

Governing Law and Jurisdiction Clauses in Brazil: Overview

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Practice note: overview | Law stated as at 01-May-2022 | Brazil

A Practice Note providing an overview of the key legal issues that need to be considered, from a Brazilian law perspective, when drafting and enforcing governing law and jurisdiction clauses.

Governing law and jurisdiction clauses refer to different things:

- A governing law clause enables the parties to specify the system of law that will apply to the interpretation of an agreement and its effect if a dispute arises. It identifies the substantive law that will be applied when determining and interpreting the rights and obligations of the parties and any disputes that may arise, but it does not indicate how disputes are to be resolved, for example, through the courts or arbitration.
- A jurisdiction clause is a dispute resolution clause which identifies the court or courts that will hear a dispute.

It is, therefore, important for parties to consider including both clear governing law and jurisdiction clauses in their contract. A failure to include clear provisions on governing law and jurisdiction can lead to lengthy and costly disputes in which a court decides which substantive law will be applied to determine the parties' rights and obligations under the contract.

This Practice Note gives an overview of the key legal issues that need to be considered, from a Brazilian law perspective, when drafting and enforcing governing law and jurisdiction clauses. In particular, it addresses:

- The level of party autonomy in choosing governing law and jurisdiction clauses.
- The mandatory laws of the forum which may override the parties' express choice of governing law.
- The approach of the local courts in applying foreign law.
- In the absence of the parties' choice, the approach of the local courts in determining the law governing the contract and the forum which can adjudicate the dispute between the parties.
- Tips for drafting exclusive, non-exclusive, and asymmetrical jurisdiction clauses.
- The restrictions on the application of jurisdiction clauses.
- The general approach to anti-suit injunctions and stay orders in the event of breach of the jurisdiction clause.
- How governing law and jurisdiction clauses can be incorporated by reference.
- How local courts determine jurisdiction in circumstances where there are conflicting jurisdiction clauses in related agreements (that form part of one transaction).
- The separability of the jurisdiction clause.
- The law governing the jurisdiction clause.

Governing Law

Recognition of Parties' Choice of Governing Law

Parties are generally free to agree a foreign governing law clause, provided that it does not violate Brazilian national sovereignty and public policy (*Article 17, Decree-Law No. 4,657/42 (known as the Law of Introduction to the Brazilian Legal System)*). Provisions of Brazilian law, which restrict the right of the parties to agree the foreign governing law, must be observed.

The applicability of foreign law will be considered by the Brazilian courts as an issue of fact, and the burden of proof will rest on the parties involved in the legal proceedings to convince the court to enforce the foreign law.

In practice, Brazilian courts are generally reluctant to apply foreign law. Even if a Brazilian court applies foreign law to a certain dispute, it does so only to a limited extent. This is because all matters falling under Brazilian law are deemed to be matters concerning public policy and are therefore subject to Brazilian law.

Formal Requirements

Governing law clauses in international transactions are considered to be valid, if not in violation of Brazilian national sovereignty and public policy (*see Recognition of Parties' Choice of Governing Law*). A valid choice of law clause must be part of a written legal instrument, and duly signed by the parties or their authorised representatives.

Law Governing Matters of Procedure

In Brazil the Civil Procedure Code (*Código de Processo Civil*) (Law No. 13.105/2015) applies to determine matters of procedure, for example questions relating to the rules of evidence (including the burden of proof), remedies available, assessment of damages, and limitation of actions, regardless of the applicable governing law chosen by the parties to govern the contract.

Choice of Foreign Governing Law in Domestic Contracts

In domestic contracts (that is, contracts where all parties are domiciled in Brazil), Brazilian law will always apply, even in cases where the parties have elected a foreign law (*Articles 21 and 23, Civil Procedure Code*).

For a foreign governing law clause to be enforceable there must be a connection between the governing law chosen and elements of the contract, for example the domicile of the parties, the place of execution, or the place of actual performance of the object of the contract.

