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 Committee on Judiciary

BILL:	SB 58
INTRODUCER:	Senators Hays and Evers
SUBJECT:	Application of Foreign Law in Certain Cases
DATE:	March 5, 2013 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	**Pre-meeting**
2.			GO	
3.			CF	
4.			RC	
5.				
6.				

I. Summary:

SB 58 restricts courts from applying foreign law, legal codes, and systems to disputes brought under chapters 61 and 88, F.S. These chapters relate to divorce, alimony, the division of marital assets, child support, and child custody.

The bill restricts courts from applying foreign laws that do not grant the parties to litigation the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.

Specifically, under the bill, the courts of this state may not:

- Base a decision on a foreign law that does not grant the parties to litigation the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Enforce a choice of law clause in a contract which requires a dispute to be resolved under a foreign law that does not grant the parties the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Enforce a forum selection clause in a contract which requires a dispute to be resolved in a forum in which a party would be denied his or her fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Grant a motion to dismiss a lawsuit based on forum non conveniens if granting the motion would likely result in the denial of a party's fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.

The bill authorizes a party to a contract to waive his or her rights, but requires the court to narrowly construe the scope of a waiver.

This bill does not apply to the following:

- Corporations, partnerships, and other types of business associations;
- Ecclesiastical matters; and
- Matters governed by federal treaty or international agreements to which the United States is a party and which preempt state law.

This bill creates section 45.022, Florida Statutes.

II. Present Situation:

Choice of Law and Choice of Forum

Questions of choice of law or forum generally arise when a case involves parties or situations with connections to multiple states or countries.

Domestic Law

The Full Faith and Credit Clause, found in section 1, Article IV of the U.S. Constitution, provides, in part: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The question of full faith and credit may arise after a state refuses to enforce another state's judgment, considered to be a "sister state."[1] Full faith and credit may also arise when a party to a case involving contacts in one state seeks to have the law of another state apply.

In choice of law cases, a court typically requires proof of sufficient contacts to a state, such as through residency, home ownership, or place of work to apply the law of that state. This test remains the prevailing standard in choice of law cases.[2]

Foreign Law

Choice of Law

Some contracts stipulate a choice of law, defined as "A contractual provision by which the parties designate the jurisdiction whose law will govern any disputes that may arise between the parties."[3]

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[1] William B. Sohn, *Supreme Court Review of Misconstructions of Sister State Law*, 98 VA. L. REV. 1861, 1864-65 (Dec. 2012).

[2] In the seminal case of *Allstate Insurance Co. v. Hague*, the Supreme Court considered whether Minnesota law could apply where the widow established the following state ties to Minnesota: the decedent's long-term workplace, a daily commute between states, the insurer's place of operation, and the wife's new place of residency. The Court required proof of a singular or aggregate significant contact to a state so that choice of its law is not arbitrary or fundamentally unfair. Here, the court determined that the aggregate of contacts justified application of Minnesota law. 449 U.S. 302, 313-319 (1981).

[3] BLACK'S LAW DICTIONARY (9th ed. 2009).

Numerous policies exist that favor the application of foreign law to U.S. state and federal courts.[4] These policies are based on principles of international comity, reciprocity, predictability, fairness, and disapproval of forum shopping.[5] The term "comity" is defined as "A practice among political entities (as nations, states, or courts of different jurisdictions), involving esp[ecially] mutual recognition of legislative, executive, and judicial acts."[6] Principles of comity are the international equivalent of full faith and credit.[7]

A court does not take judicial notice of the law of another country.[8] Instead, if relevant to a case, a court conducts a review of foreign statutes, case law, and secondary sources and heavily relies on expert testimony.[9]

Choice of Forum

The term "forum non conveniens" is defined as:

> 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.[10]

Courts apply a strong presumption in favor of a plaintiff's choice of forum.[11] Still, the proponent must firmly establish bona fide connections to the forum choice to outweigh perceptions of forum shopping.[12] Courts typically allow a U.S. citizen to choose a U.S. forum, rather than have the case heard in a foreign jurisdiction. However, if a U.S. corporation operates in international commerce, not all litigation will be heard in the U.S.[13]

