

Governing law and jurisdiction clauses Q&A: Spain

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Spain-specific information concerning the key legal issues that need to be considered when drafting and enforcing governing law and jurisdiction clauses.

This Q&A provides country-specific commentary on *Practice note, Governing law and jurisdiction clauses: Cross-border* and forms part of *Cross-border dispute resolution*.

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Recognition of parties' choice of governing law

1. Do local courts recognise foreign governing law clauses? Do local courts respect a choice of governing law even where a different jurisdiction has been selected by the parties to hear the dispute?

Since Spain joined the European Economic Community, the Spanish courts have been familiar with governing law clauses. Local courts respect the parties' choice of governing law, even where the parties have selected a foreign jurisdiction to hear the dispute.

Local courts must apply the Convention on the law applicable to contractual obligations (80/934/EEC) (Rome Convention) or Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I), as appropriate, to determine the law governing a contract. The application of either of these instruments does not depend on the nationality or domicile of the parties to the contract.

These principles extend to the application of Regulation (EC) No 864/2007 (Rome II) with regard to freedom of choice of governing law for non-contractual claims (*Article 2, Rome I* and *Article 3, Rome II*).

EU legislation applies in Spain with preference over domestic law, as in other EU member states.

Article 10.5 of the Spanish Civil Code will apply in cases where the EU regime does not apply, for example governing law clauses that do not meet the requirements stated in Article 3.1 of Rome I.

Under Article 10.5, parties can choose the law that will govern their contract provided it has a connection with the subject matter of the contract (*Article 10.5, Civil Code*).

The "connection" should be interpreted in a very broad sense. It is enough that either:

- One of the parties is a resident of the jurisdiction relating to the law that has been selected by the parties.
- The contract has been executed in the jurisdiction or it is to be fulfilled in the jurisdiction.

In cases of ambiguity regarding the applicable law, Spanish courts are likely to apply Spanish law over the law of a foreign jurisdiction when it is the law of an EU non-member state.

Where the parties choose a foreign governing law that is not an EU member state law, bilateral or multilateral international conventions or treaties subscribed to by Spain are also relevant. For example, the United Nations Convention on International Sale of Merchandises made in Vienna (1980) could be considered by the court in the event of foreign commercial transactions not involving residents in any EU member state. Also, attention should be drawn to the various WIPO Treaties concerning intellectual property and copyrights when one of the parties is a non-resident in any EU member state.

Formal requirements: governing law clause

2. What are the requirements for a governing law clause to be valid?

No special formal requirements must be observed for a choice of governing law to be valid and enforceable. The only requirement is that the governing law must have a connection with the subject matter of the contract (see *Question 1*).

However foreign law is considered by the Spanish courts to be a fact that must be proved, with the burden of proof being on the party who seeks to rely on the foreign law. Proof must be given not only about the contents of the foreign law but also about its actual

validity in the relevant country and the way in which it is interpreted and applied by the courts in that country. If the party who claims the application of a foreign law fails to provide proof of these issues, the law of the forum must apply to the contract, irrespective of the governing law chosen by the parties.

There is no special wording to be followed when drafting a governing law clause. The wording of *Standard clause, Governing law: Cross-border* is appropriate.

Law governing matters of procedure

3. Will the law of the forum (in other words, the law of the place where the dispute is heard), or the law chosen by the parties to govern the contract, determine matters of procedure such as, questions relating to the rules of evidence (including the burden of proof), the remedies available, the assessment of damages and the limitation of actions?

The law chosen by the parties to govern the contract applies not only to the contract itself but also to the performance of the contract and its interpretation, as well as the consequences of breach of contract (such as, the remedies available and the assessment of damages) and issues relating to limitation of actions. This is the position under the Spanish procedural law as well as Rome I (*Articles 12 and 18.2*).

If there is no jurisdiction clause in the contract, the law of the forum must apply to questions relating to procedure such as rules of evidence (including the burden of proof).

Choice of foreign governing law in domestic contracts

4. Can two (or more) domestic parties choose a foreign law as the governing law of their contract?

Two or more domestic parties can choose a foreign law as the governing law of their contract (without objection from the Spanish courts). This freedom of governing law is subject to Articles 3.3 and 3.4 of Rome I.

Mandatory laws of the forum

5. Are there any circumstances or mandatory rules or regulations of the forum that can override the parties' choice of governing law?

The parties can agree any clause, agreement or condition they think fit, provided it is not contrary to law, morality or public order. Spanish courts will apply these rules when deciding whether to apply a parties' choice of governing law. In particular, they will apply the public policy restriction, in relation to the protection of consumers and competition restrictions as well as labour contracts, insurance contracts and transport contracts. Local advice must be sought on the specific foreign law chosen.

