Northern Natural Gas Company, a Delaware corporation, appellee, v. Centennial Resource Production, LLC, a Delaware limited liability company, appellant.

___ N.W.3d ___

Filed March 29, 2024. No. S-23-647.

1. **Jurisdiction: Evidence.** If a court holds an evidentiary hearing on the issue of personal jurisdiction or decides the matter after trial, then the plaintiff bears the burden of demonstrating personal jurisdiction by a preponderance of the evidence.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
3. **Appeal and Error.** Vague or conclusory assertions unsupported by coherent analytical argument fail to satisfy the requirement of arguing an assigned error to obtain consideration by an appellate court.
4. _____. An appellate court does not consider arguments only clearly articulated on appeal in oral arguments or a reply brief.
5. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
6. **Due Process: Jurisdiction.** The Due Process Clause of the U.S. Constitution requires that individuals have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign.
7. **Constitutional Law: Due Process.** The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations.

8. **Courts: Liability.** A court's ability to impose liability should be predictable to the parties before the court based on their own actions.
9. **Jurisdiction: Waiver.** Because the requirement of personal jurisdiction represents an individual right, it can, like other such rights, be waived.
10. **Jurisdiction: States: Contracts: Waiver.** A valid and enforceable choice of forum clause in a contract is sufficient in itself to waive the requirement of minimum contacts and to submit a nonresident to the jurisdiction of the forum state.
11. **Jurisdiction: Contracts.** It can hardly be said that a defendant cannot reasonably anticipate being haled into court in a jurisdiction identified by a valid forum selection clause.
12. ____: ____. Absent a showing that trial in the contractual forum will be so gravely difficult and inconvenient that the party challenging the clause will be deprived of his or her day in court, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his or her bargain.
13. **Due Process: Jurisdiction: Contracts.** Due process is satisfied when a defendant consents to personal jurisdiction by entering into a contract that contains a valid forum selection clause and it is not a forum non conveniens.
14. **Jurisdiction: Statutes: Words and Phrases.** The language of Neb. Rev. Stat. § 25-414 (Reissue 2016) was intended to prevent a court from exercising jurisdiction where that exercise would result in injustice or in substantial inconvenience to the parties.
15. **Due Process: Jurisdiction: States: Contracts.** As a practical matter, any forum selection clause which meets the Model Uniform Choice of Forum Act's requirement that Nebraska be a reasonably convenient place for the trial of the action will also satisfy the Due Process Clause's requirement that trial of the action in Nebraska not be so gravely difficult and inconvenient that the party challenging the clause will be deprived of his or her day in court.
16. **Jurisdiction: States.** The doctrine of forum non conveniens (literally, "an unsuitable court") provides that a state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action, provided that a more appropriate forum is provided to the plaintiff.
17. **Jurisdiction: Words and Phrases.** Forum non conveniens refers to the discretionary power of a court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum.
18. **Courts: Jurisdiction.** A plaintiff's choice of a forum should not be disturbed except for weighty reasons, and only when trial in the chosen forum would establish oppressiveness and vexation to a defendant out of

all proportion to the plaintiff's convenience, or when the forum is inappropriate because of considerations affecting the court's own administrative and legal problems.

19. **Jurisdiction: Contracts: Waiver.** When parties agree to a forum selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation; in essence, they waive the right to challenge the private interest factors.
20. **Courts: Jurisdiction.** In determining the convenience of the forum, the trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process.
21. **Courts: Jurisdiction: States.** In determining the convenience of the forum, it is appropriate to consider the advantages of having trial in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.
22. **Jurisdiction: Proof.** In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his or her home forum will normally outweigh the inconvenience the defendant may have shown.
23. **Jurisdiction: Contracts.** A minimum contacts analysis is not appropriate in determining the validity of forum selection clauses in commercial contracts.
24. ____: ____. The minimum contacts analysis and the contractual consent to jurisdiction analysis are separate analyses.
25. ____: ____. The language of Neb. Rev. Stat. § 25-414 (Reissue 2016) that "the agreement provides the only basis for the exercise of jurisdiction" merely means that the choice of forum clause is a necessary component to the assertion that there is personal jurisdiction on the grounds of contractual consent and that minimum contacts are not part of this inquiry.
26. **Constitutional Law: Statutes: Legislature: Presumptions: Intent: Appeal and Error.** An appellate court must construe a statute in a way that is constitutional where possible, as well as presume the Legislature intended a sensible rather than an absurd result.
27. **Jurisdiction.** The Model Uniform Choice of Forum Act does not dictate the order in which a court may analyze alternative arguments for personal jurisdiction.

