NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

CARDINAL MIDSTREAM II, LLC	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ENERGY TRANSFER LP, F/K/A ENERGY TRANSFER OPERATING, L.P., AND ETC NORTHEAST PIPELINE, LLC, F/K/A ETC NORTHEAST MIDSTREAM, LLC, F/K/A ETC CARDINAL MIDSTREAM, LLC	:	No. 1000 WDA 2025
Appellants	:	

Appeal from the Judgment Entered July 23, 2025
In the Court of Common Pleas of Beaver County Civil Division at No(s): 2021-10523

BEFORE: McLAUGHLIN, J., KING, J., and BENDER, P.J.E.

DISSENTING MEMORANDUM BY KING, J.: **FILED: November 17, 2026**

I disagree with the Majority's decision to affirm on the basis of the trial court opinion,[1] which found that the language in the forum selection clause in the Membership Interest Purchase Agreement ("MIPA") was permissive and not mandatory. In my opinion, the trial court was bound to interpret the MIPA under Texas law. Because Texas law compels a finding that the language in the forum selection clause was mandatory rather than permissive, I would vacate the entry of judgment, remand for a new trial, and transfer the matter to state or federal court in Dallas County, Texas. Therefore, I respectfully

[1] Although the Majority relies on three separate trial court opinions based on the issues presented, the trial court opinion applicable to my analysis is the opinion filed November 16, 2021, which overruled preliminary objections based on the forum selection clause.

dissent.

To begin, the MIPA contains a choice of law clause in which the parties have contracted as follows:

> [A]ll actions, causes of action, or claims of any kind (whether at law, in equity, in contract, tort, or otherwise) that may be based upon, arise out of, or relate to this Agreement, or the negotiation, execution or performance of this Agreement **shall be governed by and construed in accordance with the Laws of the State of Texas, without giving effect to any choice or conflict of law provision or rule** (whether of the State of Texas or any other jurisdiction).

(***See*** MIPA, § 14.12(a)) (emphasis added). In contract disputes, Pennsylvania courts generally honor the parties' choice of law provisions. ***Nationwide Mut. Ins. Co. v. West***, 807 A.2d 916, 920 (Pa.Super. 2002) (citing ***Smith v. Commonwealth Nat. Bank***, 557 A.2d 775 (Pa.Super. 1989)). ***See also Insurance Adjustment Bureau, Inc. v. Allstate Ins. Co.***, 588 Pa. 470, 481, 905 A.2d 462, 468 (2006) (observing that when terms of contract are clear and unambiguous, intent of parties is to be ascertained from document itself).

In its opinion dated March 10, 2025, the trial court acknowledged the choice of law clause in the MIPA when discussing the earnout provision contained in the MIPA and stated:

> [T]his [c]ourt, when necessary, will apply Texas substantive law to the issues to be addressed in this Legal Analysis section. During the trial, the [c]ourt applied Pennsylvania evidentiary and procedural rules when necessary without any objection by counsel.

(Trial Court Opinion, 3/10/25, at 53). Nevertheless, when discussing and analyzing the forum selection clause in its ruling on the preliminary objections in 2021 (discussed in greater detail ***infra***), the trial court did not discuss or apply Texas law.[2] As well, the Majority does not separately acknowledge the choice of law clause in the MIPA or mention the application of Texas law in affirming based on the trial court opinion.[3] To me, the MIPA mandates application of Texas law based on the parties' clear contractual language above. ***See Insurance Adjustment Bureau, Inc., supra***; ***Nationwide, supra***. For the following reasons, I believe that an application of Texas law

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[2] The trial court stated: "There is no Pennsylvania appellate case that address language in a forum selection clause similar to this situation. This appears to be a case of first impression regarding this particular language." (Trial Court Opinion, filed 11/16/21, at 9). The court then went on to rely on a number of federal cases, some published and some unpublished. We note that one case cited by the trial court, ***Nymbus, Inc. v. Sharp***, No. 3:17-cv-01113 (JAM), 2018 WL 705003 (D.Conn. filed Feb. 5, 2018), is a United States District Court of Connecticut case which applied Texas law. Therein, the parties' agreement stated that it was to be governed by Texas law. The forum selection clause in the agreement provided, *inter alia*, that any suit, action or proceedings arising out of or based on the agreement "may be instituted in the federal courts of the United States of America or the courts of the state of Texas, and each party irrevocably submits to the exclusive jurisdiction of such courts[.]" ***Id.*** at *1 (capitalization omitted). While not expressly stating whether the contractual language was mandatory or permissive, the district court held that the language was unambiguous and because the agreement provided that suit could be filed in any federal court of the United States of America **or** in the courts of the state of Texas, jurisdiction was proper in the district court of Connecticut. ***See id.*** at *3. The language in the agreement in ***Nymbus***, however, is distinguishable from the language in the MIPA in the case at bar, as I will discuss ***infra***.

