

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Budget Subcommittee on Criminal and Civil Justice Appropriations

BILL: SB 1360

INTRODUCER: Senator Hays

SUBJECT: Application of Foreign Law in Certain Cases

DATE: February 6, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Irwin</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Harkness</u>	<u>Sadberry</u>	<u>BJA</u>	Pre-meeting
3.	_____	_____	<u>BC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill states that any court decision or ruling based, in whole or in part, on any foreign law or legal code that does not grant the parties affected by the ruling the same fundamental liberties, rights, and privileges granted by the State Constitution or the Constitution of the United States violates public policy and is void and unenforceable. Also, any contract that provides for choice of law to govern disputes between the parties is void and unenforceable if the law chosen incorporates any substantive or procedural law that would not provide the parties the same fundamental liberties, rights, and privileges afforded by the State Constitution and the Constitution of the United States.

The bill states that if a contract provides for a choice of venue outside the state or territory of the United States and if enforcement of that choice of venue would result in a violation of any right guaranteed by the State Constitution or the Constitution of the United States, then the provision must be construed to preserve the constitutional rights of the person against whom enforcement is sought. Finally, a claim of forum non conveniens¹ must be denied if a court of this state finds that granting the claim violates or would likely lead to a violation of any constitutional right of the nonclaimant in the foreign forum.

The bill provides that it does not apply to corporations, partnerships, or other forms of business associations. And the bill only applies to actual or foreseeable denials of a natural person's

¹ "Forum non conveniens" is the "doctrine that an appropriate forum – even though competent under the law – may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place." BLACK'S LAW DICTIONARY (9th ed. 2009).

constitutional rights in proceedings brought under or pertaining to the subject matter of chapter 61 or chapter 88, F.S., Dissolution of Marriage and the Uniform Interstate Family Support Act, respectively.

This bill creates section 45.022, Florida Statutes.

II. Present Situation:

Application or Interpretation of Foreign Laws or Decisions

Courts in the United States use three guiding doctrines when deciding cases that involve the application or interpretation of foreign laws or decisions: the political question doctrine, the act of state doctrine, and the international comity doctrine.

Political Question Doctrine

A court may determine, under the political question doctrine, that a dispute should be addressed by the political branches of government and that the judicial branch is the inappropriate forum for a decision concerning political matters. The political question doctrine stems from constitutional separation of powers concerns and contemplates the strong legislative and presidential foreign affairs powers.²

In *Baker v. Carr*, the U.S. Supreme Court found that if one of the following circumstances exists in a case, then typically the matter is a political question and should not be decided by the court.

- There exists a textually demonstrable constitutional commitment of the issue to a coordinate political department;
- There is a lack of judicially discoverable and manageable standards for resolving the issue;
- It is impossible to decide the issue without an initial policy determination of a kind clearly for nonjudicial discretion;
- It is impossible for a court to undertake independent resolution of the issue without expressing lack of the respect due to coordinate branches of government;
- There is an unusual need for unquestioning adherence to a political decision already made; or
- There is the potential for embarrassment from multifarious pronouncements by various departments on one question.³

Act of State Doctrine

The act of state doctrine provides that U.S. courts should not judge the acts of foreign heads of state made within their states' sovereign territory out of respect for those other states' sovereignty. When used in diplomatically sensitive suits, the doctrine stands for the proposition that when the executive branch makes a determination on a matter affecting U.S. foreign

² Jay M. Zitter, *Construction and Application of Political Question Doctrine by State Courts*, 9 A.L.R. 6th 177 (2005).

³ *Baker v. Carr*, 369 U.S. 186, 216 (1962).

relations, it is not for the judiciary to second-guess that branch's expertise by adjudicating what the executive concludes are sensitive claims.⁴

The classic American statement of the act of state doctrine is found in *Underhill v. Hernandez*, in which Chief Justice Fuller, speaking for a unanimous Court said:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.⁵

However, the application of the act of state doctrine is limited, and courts may decide certain controversies involving foreign judgments. The act of state doctrine applies only to "official" acts of a sovereign.⁶ If there is a treaty or written U.S. State Department opinion disfavoring the application of the doctrine, the act of state doctrine may be avoided.⁷ In addition, the Federal Arbitration Act expressly provides that enforcement of arbitration agreements shall not be refused on the basis of the act of state doctrine.⁸

