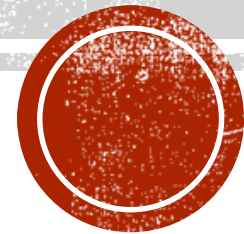


# FORUM SELECTION CLAUSES



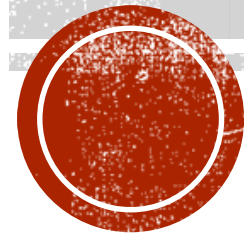
**125TH CLLA NATIONAL CONVENTION  
ORLANDO, FLORIDA  
FRIDAY, MAY 3, 2019**



**PETER DUBOWSKY, ESQ.**

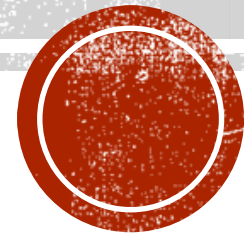


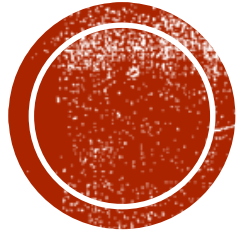
**DUBOWSKY  
LAW OFFICE, CHTD.**



# COMPLY OR DEFY

The Forum Selection Clause





# PERMISSIVE OR MANDATORY?

Permissive: consent to submit

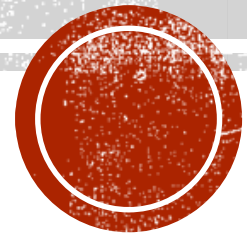
mandatory: excluding all other jurisdictions

## IS THE FORUM SELECTION CLAUSE MANDATORY OR PERMISSIVE?

“Parties consent to venue in Freedonia and submit to Freedonia’s jurisdiction”

or

“The First Judicial Court of Freedonia County of Firefly shall be the exclusive forum for litigation”



Am. First Fed. Credit Union v. Soro, 359  
P.3d 105, 107-8, 131 Nev. Adv. Op. 73  
(Nev. 2015)

Other state courts have distinguished  
between mandatory and permissive  
forum selection clauses.



Garcia Granados Quinones v. Swiss Bank Corp. (Overseas), S.A., 509 So.2d 273, 274 (Fla. 1987) (recognizing that a mandatory jurisdiction clause requires “a particular forum be the exclusive jurisdiction for litigation,” while permissive jurisdiction is merely a consent to jurisdiction in a venue.)



Polk Cnty. Recreational Ass'n v. Susquehanna Patriot Commercial Leasing Co., 273 Neb. 1026, 734 N.W.2d 750, 758–59 (2007) (distinguishing a mandatory forum selection clause based on the words “shall be brought only in” a particular jurisdiction --- from a permissive forum selection clause where parties only “consent and submit to the jurisdiction” of other courts).





Caperton v. A.T. Massey Coal Co., 225 W.Va. 128, 690 S.E.2d 322, 338–39 (2009)

“[T]o be enforced as mandatory, a forum-selection clause must do more than simply mention or list a jurisdiction; in addition, it must either specify venue in mandatory language, or contain other language demonstrating the parties' intent to make jurisdiction exclusive.”



The Wisconsin Court of Appeals stated:

Clauses in which a party agrees to submit to jurisdiction are not necessarily mandatory. Such language means that the party agrees to be subject to that forum's jurisdiction if sued there. It does not prevent the party from bringing suit in another forum. The language of a mandatory clause shows more than that jurisdiction is appropriate in a designated forum; it unequivocally mandates exclusive jurisdiction. *Absent specific language of exclusion, an agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere.*

Converting/Biophile Labs., Inc. v. Ludlow Composites Corp., 296 Wis.2d 273, 722 N.W.2d 633, 640–41 (2006) (emphasis added).



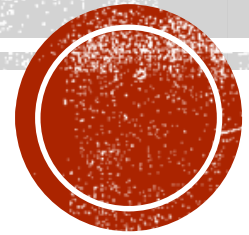
Similarly, federal circuit courts generally agree that where venue is specified [in a forum selection clause] with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified [in a forum selection clause], the clause will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive.

Paper Express, Ltd. v. Pfankuch Maschinen GmbH, 972 F.2d 753, 757 (7th Cir. 1992) (emphasis added)



**LET'S PLAY A GAME**

**Permissive or Mandatory?**



Excell, Inc. v. Sterling Boiler & Mech., Inc.,  
106 F.3d 318, 321 (10th Cir. 1997)

(describing the “mandatory/permissive dichotomy” and concluding that the clause, “jurisdiction shall be in the State of Colorado, and venue shall lie in the County of El Paso, Colorado,” was .....

