Cir. 2022) (describing that provisions in the contract provided "ample notice" that litigation could take place in a different forum); *IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc.*, 437 F.3d 606, 610, 612–13 (7th Cir. 2006) (finding that a party waives its objection to a floating forum based on inconvenience when it was agreed-upon in a contract clause); Preferred

Second, they invoke the fact that all of the contracting parties were sophisticated actors.⁷ Third, they cite to prior cases where courts enforced these provisions.⁸ Finally, they note that enforcing these clauses facilitates the loan assignment market and, in so doing, lowers the cost of servicing lease portfolios.⁹

When a court concludes that a floating clause relating to assignment is unenforceable, it usually cites the fact that the identity of the chosen forum was impossible to foresee at the time of contracting. The Ohio Supreme Court, for example, offered the following justification for invalidating a floating clause tied to the assignee's home jurisdiction:

[T]he 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. At the time the contract was entered into, the appropriate forum would have been New Jersey; the very next day, in most cases, the lease was assigned to Preferred Capital and the appropriate forum became Ohio. Nothing prevented

Capital, Inc. v. Assocs. in Urology, 453 F.3d 718, 723–24 (6th Cir. 2006) (“Given the terms of the forum selection clause in the agreements that Defendant signed, Defendant was indeed on notice practically from the inception of the agreements that any disputes would be litigated in Ohio, where the offices of Plaintiff-assignee are located.”); GreatAmerica Leasing Corp. v. Telular Corp., No. C 98–127, 1999 WL 33656867, at *4 (N.D. Iowa Apr. 20, 1999) (determining that a forum selection clause included in a leasing agreement reasonably inferred the possibility of litigation in a number of states).

7. See *Danka Funding*, 21 F. Supp. 2d at 472 (discussing the validity of a forum-selection clause in a sophisticated business transaction with sophisticated parties).

8. *U.S. Bank Nat'l Ass'n v. San Bernardino Pub. Emples. Ass'n*, Civil No. 13-2476, 2013 U.S. Dist. LEXIS 169998, at *8–9 (D. Minn. Dec. 3, 2013); *Popular Leasing USA, Inc. v. Terra Excavating, Inc.*, No. 4:04–CV–1625, 2005 U.S. Dist. LEXIS 32267, at *4–5 (E.D. Mo. June 28, 2005); *AI Credit Corp. v. Liebman*, 791 F. Supp. 427, 428–30 (S.D.N.Y. 1992).

9. See *Signature Fin. LLC v. Neighbors Glob. Holdings, LLC*, 281 F. Supp. 3d 438, 448, 452 (S.D.N.Y. 2017) (stating that the purpose of the clause is to “facilitate the assignment market and expand the supply of credit to areas around the country by making it easier for creditors to recover when debtors default” and to “lower the cost of servicing lease portfolios”); *IFC Credit Corp. v. Rieker Shoe Corp.*, 881 N.E.2d 382, 391 (Ill. App. Ct. 2007) (indicating that there are “legitimate business reasons for this type of forum selection clause, which facilitates the marketability of commercial paper because financial institutions can depend on selling it freely.”).

Preferred Capital from assigning its interest and changing the forum yet again.¹⁰

Other courts have similarly reasoned that because the purpose of forum selection clauses is to promote certainty as to the identity of the chosen court, and because floating clauses selecting the assignee's home jurisdiction do nothing to further this purpose, such clauses should not be given effect.¹¹

C. *Unilateral Clauses*

Still other floating clauses stipulate that litigation shall occur in any jurisdiction selected by one of the parties after the dispute arises.¹² Such a clause might state, for example, that “each of the parties hereto agrees that any . . . claim or cause of action shall be tried by a court trial without a jury in seller's county and state of choice.”¹³ Although the identity of the chosen forum is no more foreseeable to the defendant in this type of floating clause than in the ones discussed above, most courts have held that these “unilateral” clauses are unenforceable because they provide too little guidance as to the identity of the chosen forum.