Appeal from the District Court for Douglas County: Timothy P. Burns, Judge. Affirmed.

David A. Domina, of Domina Law Group, P.C., L.L.O., and Patrick G. Compton, of Ballard Spahr, L.L.P., pro hac vice, for appellant.

Patrick S. Cooper, of Inserra | Kelley | Cooper | Sewell, and Katherine A. McNamara, of Fraser Stryker, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Papik, and Freudenberg, JJ.

Freudenberg, J.

I. INTRODUCTION

A corporation providing natural gas pipeline transportation services sued a shipper that had contracted for it to transport natural gas from Texas to Kansas. The transporter alleged breach of contract after the shipper, due to a cold weather event in Texas, was unable to utilize its reserved pipeline capacity, and it refused to pay its invoice corresponding to those dates. The transporter has its principal place of business in Omaha, Nebraska, while the shipper has its principal place of business in Denver, Colorado. The district court concluded it had personal jurisdiction over the shipper based on the shipper's contractual consent. Alternatively, the court found sufficient minimum contacts with Nebraska during the formation and implementation of the parties' 3-year business relationship to support personal jurisdiction. We affirm on the grounds of contractual waiver and find it unnecessary to address the alternative grounds of minimum contacts.

II. BACKGROUND

Northern Natural Gas Company (Northern) is a Delaware corporation that engages in the transportation of natural gas in interstate commerce, operating approximately 14,600 miles of pipeline geographically located from Texas to Michigan and running through Nebraska. Northern's principal place of business is in Omaha, where it has its headquarters. Northern oversees the maintenance of its pipeline from that location.

Centennial Resource Production, LLC (Centennial), now known as Permian Resources Operating, LLC, is an oil and natural gas company with production assets located in western Texas and southeastern New Mexico. Centennial is a Delaware limited liability company with its principal place of business in Denver.

Centennial submitted a bid to Northern for the "open season" that commenced on March 13, 2018, and ended on March 21. Northern eventually accepted the bid and agreed to transport natural gas from Texas, where Centennial's wells were located, to Kansas, up to a maximum daily reserved capacity.

1. Contracts

Five contracts governed the parties' relationship. Centennial and Northern entered into a "Firm Throughput Service Agreement" (Service Agreement) with an initial term from April 1, 2018, to March 31, 2020, which was subsequently amended effective April 1, 2020, to extend the term through March 31, 2021. The initial Service Agreement and the amended Service Agreement were subject to and incorporated Northern's gas tariff (Tariff) that has been approved by the Federal Energy Regulatory Commission (FERC). Also, Centennial executed a "Joinder in Master Escrow Agreement" (Joinder Agreement) by which it joined in Northern's master escrow agreement (Master Escrow Agreement) with U.S. Bank.

(a) Service Agreement

The Service Agreement set forth the requirement that formal communication be directed to Northern's Omaha office. It stated:

> Any notice, statement, or bill provided for in this Agreement shall be in writing and shall be considered as having been given if delivered personally, or if mailed by United States mail, postage prepaid, or if sent by express mail, overnight delivery, telex, telecopy or other mutually agreeable means of electronic transmission,

> to Shipper when sent to the address set forth on this Agreement and to Northern when sent to the following:

The agreement then listed Northern's Omaha office's mailing address and fax number for "All Notices/Accounting Matters." For "Payments to Designated Depository," the Service Agreement set forth a specific account number at U.S. Bank, giving its address at a branch in Omaha.

The Service Agreement contained provisions expressly incorporating Northern's Tariff:

> This Agreement constitutes the entire agreement between the parties with respect to the subject matter of this Agreement and shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns. No promises, agreements or warranties additional to this Agreement other than as may be contained in Northern's FERC Gas Tariff will be deemed to be a part of this Agreement nor will any alteration, amendment or modification be effective unless confirmed in writing by the parties.
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> . . . .
>
> This Agreement shall incorporate and in all respects shall be subject to the GENERAL TERMS AND CONDITIONS and the applicable Rate Schedule(s) set forth in Northern's FERC Gas Tariff, as may be revised from time to time. Northern may file and seek Commission approval under Section 4 of the Natural Gas Act (NGA) at any time and from time to time to change any rates, charges or other provisions set forth in the applicable Rate Schedule(s) and the GENERAL TERMS AND CONDITIONS in Northern's FERC Gas Tariff, and Northern shall have the right to place such changes in effect in accordance with the NGA, and this Throughput Service Agreement shall be deemed to include such changes and any changes which become effective by operation of law and Commission Order, without prejudice to Shipper's right to protest the same.

