

Forum Selection Clauses

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- ▶ Considerations in litigation:
 - Expression of policy of local forum?
 - Type of clause?
 - Designation of the court?
 - Designation of claims subject to clause?

Policy of Local Forum

- ▶ Idaho Code § 29-110
 - Dates back to 1887. R.S. 1887, § 3229
 - *Huber v. St. Joseph's Hospital*, 11 Idaho 631 (1905)
 - Last amended in 2012. S.L., ch. 328, § 1

Policy of Local Forum

29-110. LIMITATIONS ON RIGHT TO SUE UNDER CONTRACT OR FRANCHISE AGREEMENT. (1) Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract ~~by the usual proceedings~~ in ~~ordinary~~ Idaho tribunals, or which limits the time within which he may thus enforce his rights, is void as it is against the public policy of Idaho.

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Policy of Local Forum

- ▶ How is Section 29–110 applied to forum selection clauses?
 - *Atlantic Marine Const. Co. v. U.S. Dist. Court for the Western Dist. of Texas*, 134 S.Ct. 568 (2013)
 - *Wada Farms, Inc. v. Jules and Assocs., Inc.*, 2015 WL 128100 (Jan. 7, 2015)

Policy of Local Forum

- ▶ What else can Section 29-110 do in litigation?

Other Drafting Considerations

- ▶ Type of clause?
 - *Mandatory v. Permissive*
- ▶ Designation of the court?
 - *“Venue shall be in ____ County, Idaho.”*
- ▶ Designation of the claims subject to clause?
 - *“Any and all claims arising from this Agreement.”*

Sample Mandatory Forum Selection Clause

(a) Any party bringing a legal action or proceeding against any other party arising out of or relating to this Agreement or the transactions it contemplates shall bring the legal action or proceeding in either the United States District Court for the [insert District location] District of [insert state name] or in any court of the State of [insert state name] sitting in [insert city name].

(b) Each party to this Agreement consents to the exclusive jurisdiction of (i) the United States District Court for the [insert District location] District of [insert state name] and its appellate courts, and (ii) any court of the State of [insert state name] sitting in [insert city name] and its appellate courts, for the purpose of all legal actions and proceedings arising out of or relating to this Agreement or the transactions it contemplates.

(c) Each party agrees that the exclusive choice of forum set forth in this Section does not prohibit the enforcement of any judgment obtained in that forum or any other appropriate forum.

Commentary to Mandatory Forum Selection Clause

- ▶ Subsection (a) uses the phrase “legal action and proceeding” because some states, such as New York, distinguish between an action and proceeding.
- ▶ Subsection (a) uses the phrase “arising under and relating to” because some courts have found that the phrase “arising under and relating to” implies a broader application than the phrase “arising under” when interpreting governing law provisions.
- ▶ Subsection (a) specifies which court is intended, rather than simply mentioning a geographic location (such as Idaho), to avoid ambiguity in determining whether the parties intended the action to be brought only in the state court of the designated state, in the federal district court of the relevant state, or in either location. The drafter should remember not to designate a federal court as the only permissible forum because the court may not have federal subject matter jurisdiction based on either diversity or federal subject matter grounds.
- ▶ Some courts have viewed subsection (a) as permissive despite the use of “shall.” For that reason, subsection (b) states that the parties consent to the “exclusive” jurisdiction of the courts enumerated in subsection (a).
- ▶ The purpose of subsection (c) is to preclude a defendant from arguing that subsection (b) renders unenforceable a judgment obtained against the defendant in another jurisdiction.

12-121 Reinstated

No general equitable authority to order a party to pay an opponent's attorney fees

Deference to Contract Provisions on Attorney Fees

Zenner v. Holcomb, 147 Idaho 444, 210 P.3d 552(2009)

- ▶ In *Farm Credit Bank*, we stated that I.C. § 12–120 “does not override a valid agreement” ... Likewise, we hold that the general entitlement to costs under I.R.C.P. 54(d)(1) does not override a valid agreement. This standard also promotes the freedom to contract, which is a “fundamental concept underlying the law of contracts and is an essential element of the free enterprise system.” When faced with an action that could implicate both a contract and a statute, the contract will be the governing source of an attorney fee award

Zenner v. Holcomb, 147 Idaho 444, 210 P.3d 552(2009)

Instead of applying Idaho Rule of Civil Procedure 54(d), which provides for reasonable attorney fees, the Court held that the prevailing party was entitled to its actual attorney fees pursuant to the contract.

Provision: “[s]hould any kind of proceeding including litigation or arbitration be necessary to enforce the provisions of this agreement the prevailing party shall be entitled to have it's [sic] attorney's fees and costs paid by the other party.”

But challenge as unconscionable penalty if too harsh.

Attorneys Fees Clause Survival

Bauchman–Kingston Partnership, LP v. Haroldson, 149 Idaho 87, 233 P.3d 18 (2008)

- ▶ Land contract that did not comply with the statute of frauds, unenforceable.
- ▶ “[a] party may be awarded attorney fees based on an agreement so providing, even when the court determines that the agreement is not enforceable.”

One Way provisions

Barnes v. Hinton, 103 Idaho 619, 651 P.2d 553 (Ct. App. 1982)

- ▶ Both California and Oregon have adopted statutes which provide that where a contract specifically provides that attorney fees to enforce the contract shall be awarded to one of the parties, the prevailing party—whether he is the party specified in the contract or not—is entitled to reasonable attorney fees. See Cal.Civ.Code § 1717 and O.R.S. 20.096(1). While California and Oregon courts may be free to imply a reciprocal meaning to attorney fees provisions in contract, Idaho courts are not. Until the Idaho Legislature adopts a statute like that found in California or Oregon, Idaho courts must abide by the rule to which our Supreme Court has consistently adhered.
- ▶ Fee statute applies nevertheless?