Mandatory Laws of the Forum

In Brazil, commercial parties generally have freedom of contract. However, their freedom to contract may be limited by law. A contractual provision, including a governing law clause, will be invalid in Brazil if it violates Brazilian national sovereignty and public policy (*Article 17, Decree-Law No. 4,657/42*) (*see Recognition of Parties' Choice of Governing Law*).

In international contracts, Brazilian or foreign law can apply, depending on where the contract has been executed and where the party that proposed the transaction is domiciled. If a foreign entity has a branch in Brazil, it will be deemed domiciled in Brazil if the Brazilian branch has participated in the transaction (*Article 21, Civil Procedure Code*).

The parties' choice of law in relation to international contracts will be recognised by the courts as follows:

- Where the law of the country of domicile of the supplier is selected: the election will be recognised by the courts if the contract was executed in the supplier's place of domicile or the supplier proposed the transaction.
- Where the law of the country of domicile of the customer is selected: the election will be recognised by the courts if the contract was executed in the customer's place of domicile or the customer proposed the transaction.
- Where the law of a third jurisdiction was elected: the election will be recognised by the courts if the contract was executed outside of Brazil, or the party that proposed the transaction is not domiciled in Brazil, and the law chosen contains connecting elements with the contract (for example, the language of the contract and nature of the services).

The above restrictions will not apply if the parties agree to settle their disputes through arbitration.

However, Brazilian law prohibits choice of governing law clauses in the following circumstances:

- Employment agreements, which are governed by the law of the jurisdiction where the employee works.
- International contracts relating to technology transfer or consumer rights, both of which are regulated by Brazilian law.
- Contracts relating to economic activities controlled by the government (for example, stock exchanges, price control, interest rates, salaries, and exchange controls), which are governed by the law of the jurisdiction in which they are performed (*lex loci solutionis*).
- Contracts relating to real estate ownership, which are governed by the law of the jurisdiction in which the real property is located.

Law Governing Non-Contractual Claims

Under Brazilian law, any negligence or misrepresentation claim that arises out of a contractual relationship is considered a contractual claim. Therefore, the choice of law clause in an agreement also applies to claims arising from negligent acts or misrepresentations. It is not necessary to include a clause expressly stating the law applicable to non-contractual disputes or claims.

However, the choice of law clause will not be applied to claims that hold no connection to the agreement (*see Choice of Foreign Governing Law in Domestic Contracts*).

Application of Foreign Law by Local Courts

Foreign law will be considered by the Brazilian courts as an issue of fact, and the burden of proof rests on the parties involved in the proceedings to convince the court to enforce foreign law (*see Recognition of Parties' Choice of Governing Law*).

The rule in Brazil is that the party claiming foreign law must prove the existence, content, and validity of the foreign law. The most appropriate means of proof is that of a certificate issued by a foreign consular authority containing the legal text or a certificate authenticated by the consul. There is no obligation for attorneys to assist the judge in the interpretation of the foreign law. This is the judge's own task. However, attorneys can voluntarily present their contribution on the interpretation of the law.

Governing Law in the Absence of Choice

If the contract is silent on the applicable law (for example, if the parties failed to include a governing law clause), the Brazilian courts will take one of the following approaches:

- They will apply the law of the jurisdiction where the contract was signed (or the domicile of the party that proposed the transaction).
- Where the above is not possible, they will consider other factors like the parties' domicile and implicit intention, the language of the contract, and/or the jurisdiction elected by the parties to resolve disputes which may arise under the contract.
- They will apply Brazilian law, if the dispute was brought before Brazilian courts and the courts accepted jurisdiction over the dispute (*lex fori*).

Jurisdiction

Recognition of Parties' Choice of Jurisdiction

Brazilian case law is generally hesitant on the issue of party autonomy regarding choice of jurisdiction clauses. Supreme Court of Justice decisions have recognised and disregarded jurisdiction clauses.

Until very recently, Brazilian courts commonly ruled that parties are not permitted to exclude the jurisdiction of Brazilian courts through foreign jurisdiction clauses. This is because the rules on the jurisdiction of a state are directly based on Brazil's national sovereignty and therefore not subject to party autonomy.