(b) Tariff

The Tariff is posted on Northern's website. Under section 13 of the general terms and conditions, regarding the term "applicable law," the Tariff states that "[a]s to all matters of construction and interpretation, the service agreement shall be interpreted, construed and governed by the laws of the State of Nebraska."

Section 17 of the Tariff provides that customers should direct all oral and written complaints regarding transactions to the "Chief Compliance Officer," listing for that contact Northern's address in Omaha and a phone number at that office with a "402" area code.

Section 18 of the Tariff states that communication of pricing and capacity information can be found on Northern's website. It also states that Northern may communicate information of general interest to potential shippers, and it directs parties to send a request to Northern at its Omaha office to ensure a party falls within the definition of a potential shipper.

The Tariff expressly contemplates shippers' obligations to maintain creditworthiness, stating that "[p]rior to execution of a Service Agreement, providing for service under any Rate Schedule, a Shipper or a prospective shipper . . . shall be required to establish creditworthiness with Northern."

It contemplates the possibility of entering into further agreements to establish creditworthiness with Northern. The Tariff states that such agreements shall constitute one unitary unseverable agreement with the service agreement:

> Northern and Shipper may enter into agreements to implement the provisions of this section or agreements related to credit and/or repayment for the cost of construction of mainline or lateral facilities. Any such agreement(s), along with the Shipper's service agreement(s), constitute one unitary unseverable agreement and memorialize the terms and conditions of a single transaction. A default under either agreement shall constitute a default under the other agreement. Upon

> Shipper's default, Northern shall have all rights granted to it by law or equity, including those contained in this Tariff and the agreements.

(c) Joinder Agreement

The Joinder Agreement signed by Centennial in March 2023 provided that "the Shipper hereby joins in and becomes a Shipper under the Master Escrow Agreement." Furthermore, "[t]he Shipper has received a copy of the Master Escrow Agreement, understands its provisions and Shipper hereby adopts and agrees to be bound by all of the provisions of the Master Escrow Agreement and all of the provisions of the Master Escrow Agreement hereby being incorporated herein."

(d) Master Escrow Agreement

Northern's Master Escrow Agreement is with U.S. Bank. The agreement was formed in 2015. The Master Escrow Agreement defines that the term "joinder" "shall mean that certain written agreement of the Shipper, substantially in the form of Exhibit A hereto, executed by Shipper, Company and the Escrow Agent pursuant to which Shipper has agreed to become a 'Shipper' for all purposes hereunder and to be bound by the terms of this Escrow Agreement."

The Master Escrow Agreement, under section 15, provides:

> Consent to Jurisdiction and Venue. THE PARTIES HERETO AGREE TO THE PERSONAL JURISDICTION BY AND VENUE IN THE COURTS OF THE STATE OF NEBRASKA, SITTING IN THE CITY OF OMAHA, COUNTY OF DOUGLAS . . . AND WAIVE ANY OBJECTION TO SUCH JURISDICTION OR VENUE. THE PARTIES HERETO CONSENT TO AND AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF ANY OF THE COURTS SPECIFIED HEREIN AND AGREE TO ACCEPT SERVICE OF PROCESS TO VEST PERSONAL JURISDICTION OVER THEM IN ANY OF THESE COURTS.

Section 20 states: "Governing Law. This Escrow Agreement shall be construed and interpreted in accordance with the internal laws of the State of Nebraska without giving effect to the conflict of laws principles thereof."

The Master Escrow Agreement further sets forth that "[a]ll notices, approvals, consents, requests, and other communications hereunder shall be in writing" and, if to Northern, "shall be delivered" to Northern's Omaha address specified therein or by a fax to the phone number listed with a "402" area code or by email by way of a PDF attachment.

2. Cold Weather Event and Lawsuits

From February 12 through 19, 2021, a cold weather event caused disruptions, reducing the available upstream supply of natural gas. Northern's pipeline system was able to perform and did not have any outages or equipment failures due to the cold weather event. However, Centennial was unable to process natural gas in Texas and deliver it into Northern's pipeline during that time. Centennial sent a fax to Northern, giving it notice of an event of force majeure.

