

# Governing law and jurisdiction clauses Q&A: Turkey

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Country Q&A | [Law stated as at 30-Jun-2019](#) | Turkey

Recognition of parties' choice of governing law  
Formal requirements: governing law clause  
Law governing matters of procedure  
Choice of foreign governing law in domestic contracts  
Mandatory laws of the forum  
Law governing non-contractual claims  
Application of foreign law by local courts  
Governing law in the absence of choice  
Recognition of parties' choice of jurisdiction  
Formal requirements: jurisdiction clause  
Exclusive and non-exclusive jurisdiction clauses  
Breach of exclusive jurisdiction clause  
Restrictions on jurisdiction clauses  
Choice of foreign jurisdiction in domestic contracts  
Anti-suit injunctions and stay orders  
One way jurisdiction clauses  
Incorporation of governing law and jurisdiction clauses by reference  
Related agreements  
Separability of jurisdiction clause  
Law governing jurisdiction clause  
Jurisdiction in the absence of party choice  
Contributor details

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Turkey - 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: Cross-border* and forms part of *Cross-border dispute resolution*.

## 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?

Under Article 2 of the Code on International Private and Procedural Law (No. 5718) (IPPL), Turkish courts apply the rules of the Turkish conflict of laws and the foreign governing law which is applicable under these rules.

In principle, the Turkish courts recognise foreign governing law clauses. However, in some situations the local courts may not respect the parties' choice despite a duly executed governing law clause. Such situations may occur:

- When the clauses contravene relevant legislation or rulings of the Court of Appeals.
- Due to the court's lack of experience and/or knowledge of dealing with commercial disputes that have a foreign element. (It is relatively rare for foreign parties to be involved in litigation in the courts of first instance, because Turkish law, as a rule, requires the payment of a security deposit from any foreign party that brings an action against a Turkish party. Therefore, foreign parties are generally not willing to apply to the court unless it is the last resort.)

However, such rulings are consistently reversed by the Court of Appeals, where the judges have vast experience in dealing with foreign law-governed disputes. The Court of Appeals may also use sworn experts specialised in the relevant foreign law and issue a new judgment on the relevant issue.

Since jurisdiction clauses and choice of governing law are considered as separate matters by the Turkish courts, the courts also respect the parties' autonomy on governing law, regardless of selected jurisdiction.

Following the amendment of the IPPL in 2007, foreign intervening rules, which are directly and automatically applicable in every case, are also provided. The application of these rules depends on the legal nature of the litigation and involves evaluating the purpose, content and consequences of the relevant rule.

## Formal requirements: governing law clause

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

Under Article 7 of the IPPL, legal transactions must observe either the:

- Laws of the place where transaction is executed (*locus regit actum*).
- Parties' choice of law.

The IPPL remains silent on the formal requirements of a governing law clause. Conformity with at least one of the above requirements is sufficient for a governing law clause to be recognised as valid and binding.

However, there are some exceptions to the general rules, for example:

- Under Article 21 of the IPPL, legal transactions regarding rights in rem of immovable property must be governed by the laws of the state where the immovable property is located (*lex rei sitae*). If the immovable property is in Turkey, the relevant contract must be executed by a notary public or the Turkish consulate.
- Under Article 20 of the IPPL, in addition to the requirements of Article 7, legal transactions related to testimonial disposals must be executed in compliance with the national law of the deceased.

## 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?

In principle, under Article 2(1) of the IPPL, the rules of Turkish procedural law (*lex fori*) are applied to all disputes heard in Turkish courts regardless of the governing law chosen by the parties, except in cases where an international agreement on procedural law exists between the countries of the related parties. The rules regarding assessment of damages and remedies, burden of proof and limitation laws fall within the scope of the procedural laws of Turkey. However, judicial precedent allows the application of contractual governing law to limitation laws and assessment of damages and remedies.

If there is a bilateral or a multilateral agreement regarding the procedural rules between Turkey and the country of the other party, the rules specified by the agreement must be applied, instead of Turkish procedural rules.

The list of bilateral or multilateral procedural law agreements is available on the website of the Turkish Ministry of Justice (see [Turkish Ministry of Justice, Documents](#)).

## 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?

In principle, domestic parties can choose a foreign law as the governing law of the contract, but there must be a certain connection with the jurisdiction that has been chosen. Under Article 1 of the IPPL, foreign governing law can be chosen by the parties if one of the following foreign elements is present:

- At least one party is not a Turkish citizen. The party does not need to be a citizen of the country of the governing law.
- The tort related to the transaction has occurred in another country.
- The place of performance or execution of the agreement is in another country.
- The subject of the contract (such as goods or services) is in another country.
- At least one party resides in another country.