Under the Civil Procedure Code (which came into force in March 2016), national courts are prohibited from recognising and establishing jurisdiction over disputes which arise from contracts containing a foreign jurisdiction clause (*Article 25, Civil Procedure Code*).

However, despite this express law, party autonomy is still limited and subject to Brazilian national sovereignty and public policy. In addition, a Brazilian court may, in exercising its discretion, disregard the jurisdiction provision if it takes the view that accepting the chosen forum:

- Would lead to a disproportionate burden on and vexation to a defendant, at the claimant's convenience.
- The chosen forum is inappropriate due to considerations affecting the court's own administrative and legal issues.

(*Article 63, §3, Civil Procedure Code*.)

Formal Requirements

A valid choice of law clause must be part of a written legal instrument, and duly signed by the parties or their authorised representatives.

Exclusive and Non-Exclusive Jurisdiction Clauses

There are no legal provisions that permit or prohibit exclusive and non-exclusive jurisdiction clauses. Therefore, local courts can recognise exclusive and non-exclusive jurisdiction clauses (including as worded in *Standard Document, Jurisdiction Clause: Cross-Border: Clause 1.1 option 3*), if the legal requirements applicable for jurisdiction clauses are complied with (see *Formal Requirements*).

However, if the jurisdiction clause leads to a disproportionate burden and vexation to a defendant, at the claimant's convenience, or if the chosen forum is deemed inappropriate on account of administrative and legal issues, the court may, in exercising its discretion, disregard the jurisdiction provision (*Article 63, §3, Civil Procedure Code*).

If the contract is silent on the choice of jurisdiction, the court of the defendant's domicile has jurisdiction over the case (*Article 46, Civil Procedure Code*).

The same applies to non-contractual disputes.

One-Way, Unilateral, or Asymmetrical Jurisdiction Clauses

There are no legal provisions that prohibit one-way, unilateral, or asymmetrical jurisdiction clauses. Therefore, local courts can recognise the validity of these clauses (including as worded in *Standard Document, Jurisdiction Clause: Cross-Border: Clause 1.1 option 3*), provided the relevant legal requirements have been met (see *Recognition of Parties' Choice of Jurisdiction, Formal Requirements and Restrictions on Jurisdiction Clauses*). In particular, these clauses must not lead to a gross contractual imbalance between the parties.

Some of the key recent decisions of the Superior Court of Justice on this matter are as follows:

- Choice of jurisdiction clause in a service contract is valid unless the defendant is able to demonstrate a disproportionate burden (*Special Appeal 1,707,855/SP, Superior Court of Justice (STJ), 23 February 2018*).
- Choice of jurisdiction clause in a contract is valid unless the defendant is able to prove its unequal bargaining power (*Specific Appeal in Special Appeal 978,563/SP, STJ, 20 November 2017*).

Reciprocal Home Country Jurisdiction Clauses

There are no legal provisions that permit or prohibit reciprocal home-country jurisdiction clauses. Therefore, local courts can recognise these clauses (including as worded in *Standard Document, Jurisdiction Clause: Cross-Border: Clause 1.1 option 3*), if the legal requirements applicable for jurisdiction clauses are complied with (see *Formal Requirements*).

However, if the jurisdiction clause leads to a disproportionate burden and vexation to a defendant, at the claimant's convenience, or if the chosen forum is deemed inappropriate on account of administrative and legal issues, the court may, in exercising its discretion, disregard the jurisdiction provision (*Article 63, §3, Civil Procedure Code*).

If the contract is silent on the choice of jurisdiction, the court of the defendant's domicile has jurisdiction over the case (*Article 46, Civil Procedure Code*).

The same applies to non-contractual disputes.

Breach of Exclusive Jurisdiction Clause

In the event of breach of an exclusive jurisdiction clause, the non-breaching party must inform the court of the breach at the first possible opportunity and the original proceedings will be stayed until the issue of jurisdiction is resolved.