In addition, Spain is subject to Rome I.

Some examples of the mandatory provisions of Spanish law under Article 9 of Rome I are:

- Article 1.271 of the Civil Code that prohibits any contract concerning future inheritance and/or any contract concerning services against the law (in other words, surrogacy).
- Article 1.256 of the Civil Code, providing that contract fulfilment cannot be left to the sole discretion of one of the contracting parties.

The general rule is that the parties are free to choose the governing law to be applied to civil and commercial contractual obligations, unless the specific restrictions mentioned above apply.

Law governing non-contractual claims

6. Can parties choose a governing law to cover non-contractual claims (such as, negligence and misrepresentation)? If so, should the clause expressly state "including non-contractual disputes or claims"?

Different laws apply, depending on whether the parties are residents of a member state of the EU, a non-member state of the EU or a state that is not party to an international treaty that Spain has subscribed to. However, in all three situations, to avoid any ambiguity, it is convenient to expressly state that the governing law clause applies to both contractual and non-contractual obligations.

Residents of any EU member states

Under Rome II, parties are free to choose the governing law applicable to non-contractual obligations. However, there are certain restrictions depending on the subject matter, such as damage caused to privacy and/or personal rights, including defamation.

Residents of non-member states of the EU

In disputes between EU residents and residents of non-member states of the EU, the specific rules contained in bilateral or multilateral international treaties apply.

Citizens of non-member states of the EU that have treaty with Spain

Where the dispute is between citizens of non-EU member states, Article 10.9 of the Spanish Civil Code applies, and the governing law must be the law of the place where the fact from which the non-contractual obligation derives has arisen.

Application of foreign law by local courts

7. What is the approach of local courts in exercising jurisdiction over a dispute which is governed by a foreign law?

Local courts consider governing law and jurisdiction agreements to be entirely independent, and they have no effect on each other.

The Spanish courts consider the choice of a foreign governing law to be a fact that must be proved by the party who claims its application (see [Question 2](#)). Typically, proof of the validity, interpretation and the application of a foreign law is achieved by producing to the court an affidavit issued by the competent court of the relevant foreign country. Spanish courts also admit as proof affidavits issued by reputable jurists (their involvement at court is limited to ratifying their affidavits).

Governing law in the absence of choice

8. What is the courts' approach to determine what law governs the parties' contract in the absence of a specific clause in international commercial contracts?

Governing law and jurisdiction clauses are separate issues. As a result, Spanish courts pay no attention to jurisdiction clauses to determine the governing law of a contract, in the absence of a governing law clause.

In the absence of a specific governing law clause in international commercial contracts, Rome I will apply. In cases where Rome I does not apply, it is necessary to check if there are any bilateral or multilateral

conventions or treaties subscribed by the countries of residence of the relevant parties in the dispute. If so, then the relevant convention or treaty will determine what law governs the parties' contract.

In the absence of any bilateral or multilateral international treaty or convention the court will apply the law of the forum, which must be consistent with Article 10.5 of the Civil Code (see [Question 1](#)).

Recognition of parties' choice of jurisdiction

9. Do local courts recognise jurisdiction clauses in a contract?

The local courts in Spain recognise jurisdiction clauses in a contract. As a general rule, a submission by the parties to a specific court will determine the jurisdiction of the matter, in cases where there is no compulsory forum provided by the relevant governing law (*Article 22, Organic Law for Judicial Power 1985*).

In the absence of a jurisdiction clause agreed by the parties, jurisdiction will be determined in accordance with:

- The laws passed by the EU, that is the Brussels Revised I Regulation or Brussels I bis, together with international conventions subscribed between the EU and non-member countries of the EU (Denmark and certain countries in the European Free Trade Association EFTA) and in particular the Lugano Convention 1988 and Lugano Convention 2007.
- The International Conventions and/or Treaties whether bilateral or multilateral subscribed by the Kingdom of Spain with non-member countries of the EU (for example, the Hague Convention on Choice of Court Agreements).
- The laws of forum stated in Articles 22 to -25 of Organic Law for Judicial Power (2015 revision) where the rules of private international law applicable to decide about international jurisdiction are settled. The rules stated in these articles are very close to the rules contained in the Brussels Revised I Regulation.

