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 Commerce Committee

BILL:	CS/SB 1962
INTRODUCER:	Commerce Committee and Senator Baker
SUBJECT:	Application of foreign law
DATE:	April 7, 2010 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Cooper	CM	**Fav/CS**
2.			CF	
3.			JU	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This CS creates s. 45.022, F.S., to direct courts to consider as a "primary factor," the preservation of a person's constitutional rights, when interpreting, enforcing, or applying any foreign court decision, choice of foreign law contract provision, or choice of foreign venue or forum contract provision that violates any right guaranteed by the Florida Constitution or the U.S. Constitution.

The CS also may require a court to deny a claim for *forum non conveniens* if the granting of such claim would likely violate the constitutional rights of the non-claimant.

In addition, the CS provides an exception for application of the bill to corporations, partnerships, or other business associations and provides a severability clause.

This CS creates s. 45.022, F.S.

II. Present Situation:

Application or Interpretation of Foreign Laws or Decisions

Courts in the U.S. use three guiding doctrines when deciding cases that involve the application or interpretation of foreign laws or decisions: the political question doctrine, act of state doctrine, and 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.[1]

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

The Act of State Doctrine

The act of state doctrine provides that the 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 relations, it is not for the judiciary to second-guess that branch's expertise by adjudicating what the executive concludes are sensitive claims.[2]

The classic American statement of the act of state doctrine is found in *Underhill v. Hernandez*, 168 U.S. 250 (1897), where Chief Justice Fuller, speaking for a unanimous court said:

[1] 9 A.L.R. 6th 177.

[2] 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.

> 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.[3]

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.[4] 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.[5] 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.[6]

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.[7]

International Comity Doctrine[8]

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.[9]

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.
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.[10]

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

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[3] 12 A.L.R. Fed. 707.
[4] *W.S. Kirkpatrick Co. v. Environ. Tectonics Corp. Int'l*, 493 U.S. 400 (1990). Note: Commercial acts by foreign governments are not generally deemed to be "official acts."
[5] Scullion, Jennifer., Gerstein, Jason D., Kastner, Jessica; *Proskauer on International Litigation and Dispute Resolution: Ch. 9 Suing Non-U.S. Governmental Entities in U.S. Courts*; available at http://www.proskauerguide.com/litigation/9/XV.
[6] 9 U.S.C. s. 15.
[7] *Supra* fn. 4.
[8] Information concerning the international comity doctrine was adapted from 44B Am. Jur. 2d International Law § 8.
[9] *See Allstate Life Insurance, Co. v. Linter Group Ltd.,* 994 F.2d 996 (2d Cir. 1993), citing *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).
[10] *See Allstate Life Insurance, Co. v. Linter Group Ltd.,* 994 F.2d 996 (2d Cir. 1993), citing *Cunard S.S. Co. v. Salen Reefer Serv. AB,*773 F.2d 452, 457 (2d Cir. 1985).

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 U.S. or violates any laws or public policies of the U.S.[11]

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).[12] The Supreme Court of Florida has noted that the Florida Recognition Act was adopted to "ensure the recognition abroad of judgments rendered in Florida."[13] 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.[14] However, even though the Florida Recognition Act presumes that foreign judgments are prima facie enforceable, the 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.[15]

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 which 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.[16]

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.

[11] *Id*. at 1000.
[12] Sections 55.601-55.607, F.S.
[13] *Osorio v. Dole Food Co.*, 665 F.Supp.2d 1307 (S.D. 2009) , citing *Nadd v. Le Credit Lyonnais, S.A.*, 804 So.2d 1226, 1228 (Fla. 2001).
[14] *Id*.
[15] *Id*.
[16] *Id*.

- 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 U.S., 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.[17]

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.[18]

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.[19]

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.
- 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.[20]

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

[17] *Id*.
[18] Section 44.104(1), F.S.
[19] Section 44.104(10)(c), F.S.
[20] Section 61.502, F.S. *See also*, s. 5, ch. 2002-65, L.O.F. Note: This act replaced the Uniform Child Custody Jurisdiction Act (UCCJA), adopted in 1977.

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.[21]

III. Effect of Proposed Changes:

Section 1 creates s. 45.022, F.S., to direct courts to consider as a "primary factor," the preservation of a person's constitutional rights, when interpreting, enforcing, or applying any foreign court decision, choice of foreign law contract provision, or choice of foreign venue or forum contract provision that violates any right guaranteed by the Florida Constitution or the U.S. Constitution. In addition, the CS provides that it is the public policy of the state that a court consider as a primary factor in granting comity to a decision rendered under any foreign law, legal code, or system against a natural person in Florida, whether the decision rendered violates or would violate any constitutional right of that person.

The CS also may require a court to deny a claim for *forum non conveniens* if the granting of such claim would likely violate the constitutional rights of the non-claimant.

In addition, the CS provides an exception for application of the bill to corporations, partnerships, or other business associations and provides a severability clause.

Section 2 provides that the CS to take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[21] Section 61.506, F.S.

D. Other Constitutional Issues:[22]

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 Supreme Court 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."[23]

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 say, and has held, that the national government has exclusive power over foreign affairs. In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Supreme Court reviewed an Oregon statute which 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 Supreme Court also held that to be unconstitutional, the state action must have more than "some incidental or indirect effect on foreign countries," and the action must pose a "great potential for disruption or embarrassment" to the national unity of foreign policy.

Separation of Powers

The first three articles of the U.S. Constitution define the powers given to the three branches of government in the U.S.[24] Article I defines the Congress, Article II defines the executive branch, and Article III defines the judiciary. The legislative branch has the power to make the law; the executive branch has the power to enforce the law; and the judicial branch has the power to interpret the law.[25]

To the extent that this CS directs Florida courts to consider and interpret foreign decisions and law in a certain manner, which may interfere with the federal government's ability to govern foreign policy with one voice and the judiciary's constitutional role as the sole interpreter of laws, this CS may be challenged as preempted by the federal government and as a violation of the constitutional separation of powers.

[22] The constitutional analysis was adapted, in part, from 1 J. Transnat'l L. & Pol'y 197.
[23] *Von Saher v. Norton Simon Museum of Art at* Pasadena, 592 F.3d 954 (9th Cir. 2010).
[24] Articles I, II, III, U.S. Const.
[25] American Bar Association; Separation of Powers; available at http://www.abanet.org/publiced/lawday/talking/tpseparation.html.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

It is indeterminate the effect this bill, if enacted, would have on Florida courts refusing to recognize foreign laws or decisions.

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.)

CS by the Commerce Committee on April 7, 2010:
In comparison to the bill, which declared certain contract provisions, court rulings, or court interpretations, based on foreign laws void and unenforceable because they violate the public policy of Florida, this CS instead guides courts to consider as a "primary factor," the preservation of a person's constitutional rights, when interpreting, enforcing, or applying any foreign court decision, choice of foreign law contract provision, or choice of foreign venue or forum contract provision that violates any right guaranteed by the State Constitution or the U.S. Constitution.

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B. Amendments:

None.