In justifying their refusal to enforce unilateral clauses, the courts explain that they do too little to further the goal of providing certainty. The Georgia Court of Appeals once observed that:

[T]he [unilateral] forum selection clause provides no intimation of the forum contemplated. In so doing, the clause fails to reflect a meeting of the minds

10. Preferred Capital, Inc. v. Power Eng'g Grp., 112 Ohio St. 3d 429, 433, 2007-Ohio-257, ¶ 12, 860 N.E.2d 741, 746; see also AT&T Capital Leasing Servs. V. CJP, Inc., No. 97-1804, 1997 Mass. Super. LEXIS 181, at *8 (Sept. 9, 1997) (“The court is disturbed by the far-reaching nature of a clause that forces one side to waive jurisdictional defenses as to a forum that has not even been identified.”).

11. See Copelco Capital v. Shapiro, 750 A.2d 773, 776 (N.J. Super. Ct. App. Div. 2000) (noting that such clauses do not further the objectives of “insuring a predictable and neutral locus for the resolution of any dispute”).

12. Some courts take the position that such clauses are unenforceable. See, e.g., Lopez v. United Capital Fund, LLC, 88 So. 3d 421, 425 (Fla. Dist. Ct. App. 2012) (forum selection clause unenforceable when it “do[es] not tie the selection of a forum to any mutable and identifiable fact”).

13. *Id.* at 423.

sufficient to show the parties reached an agreement on the forum. Moreover, its lack of specificity impugns a fundamental purpose of such clauses: to eliminate uncertainties by agreeing in advance on a forum acceptable to both parties.¹⁴

The U.S. District Court for the Southern District of Georgia made a similar point in declining to enforce a similar clause:

Here, the forum selection clause potentially provides for jurisdiction in any court north of Mexico. . . . The Court finds that the forum selection clause at issue is impermissibly vague, contravening the strong public policy in its favor, and thus insufficient to support personal jurisdiction.¹⁵

In cases involving unilateral floating clauses, the courts have generally held that they are unenforceable on the grounds of vagueness, lack of specificity, and overbreadth. In these cases, the foreseeability issue swamps all of the other considerations and renders the clause unenforceable. This outcome is surprising because a lack of foreseeability is also present when the floating clause selects the principal place of a business or the home jurisdiction of a contract assignee.¹⁶

14. Cent. Ohio Graphics v. Alco Capital Res., 472 S.E.2d 2, 4 (Ga. Ct. App. 1996); *see also* Conopco, Inc. v. Pars Ice Cream Co., 13 Civ. 1083, 2013 U.S. Dist. LEXIS 146234, at *13–14 (S.D.N.Y. Sept. 26, 2013) (“Forum selection or waiver clauses that do not apply to an ascertainable forum, however, undermine [certainty and predictability], and for that reason, courts refuse to enforce them.”); BBC Chartering & Logistic GmbH & Co. K.G. v. Siemens Wind Power A/S, 546 F. Supp. 2d 437, 441–43 (S.D. Tex. 2008) (discussing the enforceability of a floating forum clause in light of the clause’s inability to eliminate uncertainty).

15. Redrock Trading Partners, LLC v. Baus Mgmt. Corp., No. CV 113-043, 2014 U.S. Dist. LEXIS 145654, at *9 (S.D. Ga. Oct. 10, 2014).

16. There is one notable exception to this general rule. A so-called “service of suit” clause provides that litigation may occur in “any court of competent jurisdiction within the United States.” Some foreign insurers have agreed to write these clauses into their insurance contracts with U.S. clients as a means of attracting business. *See* Price v. Brown Grp., 206 A.D.2d 195, 199, 619 N.Y.S.2d 414, 417 (App. Div. 4th Dept. 1994) (describing why a specific foreign company would insert a “service of suit” clause into a contract as a competitive practice). There can be no doubt that such provisions are unilateral clauses. The foreign company is consenting to jurisdiction in any U.S. state where its counterparty wants to sue it. Unlike other unilateral clauses, however, service of suit clauses are routinely enforced by U.S. courts, possibly due to the fact that the defendants in these cases are sophisticated drafters

* * *

The foregoing discussion showcases the ways that the courts balance reasonability and foreseeability in the context of deciding when a defendant is subject to personal jurisdiction by operation of a floating forum selection clause. The courts are generally willing to enforce floating clauses that select a contracting party's principal place of business. They are generally unwilling to enforce unilateral clauses. And they disagree as to whether it is appropriate to enforce clauses selecting the home jurisdiction of an assignee. The remainder of the Article seeks to untangle the reasons for these disparate outcomes given that it is impossible for the defendant to predict, in advance, where it is consenting to jurisdiction under any of the scenarios outlined above.