The act of state doctrine merely requires that those acts by a sovereign within its own territory must be deemed valid under the sovereign's own law.⁹

International Comity Doctrine¹⁰

The doctrine of "comity" is based on respect for the sovereignty of other states or countries, and under it, the forum state will generally apply the substantive law of a foreign sovereign to causes of action which arise in that sovereign. "International comity" is the recognition that one nation allows within its territory the legislative, executive, or judicial acts of another nation, having due regard to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.¹¹

The principle of international comity is an abstention doctrine, which recognizes that there are circumstances under which the application of foreign law may be more appropriate than the application of U.S. law. Thus, under this doctrine, courts sometimes defer to laws or interests of a foreign country and decline to exercise the jurisdiction they otherwise have.

⁴ O'Donnell, Michael J., *A Turn for the Worse: Foreign Relations, Corporate Human Rights Abuse, and the Courts*, 24 B.C. Third World L.J. 223 (2004), available at <http://www.michael-odonnell.com/Note.pdf>.

⁵ *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

⁶ *W.S. Kirkpatrick Co. v. Environ. Tectonics Corp. Int'l*, 493 U.S. 400, 406 (1990). Note: Commercial acts by foreign governments are not generally deemed to be "official acts."

⁷ Scullion R. Scullion et al., *Proskauer on International Litigation and Arbitration: Ch. 9 Suing Non-U.S. Governmental Entities in U.S. Courts*, available at <http://www.proskauerguide.com/litigation/9/XV>.

⁸ 9 U.S.C. s. 15.

⁹ O'Donnell, *supra* note 4.

¹⁰ Information concerning the international comity doctrine was adapted from 44B AM. JUR. 2D *International Law* s. 8 (2011).

¹¹ See *Allstate Life Insurance, Co. v. Linter Group Ltd.*, 994 F.2d 996, 998-99 (2d Cir. 1993), citing *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

Furthermore, international comity is a doctrine that permits a court having a legitimate claim to jurisdiction to conclude that another sovereign also has a legitimate claim to jurisdiction under principles of international law and may concede the case to that jurisdiction. The international comity principle provides for recognition of foreign proceedings to the extent that such proceedings are determined to be orderly, fair, and not detrimental to the nation's interests.¹²

The doctrine of comity is used as a guide for the court, in construing a statute, where the issues to be resolved are entangled in international relations. A generally recognized rule of international comity states that an American court will only recognize a final and valid judgment. This doctrine is not obligatory and is not a rule of law, but is a doctrine of practice, convenience, and expediency. However, the doctrine of comity creates a strong presumption in favor of recognizing foreign judicial decrees. A court may deny comity to a foreign legislative, executive, or judicial act if it finds that the extension of comity would be contrary or prejudicial to the interest of the United States, or violates any laws or public policies of the United States.¹³

Uniform Out-of-country Foreign Money-Judgment Recognition Act

The recognition of foreign judgments in Florida is governed by the Uniform Out-of-country Foreign Money-Judgment Recognition Act (Florida Recognition Act).¹⁴ The Supreme Court of Florida has noted that the Florida Recognition Act was adopted to “ensure the recognition abroad of judgments rendered in Florida.”¹⁵ Accordingly, the Florida Recognition Act attempts to guarantee the recognition of Florida judgments in foreign countries by providing reciprocity in Florida for judgments rendered abroad.¹⁶ However, even though the Florida Recognition Act presumes that foreign judgments are prima facie enforceable, the Florida Recognition Act is also designed to preclude Florida courts from recognizing foreign judgments in certain prescribed cases where the Legislature has determined that enforcement would be unjust or inequitable to domestic defendants.¹⁷

The Florida Recognition Act delineates three mandatory and eight discretionary circumstances under which a foreign judgment may not be entitled to recognition. In Florida, a foreign judgment is not conclusive if:

- The judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.
- The foreign court did not have personal jurisdiction over the defendant.
- The foreign court did not have jurisdiction over the subject matter.¹⁸

¹² See *Allstate Life Insurance, Co. v. Linter Group Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993), citing *Cunard S.S. Co. v. Salen Reefer Serv. AB*, 773 F.2d 452, 457 (2d Cir. 1985).