[3] The Majority does not provide a separate analysis for any of the issues on appeal, instead relying fully on and adopting the various trial court opinions.

regarding the forum selection clause in the MIPA mandates a different conclusion than the Majority reaches here.

Initially, the forum selection clause in the MIPA reads as follows:

> [A]ny legal suit, action or proceeding arising out of or based upon this Agreement, the other Transaction Documents or the transactions contemplated hereby or thereby **may be instituted in the federal courts of the United States of America or the courts of the State of Texas in each case located in Dallas County, Texas, and each Party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action or proceeding....** The Parties irrevocably and unconditionally waive any objection to the laying of venue of any suit, action or proceeding in such courts and irrevocably waive and agree not to plead or claim in any such court that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum.

(***See*** MIPA, § 14.12(b)) (emphasis added).[4]

Pursuant to Texas law, when examining a forum selection clause:

> Contractual forum-selection clauses allow contracting parties to preselect the jurisdiction for dispute resolution. They are generally enforceable and presumptively valid in Texas.
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> * * *
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> A party seeking to enforce a forum-selection clause bears the initial burden of establishing the existence of a valid agreement to an exclusive forum and that the agreement applies to the claims involved. Once the party seeking to enforce the forum-selection clause makes these initial showings, the burden shifts to the party opposing the

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[4] As the trial court acknowledged: "All parties to this action agree that the forum selection clause, § 14.12(b) of the MIPA is applicable here; the argument or distinction is as to whether this clause is mandatory or permissive." (Trial Court Opinion, filed 11/16/21, at 8).

> forum-selection clause to make a "strong showing" overcoming the *prima facie* validity of the forum-selection clause. Under this framework, a forum-selection clause must be enforced unless the party opposing enforcement of the clause can clearly show that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for such reasons as fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision, or (4) the selected forum would be seriously inconvenient for trial. As the [S]upreme [C]ourt has explained, any scenario in which a court declines to enforce a forum-selection clause must involve "extreme" or "exceptional" circumstances. Absent these circumstances, a trial court should enforce a mandatory forum-selection clause by granting a motion to dismiss.
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> Courts construe forum-selection clauses based on their plain language. When asked to enforce a forum-selection clause, a trial court must determine whether the clause applies to the claims asserted in the lawsuit, utilizing a common-sense examination of the claims and the forum-selection clause to determine if the clause covers the claims. The court bases this determination on the language of the clause and the nature of the claims that are allegedly subject to the clause. The legal theories and causes of action employed are not controlling. Instead, we focus on the substance of the claims, not the labels, and avoid slavish adherence to a contract/tort distinction. A forum-selection clause cannot be circumvented by artful pleading.

In re Invincible Boat Co. LLC, ___ S.W.3d ___, 2025 WL 478190, at *3-4 (Tex.App. filed Feb. 13, 2025) (citations and quotations omitted). As well, the Texas State Supreme Court has held that when a forum selection clause contains both mandatory and permissive language, the mandatory language controls. ***See In re Fisher***, 433 S.W.3d 523, 533 (Tex. 2014).

In ***Ramsay v. Texas Trading Co.***, 254 S.W.3d 620, 626 (Tex.App. 2008), the Texarkana Court of Appeals provided a pertinent analysis of

mandatory versus permissive forum selection clauses. In that case, an investor (Ramsay) brought action against a commodity futures clearing house and broker after losing money on cattle-futures contracts. ***See id.*** at 623. The clearing house and broker then sought enforcement of a forum selection clause in the account agreement at issue. That clause provided:

> All actions or proceedings arising [directly], indirectly or otherwise, in connection with, out of, related to, or from this agreement or any transaction covered hereby, shall be governed by the law of Illinois **and may, at the discretion and election of [ADM Investor Services, Inc. ("ADM")], be litigated in a court whose situs is within Illinois**.

Id. at 625-26 (emphasis added). Ramsay argued that the clause at issue did not provide for exclusive jurisdiction in Illinois. ***See id.*** at 626. The Court considered the question of whether this clause "provide[d] only an additional location where litigation might proceed ... rather than a mandatory requirement" or whether it meant that ADM may choose to require litigation to proceed in Illinois, making such choice binding[.]" ***Id.*** at 629.