If a foreign court determines that it lacks jurisdiction due to a valid choice of court clause, and if that valid court is a competent court in Brazil, the records will be remitted without an order as to costs or fees.

However, if the breach of the jurisdiction agreement results in the original claim being dismissed, the unsuccessful party must reimburse the court fees to the successful party, and pay the successful party's lawyers' fees. The amount of fees owed to the winning party's lawyers for the work performed is between 10% and 20% of the amount claimed in the lawsuit (*Article 85, Civil Procedure Code*).

Restrictions on Jurisdiction Clauses

In principle, the parties to a commercial agreement can select any venue for the resolution of their dispute (*Article 25, Civil Procedure Code*). However, the local courts have mandatory jurisdiction over the following disputes, regardless of a choice of jurisdiction provision in a contract:

- Disputes concerning real property located in Brazil.
- Property forming part of the probate of a deceased's estate, if the assets that compose the deceased's estate are located in Brazilian territory.
- Disputes concerning assets located in Brazil on the dissolution of a marriage.

(*Article 23, Civil Procedure Code*.)

Brazilian courts will entertain joint jurisdiction in the following scenarios:

- The defendant is located in Brazil.
- The contractual obligations must be performed in Brazil.
- The action arises from an act that occurred or which takes place in Brazil.

(*Article 21, Civil Procedure Code*.)

Brazilian courts have mandatory jurisdiction over the following disputes in the following situations:

- In alimony disputes, if the beneficiary resides in Brazil or if the debtor has interests within the country.
- Disputes concerning consumer law whenever the consumer resides in Brazil.
- Where the parties expressly or implicitly choose to submit themselves to the jurisdiction of a Brazilian court.

(*Article 22, Civil Procedure Code*.)

Any contract concluded with a governmental entity will always be subject to the jurisdiction of the court where the governmental entity is domiciled (*Article 51, Civil Procedure Code*) except in one of the following instances:

- Where international bids are financed by foreign co-operation agencies.
- Where there are contracts with foreign suppliers for equipment manufactured and delivered abroad (provided a specific governmental authorisation was given).
- Where there are acquisitions of goods or services manufactured by branches located abroad.

(Article 32, §6, Federal Law No. 8,666/93 (known as the Brazilian Public Bidding Law).)

It should be noted that in cases of mandatory jurisdiction Brazilian courts will not consider foreign courts' decisions, even in cases where the parties have elected and contracted to abide by these foreign courts' decisions.

These restrictions do not apply where the parties agree to settle their disputes through arbitration.

Choice of Foreign Jurisdiction in Domestic Contracts

Two (or more) domestic parties cannot choose a foreign jurisdiction in their contract (*Articles 21 and 23, Civil Procedure Code*).

However, this limitation does not apply if the parties agree to settle their disputes through arbitration.

Anti-Suit Injunctions and Stay Orders

Brazilian courts will not grant orders to stay or suspend foreign proceedings or grant decisions preventing a party from pursuing the other proceedings in the other jurisdiction, even in cases of an exclusive jurisdiction agreement in favour of Brazilian courts.

A breach of an exclusive jurisdiction agreement in favour of a Brazilian court may prevent the ratification of a foreign judicial order before the Brazilian Superior Court of Justice.

A non-exclusive jurisdiction agreement in favour of a Brazilian court will not prevent the ratification of a foreign judicial order.

Filing a claim with a foreign authority does not prevent a Brazilian court from adjudicating over the same dispute.

A claim brought before a foreign court will not secure jurisdiction for those proceedings before the foreign court (*lis pendens*) and will not prevent the Brazilian judicial authority from disposing of the claim and those related to it, except where otherwise stated in accordance with bilateral agreements and international treaties that are in force in Brazil (*Article 24, Civil Procedure Code*).

A matter pending before a Brazilian court does not prevent the ratification of a foreign judicial order on the same matter, where the ratification is required to give legal force to a Brazilian judgment.