III. THE RELATIONSHIP OF CONSENT TO DUE PROCESS

The judicial treatment of floating forum selection clauses illuminates several unresolved conceptual foundations of the use of consent as a basis for personal jurisdiction. Consent to jurisdiction is one of the so-called "traditional" bases of jurisdiction because of its use and acceptance as a jurisdictional predicate at the time of the Supreme Court's decision in *Pennoyer v. Neff*.¹⁷ There is general agreement that, as a traditional basis of jurisdiction, consent is constitutionally adequate and does not require further inquiry beyond the question of whether the consent in question was valid. Forum selection clauses, once sparsely used and held unenforceable,¹⁸ have

who would otherwise not be subject to jurisdiction in the United States. *See, e.g.,* *Southland Oil Co. v. Miss. Guar. Ass'n*, 182 F. App'x 358, 361 (5th Cir. 2006) (discussing enforcement of service of suit clauses in U.S. courts against foreign insurance companies compared to domestic companies); *Bartlett Grain Co. v. Am. Int'l Grp.*, No. 11-0509-CV-W-ODS, 2011 U.S. Dist. LEXIS 83680, at *4-5 (W.D. Mo. July 29, 2011) (holding that a foreign insurance company's service of suit clause was a valid forum selection clause); *Ace Ins. Co. v. Zurich Am. Ins. Co.*, 59 S.W.3d 424, 429 (Tex. Ct. App. 2001) (holding that a foreign insurance company consented to personal jurisdiction of the insured party's choice by way of its service of suit clause).

17. *Pennoyer v. Neff*, 95 U.S. 715, 726, 729, 733 (1878) (discussing voluntary appearance as one of the acceptable bases for personal jurisdiction).

18. *See Home Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874) (explaining why men cannot bind themselves in advance to give up their rights through a forum selection clause); David Marcus, *The Perils of Contract Procedure: A Revised*

now become a common means of obtaining a defendant's consent to jurisdiction.¹⁹ Many courts that find personal jurisdiction based on a forum selection clause simply point to consent as a traditional, and thus constitutional, basis of personal jurisdiction.²⁰ But this superficial uniformity masks underlying disagreement about the relationship of consent to due process.

Most courts adhere to an approach that maintains that consent is tantamount to due process, thus rendering additional constitutional inquiry unnecessary.²¹ The primary analytical disagreements concern the question of whether due process requires anything from forum selection clauses beyond the demands that contract law places on the validity of the agreement. In the floating forum selection clause cases, the invocation of reasonability and foreseeability comes from principles of contract enforceability with only quiet echoes of the reasonableness and foreseeability analysis that has suffused personal jurisdiction in the minimum contacts era. These differing approaches to due process have gone mostly unrecognized in the literature. However, the inconsistencies are significant for two reasons. First, the more distance a court puts between consent and due process, the more likely it is that the court will engage in enforceability analysis that makes little (if any) reference to the constitutional dimensions of the limits on personal jurisdiction. Second, the fractured approach to the relationship between consent and due process is a symptom of a deeper problem, namely, the lack of conceptual clarity about *why* consent is a traditional basis of jurisdiction and, thus, what

History of Forum Selection Clauses in the Federal Courts, 82 TUL. L. REV. 973, 1015 (2008) (describing party agreements regarding court access as not necessarily enforceable before 1972).

19. See Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L. J. 323, 367–70 (1992) (discussing the history of courts enforcing personal jurisdiction contract clauses like forum selection clauses).

20. John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 NOTRE DAME L. REV. 187, 230 (2021).

21. See, e.g., *U.S. Bank Nat'l Ass'n v. San Bernardino Pub. Emps. Ass'n*, No. 13-2476, 2013 U.S. Dist. LEXIS 169998, at *5 (D. Minn. Dec. 3, 2013) (“[d]ue process is satisfied when a defendant consents to personal jurisdiction by entering into a contract that contains a valid forum selection clause.”); *PSFS 3 Corp. v. Seidman*, 962 N.W.2d 810, 830 (Iowa 2021) (“The point of due process is to ensure that a party is not unfairly hauled into a distant forum without either sufficient minimum contacts to support personal jurisdiction or consent to jurisdiction in the distant forum.”).

sorts of consent ought to be entitled to the presumption of constitutionality.