Centennial and Northern disagreed as to the meaning and applicability of a force majeure provision of the Tariff incorporated into the Service Agreement. Centennial refused to pay that part of Northern's invoice corresponding to the 4 days Centennial was unable to deliver gas into the pipeline. Northern sued Centennial in the district court of Douglas County, Nebraska, for a declaratory judgment that under the terms of a Service Agreement and the Tariff, Centennial owed Northern the reservation charges incurred from February 12 through 19, 2021. Northern filed a similar lawsuit against Centennial in Texas, which has been stayed pending a final determination in the Nebraska lawsuit.

3. Pretrial Motions

The district court overruled Centennial's motion to dismiss for lack of personal jurisdiction, and Centennial raised the alleged lack of personal jurisdiction as an affirmative defense. The court granted partial summary judgment in favor of Northern on the underlying merits, concluding that under the plain language of the Tariff, a force majeure event does not excuse Centennial's obligation to make payments owed under the Service Agreement and Tariff and that enforcing the plain terms of the Tariff would not lead to an unconscionable result. The court then granted partial judgment in favor of Northern on all of Centennial's remaining affirmative defenses to its contractual obligations, with the question of personal jurisdiction being the only issue remaining to be decided. Centennial did not plead federal preemption as an affirmative defense to personal jurisdiction.

4. Trial on Personal Jurisdiction

The matter of personal jurisdiction and damages was scheduled for a bench trial. At trial, Centennial did not dispute Northern's claim and calculation for damages and only disputed the issue of personal jurisdiction.

The capacity optimization manager of Northern testified at trial concerning the bidding process during open season. The open season is the vehicle by which Northern receives bids from potential customers for capacity on Northern's pipeline. He testified the process is governed by FERC. Capacity available for bid is posted on Northern's website, and customers are directed to fill out and send back a binding bid form, found on the website, to Northern in Omaha via fax or email. Centennial's bid form was received via email by Northern's capacity optimization team in Omaha in March 2018.

If awarded capacity during open season, the relationship is handed over to Northern's credit department and customer service team to begin the process of contract formation. Northern's credit manager, who oversees the credit department located in Omaha, explained that the credit department reviews prospective customers' credit applications to determine if they demonstrate creditworthiness. Submission of a credit application is a prerequisite to a potential customer's doing business with Northern.

If a prospective customer is unable to demonstrate creditworthiness, Northern's credit department will require, as a condition for doing business with it, credit assurance by way of a letter of credit, three-party escrow, or a guarantee.

Centennial was awarded capacity on Northern's pipeline during open season, and Centennial submitted a credit application to Northern's credit risk team in Omaha. The credit department in Omaha determined that Centennial did not satisfy Northern's creditworthiness requirements.

After Centennial's issuing bank was unable to provide a letter of credit that was satisfactory to Northern, Centennial elected to satisfy the creditworthiness requirement by providing an escrow. Centennial elected to do this by joining in Northern's Master Escrow Agreement with U.S. Bank. The Joinder Agreement provided assurances to Northern that it would be paid for the services Centennial provided under its Service Agreement with Northern.

Centennial presented an expert to testify about natural gas regulations. Centennial's expert witness described that a pipeline provider like Northern is required to maintain a tariff and that FERC has detailed regulations pertaining to the required content of a tariff. The expert confirmed that various aspects of Northern's tariff were required by federal regulations, including the types of information a prospective shipper must submit to satisfy creditworthiness. Each interstate pipeline has its own tariff and each is different, but "they all have to comply with the same set of detailed regulations as to what will be in them and what it'll say." The expert testified that a pipeline's tariff is public information and that it is always the case that a pipeline's tariff is incorporated into its service agreements with shippers. On cross-examination, the expert conceded that if Centennial had not wished to comply with the terms of Northern's tariff, it could have done business with a different pipeline. The expert testified, “There were lots of hungry pipelines headed north . . . .”

5. Judgment for Northern

The district court entered judgment in favor of Northern. The court found, firstly, that Centennial consented to personal jurisdiction by joining Northern’s Master Escrow Agreement that contained an express consent to jurisdiction in Nebraska and waiver of the personal jurisdiction defense. It found that the Tariff unambiguously provides that the Service Agreement, Joinder Agreement, and Master Escrow Agreement become one unitary unseverable agreement. The court noted that Centennial was aware, even before entering into the Service Agreement, that it would need to meet the creditworthiness provisions of Northern’s Tariff and that although Centennial could have utilized a letter of credit, it chose to execute the Joinder Agreement, thereby making it a credit-related agreement. The forum selection clause found in the Master Escrow Agreement applied equally to the Service Agreement as one unitary agreement. And the court found the language of the Master Escrow Agreement clearly and unambiguously subjected any party to the Master Escrow Agreement to personal jurisdiction in Nebraska and to the application of Nebraska law. The court stated it did not believe an analysis under Neb. Rev. Stat. § 25-414 (Reissue 2016) of the Model Uniform Choice of Forum Act was necessary, because Northern did not claim that the forum selection clause was the only basis for personal jurisdiction.