Courts place a high burden on a defendant who seeks dismissal of a case based on forum non conveniens. Although international treaty requirements promote the principle "equal

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[4] Nicholas M. McLean, *Intersystemic Statutory Interpretation in Transnational Litigation*, 122 YALE L.J. 303, 304 (Oct. 2012). "A court sitting in diversity might apply a state choice-of-law rule that requires the court to apply the tort law of a foreign nation. In a contract dispute, a federal court might apply foreign substantive law pursuant to an international agreement's choice-of-law clause. In the realm of corporate law, a court might find, based on an application of the internal affairs doctrine, that a foreign nation's procedural requirements govern a shareholder derivative suit (citation omitted)." *Id.*
[5] *Id*. at 304.
[6] BLACK'S LAW DICTIONARY (9th ed. 2009).
[7] James Botsford and Paul Stenzel, *The Wisconsin Way Forward with Comity: A Legal Term for Respect*, 47 TULSA L. REV. 659 (Spring 2012). "Full faith and credit is a constitutional principle requiring states to enforce fully the judgments and orders of other states. Comity is the principle of international law by which a sovereign gives deference to the judgments of another due to mutual respect." *Id*. at 660.
[8] Determination of question relating to foreign law as one of law or fact, 34 A.L.R. 1447.5
[9] McLean, *supra* note 4, at 306-307.
[10] BLACK'S LAW DICTIONARY (9th ed. 2009).
[11] Plaintiff's choice of forum, 32A AM. JUR. 2D FED. CTS. § 1364.
[12] Forum Non Conveniens – Deference to Plaintiff's Forum Choice, 14D FED. PRAC. & PROC. JURIS. §3828.2 (3d ed.)
[13] American citizenship of party; suits by aliens, 32A AM. JUR. 2D FED. CTS. §1365.

access to courts," in practice, courts do not accord foreign plaintiffs the same deference to move a case to another jurisdiction as U.S. citizens.[14]

Validity of Judgment

U.S. courts are generally not bound by foreign judgments. Still, principles of comity dictate strong consideration of another country's judicial orders, based on deference and mutual respect.

Criteria that courts apply in accepting a foreign judgment include proof that:

- The parties had access to a full and fair trial.
- The proceeding took place after due notice and voluntary appearance.
- The jurisdiction operates under impartiality, rather than prejudice, between its own citizens and those of other countries.
- No evidence of fraud existed in securing the judgment.[15]

Chapter 61, F.S.

Chapter 61, F.S., addresses dissolution of marriage including the distribution of assets and liabilities, alimony, and child support and child custody arrangements. Regarding child support, the public policy of the state is that each parent has a fundamental obligation towards dependent children.[16] Child support is based in part on a parent's income and the child's needs.[17]

Child custody arrangements, whether developed by the parents or by a court, must comply with state law and international treaties.[18]

Florida courts distribute assets and liabilities through equitable distribution, rather than, say, community property, as is done in California and a handful of other Western states. Under equitable distribution, a court considers various factors including contributions to the marriage, economic circumstances of the parties, and the length of marriage.[19] The court also considers various factors in awarding alimony and awards it on different bases, such as, monthly, lump sum, temporary, or permanent.[20]

Florida recognizes written, signed premarital agreements as enforceable contracts.[21] These agreements may include choice of law clauses.[22] However, an agreement cannot negatively

[14] 14D FED. PRAC. & PROC. JURIS. §3828.2 (3d ed.)
[15] 9 AM. JUR. *Proof of Facts* 3D 687 §1.5. Comity (Dec. 2012).
[16] Section 61.29, F.S.
[17] Section 61.30, F.S.
[18] These laws include the Uniform Child Custody Jurisdiction and Enforcement Act, the International Child Abduction Remedies Act, the Parental Kidnapping Prevention Act, and the Convention on the Civil Aspects of International Child Abduction.
[19] Section 61.075(1), F.S.
[20] The law recognizes bridge-the-gap, rehabilitative, durational, and permanent forms of alimony. Section 61.08(1) and (2), F.S.
[21] Section 61.079, F.S.
[22] Section 61.079(4)(a)7., F.S.

affect the rights of a child to support.[23] Grounds for unenforceability of a premarital agreement include coercion, fraud, duress, or overreaching or that the agreement is unconscionable.[24]

To relocate with a child, absent an agreement between the parents, the relocating parent must petition the court or face contempt charges.[25]

Chapter 88, F.S.