Formal requirements: jurisdiction clause

10. Are there any formal requirements for a jurisdiction clause to be valid?

In accordance with various decisions of the Spanish Supreme Court, the following formal requirements must be complied with for a jurisdiction clause to be valid:

- It must be agreed by the parties explicitly (that is, the jurisdiction clause must show the common will of the parties to submit their contractual dispute to an appointed court).

- It must contain a clear and definite waiver of the parties' own forum.
- It must precisely state the court to which the parties submit a dispute for decision.
- It must be agreed in writing or at least with written confirmation.
- It must comply with the normal behaviour of the parties or the international commercial uses known or expected to be known by the parties.
- It must be signed by the parties.

The position is the same under the Recast Brussels Regulation, the Lugano Convention and the Hague Convention on Choice of Court Agreements as the court will check in first place whether or not the jurisdiction clause is valid.

Standard clause, Jurisdiction: Cross-border: Option 1 and Option 3 would be enforceable in the Spanish courts. However, *Option 2* could face the opposition of the court if it provides for the possibility of choosing any competent court, without actually determining the specific court.

Exclusive and non-exclusive jurisdiction clauses

11. Do local courts recognise exclusive jurisdiction clauses and non-exclusive jurisdiction clauses? Are the words "exclusive" or "non-exclusive" considered to be sufficient to give the clause its full intended effect?

If a jurisdiction clause does not expressly state that it is "exclusive" or "non-exclusive", the Spanish courts will recognise it as being an exclusive clause. Therefore, if parties intend the jurisdiction clause to be non-exclusive, they should expressly state this.

Non-exclusive jurisdiction clauses are recognised by Spanish courts, provided that the alternative jurisdictions are determinable (that is, the clause must be drafted in such a way that the parties have no doubt as to the criteria for the selection of the alternative competent jurisdictions). An example of an invalid clause might be: "Any court that could be held competent shall have non-exclusive jurisdiction over any dispute or claim arising out or in connection with this agreement". If a non-exclusive jurisdiction clause is found to be invalid by the Spanish courts, they will apply the law of the forum.

The position on exclusive and non-exclusive jurisdiction clauses/agreements under the Recast Brussels

Regulation, the Lugano Convention and or the Hague Convention on Choice of Court Agreements is as follows:

- **Recast Brussels Regulation.** In the absence of a valid exclusive and/or non-exclusive jurisdiction clause/agreement the rules stated in sections 2 to 7 of Chapter II will be applied.
- **Lugano Convention.** In the absence of a valid exclusive and/or non-exclusive jurisdiction clause/agreement, the rules in sections 2 to 6 of Title II will be applied.
- **The Hague Convention.** The Convention does not state any rules applicable in the absence of jurisdiction choice clauses/agreements and therefore the Spanish courts will apply the internal legislation.

Breach of exclusive jurisdiction clause

12. Do local courts award remedies for breach of an exclusive jurisdiction agreement in their favour?

In the event of a breach of an exclusive jurisdiction clause that provides for the jurisdiction of the Spanish courts (for example, when a party elects to start proceedings in a court in a different jurisdiction) the Spanish courts can grant precautionary measures similar to anti-suit injunctions (*Article 22.2, Organic Law for Judicial Power*). In addition, in these circumstances, the court can award damages to the aggrieved party provided that damages are applied for and proven by the party.

The Spanish Supreme Court has upheld the introduction of penalty clauses in jurisdiction clauses, which prevent the possibility of one party bringing action in any court other than the court selected by the parties. This is because a jurisdiction clause imposes certain duties on the parties and the failure to comply with these obligations makes the party in breach of these duties liable.

Therefore, it is advisable to introduce the following provision in jurisdiction clauses:

"In the event that either party institutes any legal proceedings in any court other than [selected court], that party shall bear all the costs incurred in having such proceedings dismissed or stayed including but not limited to attorney and paralegal fees caused to the other party".

However, Spanish courts cannot compel a foreign court to refrain from continuing proceedings in breach of a jurisdiction clause.

Restrictions on jurisdiction clauses

13. Are there any circumstances in which the local courts will take jurisdiction over a dispute notwithstanding that the parties' contract contains a jurisdiction clause which purports to confer jurisdiction on the courts of another country?

Spanish courts will take jurisdiction over the followings disputes, even if the parties' contract contains a jurisdiction clause that purports to confer jurisdiction on the courts of another country:

- Rights *in rem* and rental contracts concerning real estate located in Spain.
- The incorporation, validity, nullity or dissolution of companies domiciled in Spain.
- The validity or nullity of inscriptions in Spanish public registries.
- Patent or trade mark models and industrial designs deposited in Spain.
- The recognition and enforcement of judicial resolutions judgments and awards granted by foreign courts or arbitrators.
- Provisional measures for the protection of persons and assets located in Spain, where they should be enforced in Spain.
- All matters related to insolvency proceedings.