The Court analyzed the clause noting several contract interpretation precepts, including that after the application of the ordinary rules of interpretation, where an instrument is open to two reasonable constructions, it will be construed against the author. ***See id.*** at 630. Additionally, the Court noted the primary goal in construing the meaning of the contract is to ascertain and give effect to the parties' intent as expressed in the contract, and no single provision should be taken alone to give controlling effect. ***Id.***

at 630-31.

The Court was tasked to consider whether, based on the above contractual language, Ramsay had contracted to allow ADM to choose whether a lawsuit would proceed in Illinois. ***See id.*** The contract was drafted by ADM, and the language allowed ADM to require the litigation of any action to proceed solely in Illinois. ***Id.*** The Court noted that although the word "may" intended mandatory effect, it ordinarily suggests a conditional or possible result. ***Id.*** In context, however, the Court explained that the parties had intended to make the forum mandatory once ADM made its choice. ***Id.*** Otherwise, the words giving ADM the opportunity to choose would mean nothing. ***Id.*** The Court construed the above contractual language as "mandatory," which does not exclude the ability to contract for discretion in one party, which, if exercised, would make the provision mandatory on others to the contract. ***Id.*** By contrast, a "permissive" clause is one under which the parties' consent to the jurisdiction of a particular forum but do not require suit to be filed there. ***Id.***

More directly analogous to the case at bar, is the Northern District Court of Texas's holding in ***Profrac Holdings II, LLC v. Kuzov***, No. 4:24-CV-00531-P, 2024 WL 3581985, at *2-3 (N.D.Tex. July 30, 2024),[5] which

[5] "[W]hile we recognize that federal district court cases, and especially unpublished district court cases, are not binding on this court, Pennsylvania appellate courts may utilize the analysis in those cases to the extent we find them persuasive." ***Eastern Steel Constructors, Inc. v. International Fidelity Insurance Company***, A.3d 827, 860 n.37 (Pa.Super. 2022), *affirmed*, ___ Pa. ___, 351 A.3d 766 (2026).

involved a forum selection clause nearly identical to the one at issue here. The ***Profrac Holdings II*** forum selection clause read as follows:

> Section 10.09 Governing Law and Jurisdiction. This Agreement shall be governed by and construed in accordance with the Laws of the State of Texas…. **Any legal suit, action or proceeding arising out of or based upon this Agreement, the Transaction Documents or the transactions contemplated hereby or thereby may be instituted in the federal courts of the United States of America or the courts of the state of Texas in each case located in the city of Austin and the county of Travis**, and each Party irrevocably submits to the exclusive jurisdictions of such courts in any such suit, action or proceeding....

See id. at *1 (emphasis added). The district court analyzed this clause as follows:

> A federal court sitting in diversity should use the parties' choice of law to determine whether a forum-selection provision is mandatory or permissive. ***See*** [***Weber v. PACT XPP Techs., AG***, 811 F.3d 758, 770-71 (5th Cir. 2016)]. Here, the Purchase Agreement contains a Texas choice of law clause, and neither party disputes that Texas law applies. ***See*** ECF No. 5 at 2-3. Accordingly, the Court looks to Texas law to determine whether the forum-selection clause is permissive or mandatory.
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> According to the Texas Supreme Court, language is ambiguous only if it yields "more than one reasonable interpretation." ***Sw. Royalties, Inc. v. Hegar***, 500 S.W.3d 400, 405 (Tex. 2016). But ambiguity is determined only after applying standard rules of contract construction. ***Phx. Network Techs. Ltd. v. Neon Sys., Inc.***, 177 S.W.3d 605, 615 (Tex. App.-Houston [1st Dist.] Aug. 25, 2005, no pet.). In fact, "[i]f, after the application of contract construction rules, a contract such as a forum selection agreement is susceptible of only one reasonable meaning, the contract is unambiguous." ***Id.***

Texas contract construction rules deem that the Court's primary concern when interpreting contract language is to ascertain and give effect to the parties' intentions, as expressed in the contract language. ***Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.***, 341 S.W.3d 323, 333-34 (Tex. 2011). Undefined contractual terms are typically assigned their ordinary meaning. ***Sw. Royalties***, 500 S.W.3d at 405. That meaning, however, must be "in harmony and consistent" with the contract's other terms, and "[i]f a different, more limited, or precise definition is apparent from the term's use in the context…, we apply that meaning." ***Id.*** Ultimately, the contract's words are determined both by context and intent of the parties. ***See Italian Cowboy***, 341 S.W.3d at 333.