Therefore, under Turkish legislation, in the absence of any connection to a foreign country, two (or more) domestic parties as a rule cannot choose a foreign law as the governing law of their contract in Turkey.

## 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?

Yes, the parties' choice of governing law could be overridden by either public policy or by a statute.

Public policy plays a very important role under Turkish law and its application in practice. Turkish courts may refrain from applying the relevant provision of the foreign law chosen by the parties if it explicitly contradicts public policy. The courts will then apply Turkish law instead.

The courts have a wide discretion in evaluating whether a provision contradicts public order under the IPPL. Assessment of a possible breach by the courts is based on:

- The fundamental principles of Turkish law.
- Internationally accepted general principles of law.
- The fundamental rights under the Turkish constitution.
- General Turkish moral values.

In addition to public policy, certain statutory provisions (also known as intervening rules) must be applied to a case directly, even in the presence of a foreign governing law. If there is a conflict between the governing law chosen in the contract and these provisions, the intervening rules always supersede the parties' choice of law.

There are two types of statutory provisions that apply regardless of the parties' choice of governing law:

- Turkish provisions regulated under Article 6 of the IPPL, which include provisions that aim to implement the economic, financial and social policies of the Turkish government. For instance, the Code of Protection on Value of Turkish Currency (Law No. 1567) and the Code of Protection on Cultural and Natural Assets (Law No. 2863) are automatically and directly applicable in any relevant dispute.
- Mandatory provisions of foreign law regulated under Article 31 of the IPPL, which are applicable only to disputes arising from contractual transactions. Where there is a close connection with a contract subject to a dispute, certain foreign statutory provisions can be directly applied to the dispute. A Turkish court will evaluate and assess the purpose, content and consequences of the foreign provision and, may at its discretion, apply the rule.

## 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"?

Although the IPPL does not expressly cover non-contractual claims, as a rule, these claims are included within the scope of the chosen governing law. Therefore, as a rule, there is no need to specifically incorporate a phrase such as

"including non-contractual disputes or claims" but, to be on the safe side, such claims should be explicitly included in the governing law clause one by one.

The exception from this rule are tortious acts. Under Article 34 of the IPPL, obligations arising from torts are governed by the law of the country where the tort was committed. If the related damage and the action causing the effect occurred in different countries, the law of the country where the damage occurred applies. The parties cannot rule out this provision by choosing another governing law.

## 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?

Under Article 2 of the IPPL, Turkish courts must apply the foreign governing law automatically. However, if the applicable foreign law provisions cannot be ascertained despite all efforts, Turkish law will be applied.

In practice, local courts often rely on the opinions of experts who are specialised in the foreign law chosen by the parties (as local courts usually do not have knowledge of foreign laws). However, opinions stated in expert reports do not bind the court, but only assist the court in its evaluation of the subject matter. The court may decide to apply a different view to that set out in an expert report. According to the established practice, orders are usually made by obtaining a few expert reports, evaluating them and preparing a final report that considers all reports submitted to the court.

Under Article 2 of the IPPL, the judge can also seek assistance from the parties in the interpretation of the foreign governing law. The parties can submit notarised and certified translations of related legislation and scholarly opinions to local courts, but such documents do not bind the courts that have full discretion in evaluating the documents and the information provided.

Foreign lawyers can be heard in the court as witnesses, especially to obtain information regarding the foreign law chosen by the parties. In such circumstances, relevant persons may be heard via letters rogatory (that is, formal requests from a court to a foreign court for judicial assistance) regulated under the relevant bilateral or multilateral agreements or using diplomatic correspondence methods. In addition, notarised and certified translations of legal opinions of foreign lawyers can be submitted to court.

The courts can also request information from the embassy or consulates of the relevant country located in Turkey or Turkish embassy or consulates in the relevant country via the Ministry of Justice (Directorate General for International Law and Foreign Relations) and the Ministry of Foreign Affairs.

Only the lawyers who are registered at one of the bar associations in Turkey can represent clients in lawsuits before Turkish courts. Therefore, a foreign lawyer who is not registered at any bar association in Turkey cannot provide legal representation in Turkish courts.