IV. THE PUZZLE OF WAIVER AND SUBMISSION

Courts are quick to invoke the principle that consent is a traditional basis of jurisdiction and thus entitled to a fast track to constitutionality. Few judges, however, have paused to consider what was traditional about consent. Forum selection clauses were, in most circumstances, unenforceable as a matter of state and federal law until the latter part of the twentieth century.²² As such, the “long historical pedigree” argument for the exercise of personal jurisdiction in the presence of a valid forum selection clause is an awkward fit.²³ Alternatively, one can locate the tradition of consent to jurisdiction in the broader principles of waiver of constitutional rights and volitional submission to the power of the forum state. Both principles have been present since the pre-*Pennoyer* days of jurisdictional analysis.

An examination of how courts have treated floating forum selection clauses shows that the traditional basis of consent is rooted in both waiver and submission. Neither concept can independently support the constitutionality of consent to jurisdiction, at least as it is currently understood. The puzzle, then, is to sort out where waiver ends, where submission begins, and how much each concept contributes to the constitutionality of consent to jurisdiction.

Since the early nineteenth century, judges have used both the terms “waiver” and “consent” to describe the phenomenon of party agreement to jurisdiction. Parties could manifest assent to the jurisdiction of the forum state by express conduct, although the assent itself was often implied rather than express. Courts used the term “consent” to denominate ineffective

22. Robin J. Effron & Aaron Simowitz, *The Long Arm of Consent*, 80 N.Y.U. ANN. SURV. AM. L. ___ (forthcoming 2024); John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 INDIANA L.J. 1089, 1096–98 (2021).

23. See *Burnham v. Superior Court*, 495 U.S. 604, 621–22 (1990) (describing the pedigree of in-state service as a form of personal jurisdiction as resulting from its long history of repeated validation by both courts and legislatures); see also Effron & Simowitz, *supra* note 22 (describing the contrasting approaches to the existence of a “long historical pedigree” in the *Burnham* plurality and *Shaffer* majority opinions).

assertions of jurisdiction, as it denoted unenforceable ex ante agreements to litigate in a particular forum; “consent” was rarely used to denote successful assent to the forum because “consent” implied the sort of ex ante agreement that was, at the time, unenforceable. When describing effective methods of assent to jurisdiction, courts used the label “waiver” or did not give a specific legal denomination at all.²⁴ Even in the early nomenclature, there is evidence of a nascent conceptual tension. Waiver implies that a party has voluntarily abandoned its otherwise extant right to challenge jurisdiction, and thus a court is entitled to adjudicate the matter and enter a binding judgment despite an otherwise cognizable constitutional or rule-based violation. The rules and practices of filing or appearing in a lawsuit—what we would today refer to as “consent”—suggested that parties had an independent power to bring themselves within the adjudicative ambit of the forum state that extends beyond the choice to leave jurisdiction unchallenged.

A. *Waiver Versus Submission*

The theory of consent as waiver stems from the principle that personal jurisdiction is just one of a broader category of constitutional rights that a person is entitled to waive. Courts have invoked this principle for nearly two centuries,²⁵ and the concept found its high-water mark in the Supreme Court’s decision in *Insurance Corporation of Ireland v. Bauxites de Guinee*.²⁶ The focus of the waiver inquiry is not on the content of the right but on the party’s implied or express choice to forego enforcement of that right. The theory of voluntary submission has a different conceptual focus. Here, courts stress the fact that the party has brought itself within the jurisdiction of the court by submitting to or invoking its power. This is why a plaintiff who otherwise

24. See Effron & Simowitz, *supra* note 22 (collecting cases).

25. See, e.g., Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997) (describing waiver of jury trial rights in the context of other waivers of procedural constitutional rights).

26. *Ins. Co. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694, 703 (1982) (“Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.”).

lacks a connection to the forum state can file a lawsuit there and be bound by the judgment.

The historical core of both doctrines is located in party conduct during litigation. For example, a party who fails to timely raise jurisdictional objections under the relevant procedural rules has waived the right to challenge the exercise of personal jurisdiction. Relatedly, a voluntary appearance in the forum state indicates that the defendant has chosen, expressly or impliedly, to submit itself to the power of the forum state. The animating concept behind waiver is a recognition that a party's right not to be subjected to the jurisdiction of a forum state might have been violated, but a remedy (dismissal for want of jurisdiction) is no longer available. With the idea of submission, the animating concept is that there are recognized volitional acts that a party might take that bring it within the power of a jurisdiction that, but for such volitional acts, would not have adjudicative power over that party.