Here, the Court finds that the disputed forum-selection clause is not ambiguous. The intent of the Parties was clearly to give Travis County courts exclusive jurisdiction over any claims arising from the Purchase Agreement. The mandatory language of "exclusive jurisdiction" in the clause "clearly demonstrate[s] the parties' intent to make that jurisdiction exclusive." ***City of New Orleans***, 376 F.3d at 504; ***see*** ECF No. 5 at 2-3. While ProFrac argues that the word "may" deems the clause permissive, this term must be interpreted in context vis-à-vis the rest of the clause. ***See*** ECF No. 15 at 6. The clause says that a relevant lawsuit "may be instituted in federal courts of the United States of America or the courts of the state of Texas...." ECF No. 5 at 2-3. **Read in context, "may" clearly confers discretion as between state and federal forums, not between Travis County forums and non-Travis County forums. This limited meaning of "may" is "in harmony and consistent" with the rest of the clause**. ***Sw. Royalties***, 500 S.W.3d at 405. **Interpreting "may" as rendering the entire clause permissive would directly conflict with the parties' intent and make other terms in the clause, like "exclusive jurisdiction," meaningless.**

When a forum-selection clause contains both mandatory and permissive language, the mandatory controls over the permissive. ***In re Fisher***[***, supra***] (finding a forum selection clause containing "agrees not to bring any proceeding ... in any other court" but "non-

> exclusive jurisdiction" to be mandatory). Other district courts have found identical language to be mandatory. ***See, e.g.***, ***LaBarge Coating, LLC v. LaBarge C&R LLC***, No. H-18-3961, 2018 WL 7290898, at *3 (S.D. Tex. Dec. 17, 2018) (finding that "may" allows a choice between state or federal court, while "in each case" and "exclusive jurisdiction" make the clause mandatory). The mere fact that the clause includes "may" does not render the use of "exclusive jurisdiction," "in each case," and "irrevocably submits" also permissive—and no reasonable interpretation could suggest otherwise.
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> The Parties clearly intended that state or federal courts in Travis County have exclusive jurisdiction over disputes arising from the contract. While the word "may" gives a choice between state or federal court, the Parties "irrevocably [submit] to the exclusive jurisdiction" of such court in Travis County. The Court is hard-pressed to find a clearer statement of the Parties' intent. Accordingly, the forum-selection clause in the Purchase Agreement is mandatory.

See id. at *2-3 (emphasis added).

As in ***Profrac Holdings II***, the MIPA in the instant matter contains a Texas choice of law clause. Thus, the trial court was obligated to apply Texas law to determine whether the forum selection clause at issue was permissive or mandatory. Further, reading the **entire forum selection clause** in context, the word "'may' clearly confers discretion as between state and federal forums" and not between "[Dallas] County forums and non-[Dallas] County forums." ***See id.*** at * 2-3. The mandatory language controls. ***See In re Fisher, supra***. Thus, I find the holding in ***Profrac Holdings II*** to be instructive and persuasive, and I would reach the same result in this case—namely, that to find the forum selection clause in this matter to be anything other than mandatory would "directly conflict with the parties' intent and make

other terms in the clause, like 'exclusive jurisdiction,' meaningless." ***See Profrac Holdings II, supra*** at *2-3. In my view, the word "may" in the forum selection clause provides the parties with a choice between **state court in Dallas County** and **federal court in Dallas County**; it does **not** provide the choice between Dallas County courts and non-Dallas County courts. ***See id. See also In re Fisher, supra***.[6] Accordingly, I would vacate the entry of judgment, remand for a new trial, and transfer the matter to state or federal court in Dallas County, Texas.[7] Based upon this conclusion, I would not address the remaining issues on appeal.

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[6] Notably, unlike the contractual language in the case before us and in ***Profrac Holdings II***, the contractual language in ***Nymbus*** stated that a lawsuit may be filed "in the federal courts of the United States of America **or** the courts of the state of Texas[.]" ***Nymbus, supra*** at *1 (emphasis added; capitalization omitted). ***Compare*** (MIPA, § 14.12(b)) (stating that lawsuit "may be instituted in the federal courts of the United States of America or the courts of the State of Texas **in each case located in Dallas County, Texas**, and each Party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action or proceeding") (emphasis added); ***Profac Holdings, II*** at *1 (stating lawsuit "may be instituted in the federal courts of the United States of America or the courts of the state of Texas **in each case located in the city of Austin and the county of Travis**") (emphasis added).

[7] I note that Appellee made no claim in opposition to Appellants' preliminary objections based on the forum selection clause that (1) enforcement of the clause would have been unreasonable or unjust, (2) the clause was invalid for such reasons as fraud or overreaching, (3) enforcement would have contravened a strong public policy of the forum in which suit is brought, or (4) the selected forum would have been seriously inconvenient for trial. ***See In re Invincible Boat. Co. LLC, supra***. Likewise, Appellee advances no such argument on appeal.