## 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?

Under Article 24 of the IPPL, in the absence of a governing law clause, the law that has the closest link to the subject matter of the contract will be applied. This is generally determined in relation to the characteristic performance of the contract. Characteristic performance is the primary obligation of the debtor that distinguishes the contract from other types of contracts (for example, performance of a seller in an international sales agreement or performance of a guarantor in a guarantee contract). Under this rule, the law applicable to the contract will be the law of the party that must fulfil the characteristic performance.

The applicable law can also be based on the characteristics of the contract, for example:

- If a contract is concluded because of commercial activities, the laws of the country where the debtor's workplace is located, or in the absence of a workplace, the laws of the country where the debtor resides will be applied.
- If the debtor has multiple workplaces, the laws of the country of the workplace which is most connected to the subject matter of the contract will be applied.

In the absence of a clear choice, the court determines the governing law using its inherent discretion based on the above rules. Each case should be evaluated individually before initiating legal proceedings.

The last paragraph of Article 24 of the IPPL allows the Turkish courts to use their discretion to apply another foreign law which they deem to be even more closely related to the relevant contract, even though it does not fulfil the criterion of characteristic performance of the contract.

Jurisdiction agreements alone do not provide the necessary grounds for the application of a certain foreign law in the absence of choice of governing law. Jurisdiction agreements may only boost a claim of a close link to a certain foreign law (see Article 24, last paragraph of the IPPL).

## Recognition of parties' choice of jurisdiction

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

Under Article 47 of the IPPL, Turkish courts recognise and apply both jurisdiction agreements or clauses that select foreign courts and those that select Turkish courts even if the dispute contains a foreign element. The requirements under Article 47 are similar to those listed in [Question 4](#), that is, there must be a contractual connection to a foreign element. This rule is also recognised by established precedents of the Court of Appeals (*Court of Appeals for the 11th Chamber, File Number: 2016/9180. Decision Number: 2016/7669, Date of Decision: 03.10.2016*).

## Formal requirements: jurisdiction clause

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

Under Article 47 of the IPPL, jurisdiction clauses can be proven by any written evidence and any method of communication allowing the content of an agreement between the parties to be determined. In other words, an original copy of a contract containing signatures of the parties is not the only way to prove the jurisdiction clause. Email correspondence, letters and correspondence on different platforms (including mobile phone applications) are sufficient to establish that a jurisdiction agreement is valid and binding.

If the jurisdiction clause is signed by wet signature, the signature of the party or its authorised representative makes the clause valid.

## 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?

The application and validity of exclusive and non-exclusive jurisdiction clauses differ depending on whether the jurisdiction of Turkish courts or foreign courts applies:



- **Exclusive jurisdiction clauses selecting Turkish courts.** Under Articles 17 and 18 of the Code of Civil Procedure (CCP) and Article 40 of the IPPL, the jurisdiction of Turkish courts is determined under the rules of local procedural laws and the chosen local court in the jurisdiction clause must be clearly stated. Duly executed exclusive jurisdiction clauses must comply with this principle.
- **Non-exclusive jurisdiction clauses selecting Turkish courts.** A non-exclusive jurisdiction clause in favour of the courts of Turkey as well as any other court that will accept jurisdiction will be considered invalid since it does not fulfil the requirements of Article 18 of the CCP, which states that a jurisdiction clause must clearly state the choice of jurisdiction.
- **Exclusive/non-exclusive jurisdiction clauses selecting foreign country courts.** Jurisdiction clauses in favour of foreign courts are valid and binding, except for certain types of disputes which are subject to exclusive jurisdiction of the Turkish courts by law (see [Question 13](#)). Certainty of a jurisdiction is not required in cases where the jurisdiction of a court is determined according to exclusive jurisdiction of specific court principles. However, parties should be careful and use clear wording to prevent any ambiguity or discrepancy, especially for non-exclusive jurisdiction clauses (*Article 47, IPPL*).

A lawsuit can be brought before a Turkish local court in either of the following cases:

- If the foreign court does not find itself competent.
- If none of the parties' object to the jurisdiction of Turkish courts within the relevant time after the lawsuit is filed before a Turkish local court, despite a jurisdiction clause authorising a foreign court.

In principle, clearly written exclusive jurisdiction clauses where the parties set out a reciprocal agreement to bring proceedings in the court wherever the defendant is domiciled (as in [Standard clause, Jurisdiction: Cross-border: clause 1.1 option 3](#)) will be considered valid and enforceable and it is a drafting method commonly used.