¹³ *Id.* at 1000.

¹⁴ Sections 55.601-55.607, F.S.

¹⁵ *Nadd v. Le Credit Lyonnais, S.A.*, 804 So. 2d 1226, 1228 (Fla. 2001).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

A foreign judgment need not be recognized if:

- The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him or her to defend.
- The judgment was obtained by fraud.
- The cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state.
- The judgment conflicts with another final and conclusive order.
- The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court.
- In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.
- The foreign jurisdiction where judgment was rendered would not give recognition to a similar judgment rendered in this state.
- The cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court sitting in this state before which the matter is brought first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the U.S. Constitution and the Florida Constitution.¹⁹

Florida Arbitration Act

In Florida, two or more opposing parties involved in a civil dispute may agree in writing to submit the controversy to voluntary binding arbitration, or voluntary trial resolution, in lieu of litigating the issues involved, prior to or after a lawsuit has been filed, provided no constitutional issue is involved.²⁰

A voluntary binding arbitration decision may be appealed in a Florida circuit court and limited to review on the record of whether the decision reaches a result contrary to the U.S. Constitution or the Florida Constitution.²¹

Uniform Child Custody Jurisdiction and Enforcement Act

In 2002, the Legislature enacted the "Uniform Child Custody Jurisdiction and Enforcement Act" (act) to:

- Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being.
- Promote cooperation with the courts of other states to the end that a custody decree is rendered in the state that can best decide the case in the interest of the child.
- Discourage the use of the interstate system for continuing controversies over child custody.
- Deter abductions.
- Avoid relitigating the custody decisions of other states in this state.

¹⁹ *Id.*

²⁰ Section 44.104(1), F.S.

²¹ Section 44.104(10)(c), F.S.

- Facilitate the enforcement of custody decrees of other states.
- Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child.
- Make uniform the law with respect to the subject of the act among the states enacting it.²²

The act prescribes the circumstances under which a court has jurisdiction, mechanisms for granting temporary emergency jurisdiction, and procedures for the enforcement of out-of-state custody orders, including assistance from state attorneys and law enforcement in locating a child and enforcing an out-of-state decree. It facilitates resolution of interstate custody matters and provides for the custody, residence, visitation, or responsibility of a child.

In addition, the act requires a court of this state to treat a foreign country as if it were a state of the U.S. for purposes of applying the provisions of the act. Also, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of the act must be recognized and enforced, unless the child custody law of the foreign country violates fundamental principles of human rights.²³

American Law for American Courts Movement

Recently, there has been a movement around the country to ban the use of some foreign laws in United States courts. Although this movement has been primarily targeted at prohibiting the use of Islamic Shariah law, advocates of the movement have promoted model legislation banning the use of any law that infringes on constitutional rights.²⁴ Presumably, this action has been taken to avoid freedom of religion challenges. The American Public Policy Alliance,²⁵ a group focused on the promotion of American Law for American Courts, states:

One of the greatest threats to American values and liberties today comes from abroad, including foreign laws and foreign legal doctrines which have been infiltrating our court system at the municipal, state and federal levels. . . . [The] APPA focuses on countering this infiltration of anti-Constitutional laws across a broad variety of initiatives.²⁶

This group offers model legislation that lawmakers may adopt and file as bills in their individual states.

In 2010, 70 percent of Oklahoma voters voted in favor of an Oklahoma constitutional amendment banning the use of Islamic Sharia law in court decisions.²⁷ A Muslim citizen of

²² Section 61.502, F.S. *See also*, ch. 2002-65, s. 5, Laws of Fla. Note: This act replaced the Uniform Child Custody Jurisdiction Act (UCCJA), adopted in 1977.

²³ Section 61.506, F.S.

²⁴ Public Policy Alliance, *American Law for American Courts*, http://publicpolicyalliance.org/?page_id=38 (last visited January 22, 2012).

²⁵ The American Public Policy Alliance describes itself as “a non-partisan advocacy organization dedicated to protecting U.S. constitutional rights, safeguarding U.S. sovereignty and promoting government transparency and accountability” See the organization’s website, http://publicpolicyalliance.org/?page_id=2 (last visited January 22, 2012).