Permissive or Mandatory ????????????



Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 321 (10th Cir. 1997)  
(describing the “mandatory/permissive dichotomy” and concluding that the clause, “jurisdiction shall be in the State of Colorado, and venue shall lie in the County of El Paso, Colorado,” was mandatory).



John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs. Inc., 22 F.3d 51, 52–53 (2d Cir. 1994)

(holding the forum selection clause, “[a]ny dispute arising between the parties hereunder shall come within the jurisdiction of the competent Greek Courts, specifically of the Thessaloniki Courts,” as ....

Permissive or Mandatory?????????????????.



John Boutari & Son, Wines & Spirits, S.A.  
v. Attiki Imps. & Distribs. Inc., 22 F.3d 51,  
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“[a]ny dispute arising between the  
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jurisdiction of the competent Greek  
Courts, specifically of the Thessaloniki  
Courts,” as **permissive**.)





Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 76–78 (9th Cir.1987)

(holding the forum selection clause, “[t]he courts of California, County of Orange, shall have jurisdiction over the parties in any action at law relating to the subject matter or the interpretation of this contract,” as (permissive or mandatory????????)), and noting that to be considered mandatory, a forum selection clause must clearly require that a particular court is the only one that has jurisdiction.



Hunt Wesson Foods, Inc. v. Supreme Oil Co.,  
817 F.2d 75, 76–78 (9th Cir.1987)

(holding the forum selection clause, “[t]he courts of California, County of Orange, shall have jurisdiction over the parties in any action at law relating to the subject matter or the interpretation of this contract,” as

**permissive,**

and noting that to be considered mandatory, a forum selection clause must clearly require that a particular court is the only one that has jurisdiction.



Keaty v. Freeport Indon., Inc., 503 F.2d 955,  
956–57 (5th Cir. 1974)

(holding the forum selection clause, “[t]his agreement shall be construed and enforceable according to the law of the State of New York and the parties submit to the jurisdiction of the courts of New York,” as ?????????? Permissive or Mandatory???)



Keaty v. Freeport Indon., Inc., 503 F.2d  
955, 956–57 (5th Cir. 1974)  
(holding the forum selection clause,  
“[t]his agreement shall be construed and  
enforceable according to the law of the  
State of New York and the parties submit  
to the jurisdiction of the courts of New  
York,” as **permissive**).



Golden Palm Hospitality, Inc. v. Stearns Bank Nat'l Ass'n, 874 So.2d 1231, 1233–37 (Fla. Dist. Ct. App. 2004)

Concluding that the language, “[i]f there is a lawsuit, Borrower agrees upon Lender's request to submit to the jurisdiction of the courts of STEARNS County, the State of Minnesota” as ?????????????????????? Permissive or mandatory????, and thus permitted, but did not require, that the action be brought in Minnesota.



Golden Palm Hospitality, Inc. v. Stearns Bank Nat'l Ass'n, 874 So.2d 1231, 1233–37 (Fla. Dist. Ct. App. 2004)

Concluding that the language, “[i]f there is a lawsuit, Borrower agrees upon Lender's request to submit to the jurisdiction of the courts of STEARNS County, the State of Minnesota” as

**permissive**, and thus permitted, but did not require, that the action be brought in Minnesota.



- What are the Pros and Cons of Complying with the Agreed-upon Forum?

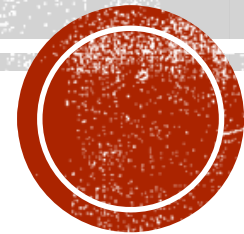
## **COMPLY OR DEFY?**

Comply with the Forum Selection  
Clause and sue in Freedonia;  
or defy and sue in Sylvania



# COMPLY?

What are the Pros and Cons of Complying with the Agreed-upon Forum?





- What are the strategic “pros” of complying with your Forum Selection Clause and suing in Freedonia ?

**IF YOU COMPLY...**

File Suit in Freedonia



## PROS:

- Convenience for your client

**IF YOU COMPLY...**

File Suit in Freedonia



## PROS:

- Familiarity with your chosen local court

**IF YOU COMPLY...**

File Suit in Freedonia



## PROS

- Forcing the debtor to come to Freedonia

**IF YOU COMPLY...**

File Suit in Freedonia



## PROS

- Leveraging the debtor to settle as opposed to hiring Freedonia counsel.

**IF YOU COMPLY...**

File Suit in Freedonia



## PROS

- Better chance of uncontested litigation.