Sample jurisdiction clauses are as follows:

**"Foreign country courts.** Each party irrevocably agrees that the courts of [Country] shall have [exclusive or non-exclusive] jurisdiction to settle [without prejudice to the right of parties to take relevant dispute to the courts of any other jurisdiction (only if non-exclusive clause)] any dispute or claim that arises out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes and claims)."

**"Turkish courts.** Parties hereby mutually agreed that Turkish laws shall be applied to any disputes arising out of or in connection with this Agreement including enforceability or validity of the same and that all disputes shall be settled by Turkish Courts [and Execution Offices of [Turkish City (Optional)]]."

## Breach of exclusive jurisdiction clause

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

Turkish courts do not award remedies for breach of an exclusive jurisdiction agreement. However, in the event of dismissal of a legal action due to lack of jurisdiction, litigation expenses following the court's ruling will be borne solely by the claimant who filed the action before a non-competent court.

## 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?

Some contracts are regarded as matters of public policy and the parties cannot choose a foreign jurisdiction for disputes related to them. Such contracts include:

- Employment contracts and employment relations.
- Consumer contracts.
- Insurance contracts.
- Personal status of foreigners in case of guardianship, tutelage, missing persons and declaration of death.
- Inheritance.
- Rights related to immovable property.
- Partnership or/and membership of the company.
- Intellectual property rights related to registry, recession and cancellation.
- Enforcement process of seizure and bankruptcy.

*(Article 42-47, IPPL.)*

## Choice of foreign jurisdiction in domestic contracts

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

If the requirements of Article 47 of the IPPL are fulfilled, domestic parties can choose a foreign jurisdiction for the contract. The requirements under Article 47 are similar to those listed in Question 4, that is, there must be a contractual connection to a foreign element.

## 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.

There is no anti-suit injunction or stay orders mechanism under Turkish law. However, in case of parallel ongoing lawsuits, any party can challenge the jurisdiction of a particular court, regardless of whether it is stated in a jurisdiction clause or not. On such challenge, the court will determine its authority to hear the case under the jurisdiction clause, the IPPL and the CCP (see challenge procedure in [Question 18](#)). Moreover, the court ruling on the lack of jurisdiction does not constitute an order to stop the other party from initiating legal action.

## 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?

Since one-way jurisdiction clauses restrict the right of litigation, they violate public policy rules under Article 5 of the IPPL. The Constitution and multilateral or bilateral international treaties signed by Turkey determine the scope of public policy in this matter.

Article 36 of the Constitution provides the right to fair litigation both for claimants and defendants. This principle is also stated in Article 6 of the European Convention on Human Rights which was signed by Turkey. Therefore, one-way jurisdiction clauses are invalid under Turkish laws as they violate public policy rules.

## 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?

Under the IPPL, the choice of governing law and jurisdiction can be express or implied (where it is clear that the parties intended that the law of a particular country will govern the contract). Under Article 24 of the IPPL, the law designated by the parties governs the contractual relations. The designation will be considered valid if the applicable governing law and jurisdiction can be identified without hesitation from the provisions of the contract or is understood from the affairs of the case. Therefore, it is not necessary for the contract itself to contain a governing law and jurisdiction clause and a clause contained in the standard terms and conditions can be incorporated by reference.

However, scholars are of the opinion that such a clause requires the following elements to be present and that therefore the absence of some or all of these may make the clause invalid:

- The clause chooses jurisdiction of courts of a particular country.
- There is a clause that specifies that the contract must be fulfilled in a specific currency.
- The contract involves standardised terms of contracts of a specific legal system.
- Previous contracts executed between the parties involve a jurisdiction and governing law clause of a specific country.

The courts generally tend to comply with Article 24 and deem such agreements or clauses valid; however, it is still at their discretion to interpret each case separately due to the vague wording of Article 24, which requires subjective evaluation of each case. In many cases, the courts have applied the jurisdiction which is deemed to be the closest to the essence and nature of the contract, particularly looking at which party is to effect the characteristic performance of the contract (see [Question 8](#)).

## 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?

The courts will specifically consider the validity of the jurisdiction clauses and date of the contracts to determine the applicable jurisdiction. Validity is assessed differently depending on whether Turkish or foreign courts are competent.

If Turkish courts are competent in disputes arising from the contract, the court will examine whether:

- The parties can decide on the subject matter of the contract without restriction or not.
- Jurisdiction of the court does not oppose exclusive jurisdiction principles in the CCP (see [Question 21](#)).
- The contract is written or not.
- Legal relationship in the relevant dispute is certain or ascertainable.