(Recast Brussels Regulation: Articles 24.1); 24.2); 24.3); 24.4) 24.5) and 45); 35 and 1.2 b; Hague Convention: Articles 2.2 l); 2.2 m); 2.2p); 2.2 n); 2.4; 7 and 2.2 e; Lugano Convention: Articles 16.1 a); 16.2; 16.3; 16.4; 1.4 and 16.5; 24 and 1.2.)

In addition, it is not possible for parties to submit to jurisdiction clauses where one of the parties is in need of protection (such as, a consumer, employee or insured party).

If a foreign jurisdiction clause involving any of the above matters is agreed by the parties, the clause will be held invalid by the Spanish courts. If a Spanish resident is party to any such dispute, legal proceedings will be held in Spain before a competent Spanish court.

Choice of foreign jurisdiction in domestic contracts

14. Can two (or more) domestic parties choose a foreign jurisdiction for their contract?

The Spanish legal system is based on the autonomy of will. As a result, there is nothing preventing domestic parties from choosing a foreign jurisdiction for their contracts. However, in practice this is not common.

Anti-suit injunctions and stay orders

15. What is the general approach to issuing anti-suit injunctions and stay orders in cases where proceedings involving the same cause of action between the same parties have been issued in another jurisdiction in breach of a jurisdiction agreement in favour of the local court? Please indicate the significance of the contract including an exclusive OR non-exclusive jurisdiction clause in favour of the local courts.

If an action has been brought before a foreign court, in breach of an exclusive jurisdiction agreement in favour of the Spanish courts, the Spanish courts cannot issue a restraining order asking the foreign court to stay or suspend proceedings. This principle only applies when none of the EU Regulations or international conventions apply.

The only remedies available for the party not in breach of the jurisdiction clause is to seek a precautionary measure similar to an anti-suit injunction, so that the Spanish court can order the defaulting party to refrain from continuing the proceedings before the foreign court that can be held incompetent. In addition, the non-defaulting party can apply for compensation for breach of contract (see [Question 12](#)).

Under the Recast Brussels Regulation, Lugano Convention and the Hague Convention, the court where an action is first exercised or a claim is filed must examine its own competence. If such action or claim is subsequently filed by one of the parties before another court in a different member or signatory state, pending the decision of the first court, the other court may suspend the procedure until the first one has declared its competence. In such a case the second court will decline its own jurisdiction. (Articles 27 and 29, Recast Brussels Regulation; Articles 19 and 21, Lugano Convention). However, these instruments do not give the competent court authority to ask the incompetent court to suspend proceedings already started.

Where proceedings involving the same cause of action between the same parties have been issued in a foreign jurisdiction, in breach of a non-exclusive jurisdiction agreement in favour of the Spanish courts, the question of which court prevails will be decided by a claim that is incidental to the main proceedings. The defaulting party will argue for a refusal of jurisdiction of the Spanish court and/or *lis pendens* and these issues will be decided by the Spanish court.

The Spanish court will first examine the validity of the non-exclusive jurisdiction clause. Once it has concluded that the clause is valid, the court will focus on the elements of connection between the proceedings and both jurisdictions. If the cause of

action is the same and the petitions of the parties are the same in both proceedings, the court will consider which claim was issued first and whether both claims will result in contradictory decisions. Finally, the Spanish court will make a decision regarding its own jurisdictional competence, in relation to whether to continue the proceedings or dismiss them.

One way jurisdiction clauses

16. Are one-way, unilateral or asymmetrical jurisdiction clauses (that limit one party to a particular jurisdiction and not the other party) considered valid in your jurisdiction?

The Spanish legal system is based on the freedom of the parties. Therefore, unilateral, bilateral and reciprocal jurisdiction clauses are considered valid in Spain. However, when drafting a jurisdiction clause, the parties must clearly identify the jurisdiction, to avoid any risk of it being found invalid by the courts on the grounds of ambiguity.

Incorporation of governing law and jurisdiction clauses by reference

17. What is the approach of the local courts when parties' contracts refer to the governing law and jurisdiction clauses in a party's standard terms and conditions?

Governing law and jurisdiction clauses that are included in a party's standard terms and conditions that are cross referred to in contractual documentation will only be valid if either:

- The parties adhering to the general conditions have been given notice of the existence of these clauses.
- The parties had the opportunity to become aware of the contents of these general conditions when concluding the contract.