During the *Pennoyer* and early *International Shoe* eras, when consent was largely limited to party conduct in pending litigation, the distinction between waiver and submission was of rather little consequence. With litigation underway, a party who had appeared in the forum had already engaged in a classic act to bring itself within the power of the forum state. The relevant question was whether a party who wished to contest jurisdiction had availed itself of the proper procedural niceties to raise such a challenge.

B. *Floating Forum Selection Clauses as Conceptual Challenge to the Meaning of Ex Ante Consent*

The advent of ex ante consent complicates this equation by raising the question of what a party is promising to do in advance of litigation. Courts have positioned forum selection clauses as an enforceable promise of future conduct. But what, exactly, is the party to a forum selection clause promising to do? According to the submission theory, ex ante consent means that a party is promising to submit itself to the adjudicative authority of the forum state. Conversely, the waiver theory describes ex ante consent as meaning that the party has made an enforceable promise to waive jurisdictional defenses. The confusion about the role that foreseeability and reasonability play in the enforceability of floating forum selection clauses is emblematic

of the conflation of waiver and submission. Underneath the patchwork of decisions as to what is “foreseeable” and “reasonable” is a deeper disagreement about what rights a party should be able to foreseeably and reasonably alienate.²⁷ At bottom, it shows that a pure waiver or pure submission theory of consent cannot provide adequate conceptual grounding to explain the decisions in this area.

On a pure waiver theory, all floating forum selection clauses should be enforceable. During pending litigation, a party may make a valid waiver of all personal jurisdiction defenses regardless of whether there is any other connection between the party and the forum. If a party can make the choice to waive defenses during litigation, then it should be able to make an enforceable *ex ante* promise to engage in just that conduct.²⁸

The waiver theory is attractive to courts wanting to avoid personal jurisdiction constitutional analysis or even mention of it at all. Waiver is a green light to withhold constitutional scrutiny, thus elevating party choice as the dominant value. But some of the floating forum selection clause cases approach the boundaries of the scope of waiver that courts are willing to tolerate.

The courts that have declined to enforce unilateral clauses and clauses selecting the home jurisdiction of assignees have

27. There is a separate and equally important dimension of enforcement of forum selection clause cases that concerns the problem of using such clauses in standard-form contracts and enforcing them against consumers, employees, or other persons who have little to no bargaining power and for whom the cost of litigating in a distant and inconvenient forum can be substantial. These questions, which have been the source of criticism by a number of scholars, implicate different dimensions of consent such as the broader questions of what it means to assent to the terms of a standard-form contract in general. For the purposes of this Essay, this analysis assumes that the parties to a floating forum selection clause are of the relatively sophisticated variety seen in most of the cases. This allows one to try and answer the question of the definition of *ex ante* consent separately from the question of what sort of manifestations of consent ought to be effective as a matter of both contract and constitutional personal jurisdiction law.

28. The Supreme Court upheld a post-filing written waiver of personal jurisdiction defenses in *Petrowski v. Hawkeye-Security Ins. Co.*, 350 U.S. 495 (1956). From there, the path to *ex ante* written waivers required only the loosening of state and federal prohibitions on forum selection clauses. See John Coyle & Katherine C. Richardson, *Enforcing Inbound Forum Selection Clauses in State Court*, 53 ARIZ. ST. L.J. 65, 76–102 (2021) (discussing and analyzing the factors leading toward the broadening of consent-based personal jurisdiction).

done so by holding that the clause was too vague or overbroad to constitute a meaningful waiver.²⁹ The courts have consistently held that forum selection clauses are generally enforceable “because they provide certainty and predictability in the resolution of disputes.”³⁰ Certainty and predictability are, doctrinally, why forum selection clauses are attractive. But they do not fully square with the individual liberty justifications for waiver of a constitutional right. If a party can make a promise not to contest jurisdiction in one jurisdiction or a few jurisdictions, why can it not promise to give up the right to contest personal jurisdiction at all? There is nothing mysterious or unknowable about this promise. In a perverse way, it is more concrete than some of the forum selection clauses that name multiple jurisdictions or permit jurisdiction in the principal place of business of the signatory or assignee—the party is now very aware that it will have to defend a lawsuit without contesting jurisdiction.