*(Article 18, CCP and Article 40, IPPL.)*

If the foreign courts are competent in the dispute, the court will examine whether:

- Jurisdiction of the court does not oppose exclusive jurisdiction principles under the CCP.
- There is a foreign element in the contract or not.
- The contract is proven by written evidence or not.
- The dispute does not refer to employment, insurance and consumer contracts.

*(Article 47, IPPL.)*

If two different clauses are valid under the above conditions, the date of contract will be considered. A subsequent jurisdiction clause supersedes the former one. Therefore, the later contract (or clause) will be considered by the court.

If both jurisdiction clauses were agreed on the same date, both clauses will be considered invalid by the court due to the lack of consistency in the parties' choice and the court will establish jurisdiction as it does in the absence of a jurisdiction clause.

## Separability of jurisdiction clause

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

Turkish law does not explicitly regulate the separability of jurisdiction clauses. However, in practice this concept is recognised under the CCP.

The validity of a contract must be examined at the judgment stage once the court enters into the assessment of the merits of the case. However, objection to a jurisdiction clause or agreement can be made only at the preliminary stages, at the beginning of the proceedings before the judgment stage.

If no party objects to the jurisdiction of the court at the beginning of the proceedings, the court automatically becomes competent and the right of objection to jurisdiction of the court will be exhausted.

If an objection is duly made to the jurisdiction of the local court, the court will only examine the agreement in relation to the jurisdiction clause, not the merits of the dispute, and will render an order in this regard only.

Therefore, in practice, the validity of a jurisdiction clause and a contract itself are separate concepts and the court can examine the validity of the contract only if there is no question regarding its jurisdiction.

If a jurisdiction clause is held invalid, it does not affect the validity of the underlying contract unless there is a substantial link between the jurisdiction clause and the underlying contract. A finding of a "substantial link" is very rare in practice. There is no legal necessity to include a severability clause in the agreement for the court to apply the doctrine of severance. However, it is always advisable to include a severability clause in the agreement.

## Law governing jurisdiction clause

20. Which law governs a jurisdiction clause?

The validity of a jurisdiction clause is assessed with reference to:

- Article 47 of the IPPL, which governs the validity of a jurisdiction clause and establishes certain conditions regardless of the parties' autonomy (see [Question 10](#)).

- Article 9 of the IPPL, which sets out the conditions relating to capacity. The legal capacity of a person is governed by their national law. However, a person who lacks legal capacity under their national laws will still be bound by the transaction that they have concluded if they are legally capable under the law of the country where the transaction was concluded.
- The relevant precedents of the Court of Appeals. The parties can only opt for genuine courts, otherwise the jurisdiction clause will be invalid.

Therefore, validity and enforceability of a jurisdiction clause are determined by the law of the forum without considering the law designated by the parties, if there is any. The law of the forum includes the provisions of the IPPL (see above), but not the provisions of the CCP as it only regulates the procedural rules of local law.

## 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?

If there is no jurisdiction clause determined by the parties, jurisdiction is determined under the CCP and Articles 2(2) and 40 of the IPPL. According to the CCP, jurisdiction of a court is divided into three categories:

- **General jurisdiction.** As a general principle, under Article 6 of the CCP, lawsuits must be filed in the court where the defendant resides.
- **Optional jurisdiction.** Alternatively, the CCP does not limit the places where a lawsuit may be filed to the domicile of the defendant and allows for alternative options. For instance, if a lawsuit arises from a contract, it may be filed at the place of performance of the contract, in addition to the domicile of the defendant. If the place of performance is in a foreign country, the competent court will automatically be the court of the defendant's domicile.
- **Exclusive jurisdiction.** In certain cases, as an exception, the competent court may be assessed specifically regardless of the general and optional jurisdiction rules. For example, the court where immovable property is located is exclusively competent for disputes arising from contracts related to that immovable property.

The courts initially examine whether they are competent under the exclusive jurisdiction rules, secondly under the optional jurisdiction rules, and finally under their general jurisdiction.

A foreign governing law clause in a contract does not necessarily mean that courts of that foreign country automatically become competent in the absence of a jurisdiction clause. Moreover, jurisdiction and governing law are two entirely different notions and, as a rule, are examined separately by Turkish courts. As a consequence, objections to jurisdiction can be made only at the preliminary stage (except where the exclusive jurisdiction rules

apply), while objections to the applicable law can be made at any stage of the case and can be considered by the court automatically even if the parties did not raise an objection.

In the absence of a governing law clause, the submission to a foreign law can be implied or inferred by the parties' choice of jurisdiction.

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