²⁶ *Id.*

²⁷ Meredith Jessup, *Oklahoma Shariah Ban May Conflict with U.S. Constitution*, *The Blaze* (Nov. 4, 2010), <http://www.theblaze.com/stories/oklahoma-shariah-ban-may-conflict-with-u-s-constitution/> (last visited January 22, 2012).

Oklahoma sought and was granted a preliminary injunction prior to the amendment being certified by the Election Board as a constitutional amendment.²⁸ On appeal, the United States Court of Appeals for the 10th Circuit affirmed the preliminary injunction prohibiting the certification of the Oklahoma constitutional amendment. The Circuit Court stated:

The proposed amendment goes further than preventing courts from “applying” Sharia law. The amendment forbids state courts from “considering” those laws. Even if the state could identify and support a reason to single out and restrict Sharia law in its courts, the amendment’s complete ban of Sharia law is hardly an exercise of narrow tailoring. [The State has] not carried [its] burden to show why the proposed amendment is “closely fitted” to a compelling state interest.²⁹

Additionally, other states, Florida, Tennessee, and Louisiana had comparable bills filed during the 2010 regular session in each of those states.³⁰ Those bills sought to ban the use of foreign laws in court decisions if the foreign laws would violate the fundamental rights guaranteed under the state or United States Constitutions.³¹ The issue has received recent attention in Florida, where a circuit court judge in Hillsborough County issued an order on March 3, 2011, regarding the disposition of proceeds flowing from the 2008 eminent domain taking of a Tampa mosque.³² The judge’s order states that the case will proceed under Ecclesiastical Islamic Law.³³

III. Effect of Proposed Changes:

The bill defines “foreign law, legal code, or system” as any law, legal code, or system of a jurisdiction outside any state or territory of the United States. The bill states that any court, tribunal, or administrative agency ruling or decision that bases the decision, in whole or in part, on any law, legal code, or system that does not grant the parties affected by the ruling the same fundamental liberties, rights, and privileges granted under the State Constitution and the Constitution of the United States violates public policy of the State of Florida and is void and unenforceable.

Similarly, the bill provides that any contract or contractual provision, if severable, that provides for a choice of law, legal code, or system to govern some or all of the disputes between parties, either in court or in arbitration, is void and unenforceable if the law, legal code, or system chosen includes or incorporates any substantive or procedural law that would not provide the parties the same fundamental liberties, rights, and privileges granted under the State Constitution and the Constitution of the United States. If a contractual provision provides for a choice of venue or forum outside the state or territory of the United States and if enforcement of that choice of venue or forum would result in a violation of any right guaranteed by the State Constitution or

²⁸ *Awad v. Ziriax*, 2012 WL 50636, at *3 (10th Cir. 2012).

²⁹ *Id.* at *14.

³⁰ CS/SB 1962 (2010 Reg. Session); Tennessee HB 3768 (2010); Louisiana HB 785 (2010).

³¹ *Id.*

³² William R. Levesque, *Hillsborough Judge in Islamic Law Case No Liberal*, St. Petersburg Times (April 1, 2011), <http://www.tampabay.com/news/courts/civil/hillsborough-judge-in-islamic-law-case-no-liberal/1160886> (last visited January 22, 2012).

³³ *Ghassan Mansour et al. v. Islamic Education Center of Tampa, Inc.*, case no. 08-03497 (Fla. 13th Jud. Cir. 2011), http://tool.donation-net.net/Images/Email/1097/110303_Order_in_Connection_with_Plaintiffs_Emergency_Motion.pdf.

Constitution of the United States, then the provision must be construed to preserve the constitutional rights of the person against whom enforcement is sought. Finally, a claim of forum non conveniens must be denied if a court of this state finds that granting the claim violates or would likely lead to a violation of any constitutional right of the nonclaimant in the foreign forum.

The bill does not apply to a corporation, partnership, or other form of business association. Also, the bill only applies to actual or foreseeable denials of a natural person's constitutional rights. Finally, the bill contains a severability clause, providing that if any provision of this bill or its application is held invalid, the invalidity does not affect other provisions or applications of the bill.