Secondly, and as an alternative basis for personal jurisdiction, the court found sufficient minimum contacts to subject Centennial to personal jurisdiction in a suit arising out of or relating to those contacts with the forum. It found that Centennial purposefully conducted business with Northern by reaching out and submitting a bid during open season. Notices for the bidding season specifically identified Northern’s Tariff that states on its face Northern’s location and address in

Omaha. Furthermore, the open season was posted on Northern's website, which clearly shows Northern's location in Omaha. Additionally, throughout the course of the business relationship, Centennial sent numerous communications to Northern in Omaha, including the open season bid, credit application, Joinder Agreement, Service Agreement, right of first refusal, and amendment to the Service Agreement. Centennial also regularly communicated with Northern by email, fax, and telephone and used Northern's interactive website to comply with and execute its Service Agreement.

Centennial appeals.

III. ASSIGNMENT OF ERROR

Centennial assigns that the trial court erred in concluding that Centennial is subject to the personal jurisdiction of Nebraska's courts.

IV. STANDARD OF REVIEW

[1] If a court holds an evidentiary hearing on the issue of personal jurisdiction or decides the matter after trial, then the plaintiff bears the burden of demonstrating personal jurisdiction by a preponderance of the evidence.[1]

[2] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.[2]

V. ANALYSIS

[3,4] The sole issue presented in this appeal is whether the district properly exercised personal jurisdiction over

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[1] *RFD-TV v. WildOpenWest Finance*, 288 Neb. 318, 849 N.W.2d 107 (2014).

[2] *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999). See, also, *Abdouch v. Lopez*, 285 Neb. 718, 829 N.W.2d 662 (2013); *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989).

Centennial. In determining whether the district court erred in finding personal jurisdiction, we consider only what Centennial has both clearly and specifically assigned and argued in its initial appellate brief.[3] Vague or conclusory assertions unsupported by coherent analytical argument fail to satisfy the requirement of arguing an assigned error to obtain consideration by an appellate court.[4] And we do not consider arguments only clearly articulated on appeal in oral arguments or a reply brief.[5]

[5-8] Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.[6] The Due Process Clause of the U.S. Constitution requires that individuals have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign.[7] The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations.[8] A court's ability to impose liability should be predictable to the parties before the court based on their own actions.[9]

[9,10] Because the requirement of personal jurisdiction represents an individual right, it can, like other such rights,

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[3] See, e.g., *Priesner v. Starry*, 300 Neb. 81, 912 N.W.2d 249 (2018); *U.S. Pipeline v. Northern Natural Gas Co.*, 303 Neb. 444, 930 N.W.2d 460 (2019).

[4] See, *State v. Boppre*, 315 Neb. 203, 995 N.W.2d 28 (2023); *State v. Wagner*, 295 Neb. 132, 888 N.W.2d 357 (2016).

[5] See, *U.S. Pipeline v. Northern Natural Gas Co., supra* note 3; *State v. Gunther*, 278 Neb. 173, 768 N.W.2d 453 (2009).

[6] *RFD-TV v. WildOpenWest Finance, supra* note 1.

[7] See *Ameritas Invest. Corp. v. McKinney*, 269 Neb. 564, 694 N.W.2d 191 (2005).

[8] See *Wheelbarger v. Detroit Diesel*, 313 Neb. 135, 983 N.W.2d 134 (2023).

[9] *Central States Dev. v. Friedgut*, 312 Neb. 909, 981 N.W.2d 573 (2022).

be waived.[10] A valid and enforceable choice of forum clause in a contract is sufficient in itself to waive the requirement of minimum contacts and to submit a nonresident to the jurisdiction of the forum state.[11]

[11-13] It can hardly be said that a defendant cannot reasonably anticipate being haled into court in a jurisdiction identified by a valid forum selection clause.[12] Absent a showing that

> "trial in the contractual forum will be so gravely difficult and inconvenient that [the party challenging the clause] will . . . be deprived of his [or her] day in court[,] there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his [or her] bargain."[13]

Thus, due process is satisfied when a defendant consents to personal jurisdiction by entering into a contract that contains a valid forum selection clause and it is not a forum non conveniens.[14]

Under Nebraska law, the enforceability of a forum selection clause is evaluated by the terms of the Model Uniform Choice of Forum Act.[15] Section 25-414 provides:

> (1) If the parties have agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state will entertain the action if (a) the court has power under the law of this state to entertain the action; (b) this state is a reasonably

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[10] See *Lanham v. BNSF Railway Co.*, 305 Neb. 124, 939 N.W.2d 363 (2020), *modified on denial of rehearing* 306 Neb. 124, 944 N.W.2d 514.