**IF YOU COMPLY...**

Filing Suit in Freedonia



## CONS:

- “Filing blind”
- Filing against defunct Debtor
- Long-Distance Debtor identification without knowing all the local search tools
- Higher Risk of mistakes in name and address rendering useless judgment: ABC Company Inc. or ABC Company LLC
- Locating competent process servers in distant jurisdiction
- Client has to retain other “local” counsel for new proceeding for enforcement: higher legal expenses for client or sharing the contingency fee

**IF YOU COMPLY...**

File Suit in Freedonia



## CONS

- Local Counsel handling “cold” foreign judgment
- (almost guaranteed mutual dissatisfaction between forwarder and receiver.)

**IF YOU COMPLY...**

Filing Suit in Freedonia





## CONS

- Freedonia Judgment Set Aside based on invalid Forum Selection Clause

**IF YOU COMPLY...**

File Suit in Freedonia



The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.

M/S Bremen v. Zapata Off-Shore Company 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)

## **IF YOU COMPLY**

Enforcing your Freedonia Judgment  
in Sylvania



The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.

Bremen Bh v. Zapata Off Shore Company, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)



Forum selection clauses in contracts are "presumptively valid; the party seeking to avoid a forum selection clause bears a 'heavy burden' to establish a ground upon which [the court] will conclude the clause is unenforceable."

Doe 1 v. AOL LLC, 552 F.3d 1077, 1083 (9th Cir. 2009) (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17 (1972)).



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. A court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum.

Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex., 134 S. Ct. 568, 187 L.Ed.2d 487, 82 USLW 4021 (2013)



Atlantic Marine provides little guidance, however, regarding what constitutes an "exceptional reason" or "extraordinary circumstances" in which courts should not give controlling weight to a valid forum-selection clause.

Therefore, we turn to the Court's prior guidance on this issue in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

M/S Bremen held that a forum-selection clause was controlling unless the plaintiff made a strong showing that:

- (1) the clause is invalid due to "fraud or overreaching,"
- (2) "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision," or
- (3) "trial in the contractual forum will be so gravely difficult and inconvenient that [the litigant] will for all practical purposes be deprived of his day in court."

Sun v. Advanced China Healthcare, Inc., 901 F.3d 1081 (9th Cir. 2018)



## PROS

- bringing the case to the Debtor's Front Door in the original action
- Better “boots on the ground” in Debtor's jurisdiction

**IF YOU DEFY...**

Suing in Sylvania



- **CONS**
- More convenient for Debtor to litigate in their backyard in Sylvania
- Debtor could get case dismissed from Sylvania for improper jurisdiction (jurisdiction is in Freedonia)

**IF YOU DEFY...**

Suing in Sylvania





- What if you get your Sylvania Judgment in defiance of the Freedonia forum selection clause?
- What if Debtor waits until after Judgment in Sylvania to get Judgment Set Aside based on Freedonia Forum Selection Clause

## **IF YOU DEFY..**

Get Judgment in Sylvania in defiance of the Freedonia Forum Selection Clause

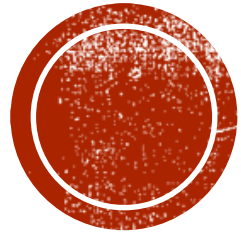


Reiner, Reiner & Bendett, P.C. v. Cadle Co., 897 A.2d 58  
(Conn. 2006) (Judgment debtor waived the exclusive forum  
selection clause when it allowed the case to go to default  
judgment.)



Euler-Siac S.P.A. v. Drama Marble Co., 274 Ga.App. 252, 254-55, 617 S.E.2d 203, 206 (2005) (The judgment debtor waived the forum selection clause when it failed to file an answer or motion to dismiss and allowed the entry of a default judgment. Judgment Set Aside reversed.)

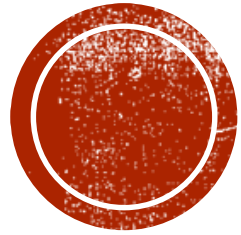




# IF PERMISSIVE

Defy your own Forum Selection Clause and the Debtor can do nothing about it. Or

Comply with your own Forum Selection Clause and the Debtor can attempt to argue that it is invalid.

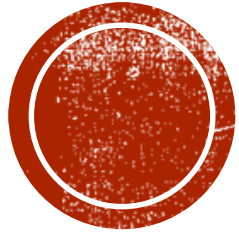


# IF MANDATORY

Comply, or

Defy your own Forum Selection Clause and your case could get dismissed and you will have to re-file in the chosen forum.

But, if already a default judgment and the Debtor did not move to dismiss, the Debtor's defense is likely waived.



**THANK YOU!**

Peter Dubowsky, Esq.

Las Vegas, Nevada



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LAW OFFICE, CHTD.**