Incorporation of Governing Law and Jurisdiction Clauses by Reference

A choice of jurisdiction clause will only be valid and enforceable if in writing and expressly relating to the agreement in question (*Article 63, § 1º, Civil Procedure Code*). Therefore, if the jurisdiction clause is not part of the main agreement, but part of another document, which is in writing and expressly incorporated into the main agreement, the jurisdiction clause is valid. The same reasoning can be applied to choice of law clauses. However, this is on the condition that the legal requirements applicable to jurisdiction clauses and governing law clauses are met and its application will not cause a disproportionate burden and vexation to a defendant, at the claimant's convenience.

Some of the key recent decisions of the Superior Court of Justice on this matter are as follows:

- Consumer can choose between the court of their domicile and the place established in the jurisdiction clause to initiate a lawsuit against supplier (*Conflict of Competence 107,44/SP, STJ, 1 August 2011*).
- Choice of jurisdiction clause in a commercial consignment agreement between the vehicle and engine producer company and the dealer (distributor/seller) is effective and valid and can only be rejected when it is abusive or may create difficulty of access to the courts (*Special Appeal 300,340/RN, STJ, 18 October 2008*).
- Choice of jurisdiction clause in a standard contract is valid and must be obeyed unless it leads to a disproportionate burden on and vexation to a defendant (*Special Appeal 1,275,00/RS, STJ, 17 September 2010*).
- Choice of jurisdiction clause in a consumer standard contract is not valid. The lawsuit must be brought before the court of the consumer's domicile (*Special Appeal 1,089,993/SP, STJ, 8 March 2010*).
- Choice of law clause cannot be disregarded if the lawsuit was initiated before the courts of the defendant's domicile. If both parties are equal (big multinational companies) the terms of the agreement regarding the jurisdiction must be obeyed (*Special Appeal 1,055,185/PR, STJ, 7 April 2014*).

Related Agreements

In circumstances where disputes have arisen from several related agreements, with conflicting jurisdiction clauses, which are part of one transaction, the courts can disregard the clauses and apply the international conflict of laws rules to ascertain the competent court.

This does not apply to cases involving arbitration, for which there are specific procedures.

Separability of Jurisdiction Clause

A jurisdiction clause is considered severable from the main contract, so that if the main agreement is held invalid, the jurisdiction clause may still be valid.

Law Governing Jurisdiction Clause

The Civil Procedure Code and Decree-Law No. 4,657/42 govern jurisdiction clauses, regardless of any governing law provisions in the contract.

Jurisdiction in the Absence of Choice

In the absence of a specific clause in international commercial contracts, the Brazilian courts will accept relative (or joint) jurisdiction over a dispute where:

- The defendant is domiciled in Brazil (for this purpose, a foreign entity with a branch in Brazil will be deemed domiciled in Brazil if the branch has participated in the transaction (*Article 17, Decree-Law No. 4,657/42*)).
- The obligation giving rise to the dispute is performed in Brazil.
- The cause of action originates in Brazil.

(Article 21, Civil Procedure Code.)

However, in these cases, the Brazilian courts will consider the decisions of competent foreign courts with jurisdiction and, if not in violation of Brazilian sovereignty and public policy, can adhere to these foreign decisions.

In the absence of a jurisdiction clause in international commercial contracts, the submission to the jurisdiction of a foreign court will not be considered implied or inferred by the choice of the governing law. The same applies to the governing law. In the absence of a governing law clause, the submission to a foreign law will not be considered implied or inferred by the parties' choice of forum/jurisdiction.

If the contract is silent on the applicable law, the Brazilian courts will apply Brazilian law, if the dispute was brought before a Brazilian court and the court accepted jurisdiction over the dispute (*lex fori*).

Brazilian courts can also assume jurisdiction in cases involving foreign citizens or foreign domiciled defendants regardless of the parties' choice of forum/jurisdiction if the foreign party voluntarily submits itself to the jurisdiction of a local court (for example, by the defendant appearing or taking steps in proceedings or by bringing an action as a claimant). In this latter case, however, the defendant may be able to successfully claim the lack of jurisdiction of the Brazilian court due to a choice of jurisdiction clause.

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