The courts have been unwilling, however, to tolerate such expansive promises. The puzzle is why courts reach for some doctrines but not others in trying to establish the boundaries of permissible waiver. Most courts invoke the concepts of foreseeability and reasonability in explaining why a floating clause is or is not enforceable. But these distinctions cannot stand up to close scrutiny. Although every floating clause raises issues relating to foreseeability, the courts have held that these issues do not matter when the clause selects a contracting party’s principal place of business. The issues that the courts consider as part of the reasonableness inquiry—party sophistication, facilitating a market for contracts, etc.—likewise fail to provide a convincing explanation as to why unilateral clauses are treated differently from assignment clauses as a general rule. Although foreseeability and reasonability are frequently invoked, they provide frustratingly little explanatory power when it comes to case outcomes.

The concept doing the most work here is, in fact, submission to the forum state. The reason that no court has enforced unfettered promises to abandon jurisdictional defenses full stop is that the jurisdictional right is inherently tied to the forum in which litigation occurs. A party can affirmatively submit to the

29. *See supra* notes 14–16 and accompanying text (citing multiple cases that failed to enforce unilateral clauses for vagueness).

30. *Conopco, Inc. v. Pars Ice Cream Co.*, 13 Civ. 1083, 2013 U.S. Dist. LEXIS 146234, at *13–14 (S.D.N.Y. Sept. 26, 2013).

jurisdiction of the forum state in a way that suggests it is doing more than just waiving a defense; the plaintiff or intervenor in a lawsuit who seeks to be a party to a binding judgment in the forum state is evidence of that concept. They are not waiving a constitutional right, but availing themselves of the ability to bring themselves within the adjudicative power of the sovereign.

This means that the promise in a forum selection clause is about agreeing to submit oneself to a cognizable adjudicative authority, not just to alienate the right to assert a particular defense in a hypothetical future lawsuit. *This* is the concept that pulls the contract doctrine of forum selection clauses back into the world of constitutional personal jurisdiction—the party must manifest some bare minimum of forum-directed activity to justify the exercise of authority.

The submission principle offers a complementary promissory path. If a party is free to submit to the jurisdiction of a forum state during litigation, it should also be free to make an *ex ante* promise to submit in a contract, and submission requires a cognizable forum. This is, perhaps, why many courts have allowed principal place of business and even assignment clauses to persist while axing unilateral clauses. The tacit idea might be that, even if the exact forum is unknown at the time of execution of the contract, and even if the identity of that forum is nigh impossible to predict, the parties have agreed to submit to the jurisdiction of a forum state that will be easily identifiable at the time of litigation.

This reveals that the root issue of submission is how much a party must know about the identity of a forum in order to genuinely submit to the authority of that forum. This brings the analysis much closer to the tone and method of minimum contacts in which the most tenuous and arbitrary connections to the forum state are insufficient, but a number of forum-directed activities will suffice. The reason for the confusion in the floating forum selection cases is that courts have used waiver as a substitute for analysis, and the existence of the waiver principle has directed attention away from the submission principle.

Courts have yet to fully engage with the implications of *ex ante* submission as distinct from *ex ante* waiver. There are a few paths that this engagement might suggest. One possible outcome is that courts adopt a more skeptical view of floating forum selection clauses on the theory that it is simply not possible to submit to an unnamed or contingent forum. A more

likely outcome is that courts will sharpen the analysis of assignment clauses. To the extent that courts will almost certainly find it difficult to explain the difference between assignment clauses and unilateral clauses from a submission perspective rather than from a waiver/contract perspective, the number of courts that reject assignment clauses or treat them with skepticism might increase. And to the extent that manifestations of intent to submit are as important as intent to waive, the submission principle could also explain the persistence of “service of suit” clauses.³¹ These clauses are indistinguishable from unilateral clauses but for one important distinction—the clear evidence that the foreign defendant will not evade submission in the United States altogether.

V. CONCLUSION

The checkered landscape of floating forum selection clauses should push jurists to focus on both waiver and submission as reasons for the constitutionality of consent to jurisdiction. The analysis does not end there, as courts and commentators will need to further parse the due process implications of enforcing such clauses.

31. *See supra* note 16 (discussing “service of suit” clauses).