[11] *Ameritas Invest. Corp. v. McKinney, supra* note 7.

[12] *Id.*

[13] *Id.* at 571, 694 N.W.2d at 199 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)).

[14] See *Ameritas Invest. Corp. v. McKinney, supra* note 7.

[15] *Id.*

> convenient place for the trial of the action; (c) the agreement as to the place of the action was not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; and (d) the defendant, if within the state, was served as required by law of this state in the case of persons within the state or, if without the state, was served either personally or by certified mail directed to his last-known address.
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> (2) This section does not apply to cognovit clauses, to arbitration clauses, or to the appointment of an agent for the service of process pursuant to statute or court order.

[14,15] The language of § 25-414 was intended to prevent a court from exercising jurisdiction where that exercise would result in injustice or in substantial inconvenience to the parties.[16] Where the exercise of personal jurisdiction is based upon a contractual choice of forum clause and is challenged on due process grounds, we must determine whether the choice of forum clause at issue satisfies the requirements of the Model Uniform Choice of Forum Act and the Due Process Clause.[17] As a practical matter, however, any forum selection clause which meets the Model Uniform Choice of Forum Act's requirement that Nebraska be a "reasonably convenient place for the trial of the action" will also satisfy the Due Process Clause's requirement that trial of the action in Nebraska not be so gravely difficult and inconvenient that the party challenging the clause will be deprived of his or her day in court.[18]

[16-18] The doctrine of forum non conveniens (literally, "an unsuitable court") provides that a state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action, provided that a more appropriate forum is

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[16] *Id.*

[17] *Id.*

[18] *Id.*

provided to the plaintiff.[19] It refers to the discretionary power of a court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum.[20] But the plaintiff's choice of a forum should not be disturbed except for "weighty reasons" and only when trial in the chosen forum would establish "oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience," or when the forum is inappropriate "because of considerations affecting the court's own administrative and legal problems."[21]

[19] When parties agree to a forum selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation.[22] In essence, they waive the right to challenge the private interest factors.[23]

[20-22] In determining the convenience of the forum, the trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process.[24] It is also appropriate to consider the advantages of having trial in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.[25]

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[19] *Id.*

[20] *Id.*

[21] *Id.* at 574, 575, 694 N.W.2d at 202 (internal quotation marks omitted).

[22] See *Atlantic Marine Constr. Co. v. United States Dist. Court for Western Dist. of Tex.*, 571 U.S. 49, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013). See, also, *Applied Underwriters v. E.M. Pizza*, 26 Neb. App. 906, 923 N.W.2d 789 (2019).

[23] See *id*.

[24] See *Ameritas Invest. Corp. v. McKinney, supra* note 7.

[25] *Id*.

In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his or her home forum will normally outweigh the inconvenience the defendant may have shown.[26]

Centennial "does not dispute that the contractual consequences of the language of Northern's Tariff was that the [Service Agreement] was merged with the [Master Escrow Agreement], to which Centennial was a party by reason of the Joinder [Agreement], to create a single, unitary agreement."[27] The Service Agreement expressly incorporated the Tariff and made it subject "in all respects" to the Tariff's general terms and conditions and rate schedule. The Tariff, in turn, contemplated the need to enter into further agreements to satisfy a shipper's obligation to maintain creditworthiness and states that "[a]ny such agreement(s), along with the Shipper's service agreement(s), constitute one unitary unseverable agreement and memorialize the terms and conditions of a single transaction." The further agreement Centennial entered into with Northern to satisfy its obligation to maintain creditworthiness was the Joinder Agreement. Therein, Centennial "hereby joins in and becomes a Shipper under the Master Escrow Agreement" and "has received a copy of the Master Escrow Agreement, understands its provisions and Shipper hereby adopts and agrees to be bound by all of the provisions of the Master Escrow Agreement and all of the provisions of the Master Escrow Agreement hereby being incorporated herein."