The bill provides that it shall take effect upon becoming law.

IV. Constitutional Issues:³⁴

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Federal Preemption

The doctrine of preemption limits state action in foreign affairs. Article VI of the U.S. Constitution states that the laws and treaties of the U.S. are the "supreme Law of the Land," and, therefore, they preempt state law. The United States Court of Appeals for the 9th Circuit has recently held that even if a state statute was not preempted by a direct conflict with federal law, field preemption could still occur if the state law purported to regulate a "traditional state responsibility," but actually "infringed on a foreign affairs power reserved by the Constitution exclusively to the national government."³⁵ If the bill faces a federal preemption challenge, a court could potentially find that the bill substantially infringes on a foreign affairs power reserved to the national government. Such a finding would likely cause a court hold that the bill is preempted by federal foreign affairs powers.

³⁴ The constitutional analysis was adapted, in part, from Eduardo E. Neret and Marcio W. Valladares, *The Florida International Affairs Act: A Model for State Activism in Foreign Affairs*, 1 J. Transnat'l L. & Pol'y 197 (1992).

³⁵ *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 964 (9th Cir. 2010).

Dormant Federal Foreign Affairs Powers

Although not explicitly provided for in the U.S. Constitution, the Supreme Court has interpreted the U.S. Constitution to mean that the national government has exclusive power over foreign affairs. In *Zschernig v. Miller*, the Supreme Court reviewed an Oregon statute that refused to let a resident alien inherit property because the alien's home country barred U.S. residents from inheriting property. The Court held that the Oregon law as applied exceeded the limits of state power because the law interfered with the national government's exclusive power over foreign affairs. The Court also held that, to be unconstitutional, the state action must have more than "some incidental or indirect effect on foreign countries,"³⁶ and the action must pose a "great potential for disruption or embarrassment"³⁷ to the national unity of foreign policy. Such a determination would necessarily rely heavily on considerations of current political climates and foreign relations, as well as the United States' perception abroad. Due to the fact that these factors could only be evaluated if and when a challenge to this bill was brought, an assessment of the likelihood for success that such an action would have is not practical at this time.

Separation of Powers

The first three articles of the U.S. Constitution define the powers given to the three branches of government in the United States.³⁸ Article I defines the legislative branch and vests with it all power to make law. Article II defines the executive branch and vest in it the power to enforce the law. Article III defines the judicial branch and vests in it all judicial power. For time immemorial, that power has been understood to mean the power to interpret and apply the law.³⁹

As discussed above, to the extent that this bill directs Florida courts to consider and interpret foreign decisions and law in a certain manner, it may interfere with the federal government's ability to govern foreign policy with one voice. As such, this bill could be challenged as preempted by the federal government. Similarly, as previously stated, the judiciary's constitutional role is to act as the sole interpreter of laws; therefore, the bill could be challenged as an infringement on the essential role of the judicial branch in violation of the constitutional separation of powers. Similarly, the Florida Constitution explicitly mandates separation of powers between branches of the Florida government. Article II, section 3 of the Florida Constitution specifically states:

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

³⁶ *Zschernig v. Miller*, 389 U.S. 429, 433 (1968).

³⁷ *Id.* at 435.

³⁸ Articles I, II, III, U.S. Const.

³⁹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Because of this language, Florida's separation of powers doctrine is even stronger than the federal concept of separation of powers. Therefore, the bill's application could result in a potentially successful separation of powers challenge under the Florida Constitution, as well. In this way, the bill may face an additional separation of powers problem if a court determines that the bill infringes on the court's exclusive judicial authority under the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill has the potential to affect a private right to freely contract. Constriction of the right to freely contract could negatively impact business flexibility and competitiveness. However, because the bill explicitly states that it does not apply to corporations or partnerships, the bill is not likely to have a significant impact on Florida's overall business climate.

C. Government Sector Impact:

The Office of the State Courts Administrator did not anticipate a fiscal impact on judicial time or court workload.⁴⁰

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

⁴⁰ Office of State Courts Administrator, *Judicial Impact Statement for SB 1360* (January 10, 2012) (on file with the Committee on Judiciary).