The general rule is that the standard terms and conditions must be signed by the parties as evidence of their acknowledgement of the binding effects of the terms and conditions.

The Spanish courts have upheld the validity of jurisdiction clauses contained in bills of lading, even in respect of third parties, which, in the course of successive transactions affecting the goods referred to in these documents, were subrogated to the position of the original parties to the bills of lading. (*Judgement of the Spanish Supreme Court N° 697/2005 of 29th September 2005, followed by judgements of the Spanish Supreme Court of 8th February 2007, 5th July 2007, and 27th May 2008*).

Related agreements

18. How do local courts approach jurisdiction in disputes that have arisen from several related agreements, with conflicting jurisdiction clauses, which are part of one transaction?

In cases where disputes have arisen from several related agreements, with conflicting jurisdiction clauses that are part of one transaction, the Spanish courts apply the principle of contractual relativity stated in Article 1257 of the Spanish Civil Code as interpreted by the Spanish Supreme Court (*judgements of 6th February 1981; 20th February 1981; 9th October 1981*). Under this principle, jurisdiction clauses must only apply to the subject matter dealt with in the agreement and only affect the parties in that contract.

As a result, a jurisdiction clause cannot be extended to agreements other than those to which it relates and cannot be invoked by any third parties to the contract. However, according to several decisions of European Union Court of Justice, third parties can rely on the jurisdiction clause if either:

- There are rights granted to the third party in the contract that contains the jurisdiction clause.
- There is an assignment of the contract by the assignor to the third party in accordance with the law applicable.

Separability of jurisdiction clause

19. Are jurisdiction clauses considered separable from the main contract?

Jurisdiction clauses are separable from the main contract. As a result, if the agreement is held invalid for causes other than the consent of one of the parties, the jurisdiction clause may still be valid (see Article 3 d) of the Hague Convention and Article 25.5 of the Recast Brussels Regulation. The Lugano Convention does not contain any provision in this respect).

The validity of the contract will be decided according to the governing law chosen by the parties. If no governing law is applicable to the agreement, it will be decided in accordance with international private law.

Law governing jurisdiction clause

20. Which law governs a jurisdiction clause?

Jurisdiction clauses and governing law clauses are entirely separate (see [Question 7](#)).

The validity and enforceability of a jurisdiction clause is determined by the law of the forum chosen by the parties. This is the position under Article 25.1 of the Recast Brussels I Regulation. The same applies under The Hague Convention (*Article 5.1*).

The Lugano Convention does not have a specific provision in relation to this, but the same conclusion may be inferred from Article 23.3 and Article 27. If the courts of any member state signatory to the Convention must refrain from continuing with the legal proceedings if the same claim has been filed before a court in another jurisdiction, it follows that the second court can decide about its own competence according to the laws of its own forum.

Jurisdiction in the absence of party choice

21. What factors are taken into account by local courts to determine jurisdiction in the absence of a specific clause in international commercial contracts? Can submission to the jurisdiction of a foreign court be implied or inferred if the agreement is governed by foreign law and vice versa?

Jurisdiction clauses and governing law clauses are entirely separate (see [Question 7](#) and [Question 19](#)). Therefore, in the absence of a jurisdiction clause it cannot be implied or inferred that it was the parties' intention to submit to the courts of the country whose legislation was selected as governing law. In the same way in the absence of a governing law clause it cannot be inferred or implied that the parties' intention was to select the governing law of the country where the courts have been selected as competent jurisdiction.

In the absence of a specific jurisdiction clause or tacit submission, and when there is no applicable international agreement or convention, Spanish courts will have jurisdiction in relation to international commercial contracts in the following circumstances:

- In contractual matters, when the obligation has been or should have been fulfilled in Spain.

- In non-contractual matters, when the damage occurred in Spain.
- In consumer contracts, when the consumer or the other contracting party has its habitual residence in Spain.
- In insurance contracts, when the insured party, the policy holder or the beneficiary are domiciled in Spain.

(Article 22, *quinquies* of Organic Law for Judicial Power.)

To be valid, service of process must be effected at the domicile of the defendant (understood as their usual living place) irrespective of whether situated within or outside the jurisdiction.

Service of process is regulated by Spanish procedural law, and the claimant must exhaust all the means prescribed by the law to effect service of process, including those means stated in any international instruments or conventions, when applicable.

"Tacit submission" occurs when a party brings an action before a local court in breach of a foreign jurisdiction clause (or where for some other reason the other party could challenge jurisdiction) and the other party does not object.

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