The Master Escrow Agreement clearly sets forth a forum selection clause stating:

> Consent to Jurisdiction and Venue. THE PARTIES HERETO AGREE TO THE PERSONAL JURISDICTION BY AND VENUE IN THE COURTS OF THE STATE

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[26] *Id.*

[27] Brief for appellant at 30-31 (emphasis omitted).

> OF NEBRASKA, SITTING IN THE CITY OF OMAHA, COUNTY OF DOUGLAS . . . AND WAIVE ANY OBJECTION TO SUCH JURISDICTION OR VENUE. THE PARTIES HERETO CONSENT TO AND AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF ANY OF THE COURTS SPECIFIED HEREIN AND AGREE TO ACCEPT SERVICE OF PROCESS TO VEST PERSONAL JURISDICTION OVER THEM IN ANY OF THESE COURTS.

The Master Escrow Agreement also provides that it "shall be construed and interpreted in accordance with the internal laws of the State of Nebraska without giving effect to the conflict of laws principles thereof." This is similar to the provision of the Service Agreement, which states that "[a]s to all matters of construction and interpretation, the service agreement shall be interpreted, construed and governed by the laws of the State of Nebraska."

The district court found that the Master Service Agreement became "one unitary and unseverable agreement" with the Service Agreement through the plain language of the Tariff and that "[t]he language of the [Master Escrow Agreement] is clear, unambiguous, and indisputably subjects any party to the [Master Escrow Agreement] to personal jurisdiction in Nebraska." Centennial does not specifically assign and specifically argue that the court erred in reaching these conclusions as to the meaning of the plain language of the unified agreement. In any event, we agree with the court's understanding of the plain meaning of the unified agreement, which is a question of law.[28] Under the plain language of the unified agreement, Centennial agreed in writing that "an action on a controversy may be brought in [Nebraska]."[29]

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[28] See *Community First Bank v. First Central Bank McCook*, 310 Neb. 839, 969 N.W.2d 661 (2022).

[29] § 25-414(1).

Despite the "contractual consequences" of the unified agreement, Centennial "disputes the jurisdictional consequences of this merger/Tariff incorporation process."[30] It states that because such joinder was "compelled by the Tariff," it was not "'purposefully' undertaken for jurisdictional purposes."[31] Centennial relies on the general principles of purposeful availment and our statement in *U.S. Pipeline v. Northern Natural Gas Co.*[32] that in order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such purpose, or acts amounting to estoppel on his or her part.

[23,24] Centennial's reliance on principles of purposeful availment is misplaced in an analysis of contractual consent to personal jurisdiction. Purposeful availment of the benefits and protections of the law of the forum state is a concept relevant to whether the defendant purposefully established minimum contacts with the forum state.[33] We held In *Ameritas Inv. Corp. v. McKinney*[34] that a minimum contacts analysis is not appropriate in determining the validity of forum selection clauses in commercial contracts. The minimum contacts analysis and the contractual consent to jurisdiction analysis are separate analyses.[35]

Likewise, *U.S. Pipeline* is inapposite to the case at bar. The proposition Centennial relies on pertained to the alleged waiver of a liquidated damages provision of a contract, through the plaintiff's alleged neglect and a failure to act.

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[30] Brief for appellant at 30, 31 (emphasis omitted).

[31] *Id.* at 30 (emphasis omitted).

[32] *U.S. Pipeline v. Northern Natural Gas Co., supra* note 3.

[33] See, e.g., *Nimmer v. Giga Entertainment Media*, 298 Neb. 630, 905 N.W.2d 523 (2018); *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004).

[34] *Ameritas Invest. Corp. v. McKinney, supra* note 7.

[35] See *id.*

The requirement of a "clear, unequivocal, and decisive action of a party showing such purpose, or acts amounting to estoppel on his or her part"[36] pertains to waiver of a written contract, through the acts or conduct of one of the parties to the contract. It is inapplicable to whether a written contract was effectuated in the first place.

Because there was no dispute as to effective service of process and no allegation that the forum selection clause was obtained through misrepresentation, duress, abuse of economic power, or other unconscionable means, the only factor of § 25-414 at issue at trial was whether Nebraska was a reasonably convenient place for the trial of the action.

We observe that the district court did not expressly consider this factor. The district court mistakenly concluded that § 25-414 did not apply because Northern asserted minimum contacts as an alternative basis for the exercise of personal jurisdiction over Centennial, and § 25-414 states, "If . . . *the agreement provides the only basis for the exercise of jurisdiction*, a court of this state will entertain the action if . . . ." (Emphasis supplied.)

[25] In *Ameritas Invest. Corp.*, we explained that any time a choice of forum clause is a "necessary component" of the court's exercise of personal jurisdiction, there is no jurisdiction "but for"[37] the agreement and the standards of § 25-414 apply. In other words, the language of § 25-414 that "the agreement provides the only basis for the exercise of jurisdiction" merely means that the choice of forum clause is a necessary component to the assertion that there is personal jurisdiction on the grounds of contractual consent and that minimum contacts are not part of this inquiry. Accordingly,

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[36] *U.S. Pipeline v. Northern Natural Gas Co., supra* note 3, 303 Neb. at 474, 930 N.W.2d at 480.

[37] *Ameritas Invest. Corp. v. McKinney, supra* note 7, 269 Neb. at 573, 694 N.W.2d at 201 (internal quotation marks omitted).

we rejected the plaintiff's argument that § 25-414 did not apply because jurisdiction could be based on a combination of the choice of forum clause and certain contacts with Nebraska, which would not, on their own, satisfy the necessary minimum contacts for personal jurisdiction.

[26] The district court noted that, unlike in *Ameritas Invest. Corp.*, Northern's arguments for personal jurisdiction are independent of each other. We do not find this to be legally significant to the applicability of § 25-414 to a court's determination that a forum selection clause waives the requirement of minimum contacts and submits the nonresident to the jurisdiction of the forum state. The choice of forum clause is a necessary component to the assertion that there is personal jurisdiction on the grounds of contractual consent, and minimum contacts are not part of this inquiry. It would be an absurd result if the elements of § 25-414 could be circumvented by raising minimum contacts as an independent, alternative basis for exercising personal jurisdiction, especially when the element of a reasonably convenient forum is constitutionally required. We must construe a statute in a way that is constitutional where possible,[38] as well as presume the Legislature intended a sensible rather than an absurd result.[39]

[27] Furthermore, we disapprove of the Nebraska Court of Appeals' holding in *Applied Underwriters v. E.M. Pizza*[40] that courts must analyze minimum contacts and determine there is no jurisdiction under a minimum contacts analysis before determining if a defendant entered into an enforceable forum selection clause. The Court of Appeals mistakenly relied on

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[38] See *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999).

[39] See *Heist v. Nebraska Dept. of Corr. Servs.*, 312 Neb. 480, 979 N.W.2d 772 (2022).

[40] *Applied Underwriters v. E.M. Pizza, supra* note 22.

Ameritas Invest. Corp. for such proposition, but we said the opposite. We said in *Ameritas Invest. Corp.* that only "[i]f the forum selection clause is not valid under the Choice of Forum Act" does "the inquiry move[] to whether the defendant has the necessary minimum contacts with Nebraska, other than the forum selection clause, to satisfy due process."[41] We explained that the language of Model Uniform Choice of Forum Act was intended to prevent a court from exercising jurisdiction where that exercise would result in injustice or in substantial inconvenience to the parties.[42] We have never said that the Act was intended to govern the order in which a court may analyze alternative arguments for personal jurisdiction. The Model Uniform Choice of Forum Act does not dictate the order in which a court may analyze alternative arguments for personal jurisdiction.

Centennial does not assign or argue that the district court erred in failing to determine under § 25-414(1)(b) that Nebraska was not a reasonably convenient forum, and we find no plain error. The trial was in the forum that is at home with Nebraska state law, which the parties contractually agreed must govern the case. Many of the witnesses were in Nebraska. There are not "weighty reasons" to disturb Northern's choice of a forum.[43]

The district court did not err in finding it had personal jurisdiction over Centennial based upon Centennial's consent through the forum selection clause of the unified agreement. We find it unnecessary to address the correctness of the district court's conclusion that minimum contacts also gave it personal jurisdiction over Centennial.

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[41] *Ameritas Invest. Corp. v. McKinney, supra* note 7, 269 Neb. at 572-73, 694 N.W.2d at 201.

[42] *Ameritas Invest. Corp. v. McKinney, supra* note 7.

[43] *Id*. at 574, 694 N.W.2d at 202 (internal quotation marks omitted).

VI. CONCLUSION

Northern's maintenance of its suit against Centennial in Nebraska does not offend traditional notions of fair play and substantial justice. Therefore, the district court's exercise of specific personal jurisdiction over Centennial in this action did not violate Centennial's right to due process.

Affirmed.

Funke, J., participating on briefs.