Federal law required each state to adopt the Uniform Interstate Family Support Act (UIFSA), codified in chapter 88, F.S.[26] The purpose of the UIFSA is to unify state law among the states regarding child support obligations, reconcile child support orders issued by more than one state, and streamline procedures for out-of-state petitioners.[27] Under the Act, only one court possesses jurisdiction and only one order is in effect at any given time.[28] This can change, however, to another court for modification, if that court has personal jurisdiction.[29]

The UIFSA applies to support proceedings involving a foreign support order (meaning an order entered into out-of-state), a foreign tribunal, or a case in which an obligee, obligor, or child lives in a foreign country.[30]

The UIFSA governs the:

- Establishment of a spousal or child support order.
- Enforcement of support orders and income-withholding orders without the registration of an order from out-of-state with a court in this state.
- Registration of a support order of another state for enforcement in this state.
- Modification of a child support order issued by a court of the state in which the support obligations originated.
- Registration of an order of another state for modification.

[23] Section 61.079(4) (b), F.S.
[24] Section 61.079(7), F.S.
[25] Section 61.13001(3), F.S.
[26] Building on earlier federal efforts to address the complications of enforcing child support across state lines, Congress passed the original UIFSA in 1992, and later amended it in 1996 and 2001. Kimball Denton, *A Brief History of Uniform Laws for Private Interstate Support Enforcement*, 20 J. CONTEMP. LEGAL ISSUES 323, 326 (2011-12). "[T]he Act innovatively created a one-order system by including a long-arm jurisdiction provision, which provided that a case should be kept in the obligee's home state as often as possible. The long-arm provision called for 'extended personal jurisdiction over nonresidents'… ." This was thought to remove the noncustodial parent's advantage of having automatic case transfer to his or her home state. Nicole K. Bridges, *The "Strengthen and Vitalize Enforcement of Child Support (Save Child Support) Act: Can the Save Child Support Act Save Child Support from the Recent Economic Downturn?,"* 36 OKLA. CITY U.L. REV. 679, 692-93 (Fall 2011).
[27] 23 AM. JUR. 2D *Desertion and Nonsupport* § 73; 67A C.J.S. Parent and Child §247.
[28] Denton, *supra* note 26 at 327.
[29] *Id*. at 327. In Florida, a court may establish personal jurisdiction over an individual based on any of the following: The individual is served with citation, summons, or notice in-state; the individual consents to jurisdiction in the state; the individual lived with the child in-state and provided prenatal expenses or child support; the child lives in the state as a result of the acts or directives of the individual; the individual had sexual intercourse in this state which may have resulted in the conception of the child; the individual asserted parentage in a court or putative father registry in the state; or any other basis which is constitutional for the exercise of personal jurisdiction. Section 88.2011, F.S.
[30] Section 88.1041(1), F.S.

- Determination of parentage as it relates to child support.[31]

Jurisdiction

Section 88.2011, F.S., addresses a court's jurisdiction over parties to a support order or parentage determination. When a court exercises personal jurisdiction over a nonresident, in some circumstances, the state procedural and substantive laws apply, including choice of law rules, unless specified otherwise in the UIFSA:

> Under … choice of law … the substantive law of an issuing state applies to petitions filed in a responding state to enforce the existing … orders of the issuing state; … the substantive law of the issuing state does not apply to petitions filed in a [subsequent] responding state to modify the existing child support orders of the issuing state.
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> A foreign country may be a "state" for purposes of application of the UIFSA, but the Act does not apply to obligations established under the law of a foreign country where there is no state law or contravening treaty or federal statute recognizing the enforcement of support orders from the foreign country … .[32]

Enforcement of Income-Withholding Orders Without Registration

Part V of chapter 88, F.S., provides for income-withholding orders issued by another state to be self-executing and treated as if a Florida court issued them.[33] However, a Florida court can enforce out-of-state support and income-withholding orders once a party registers the order with the Florida court.[34]

Choice of Law

Under the UIFSA, the law of the issuing or originating state applies regarding the nature, extent, amount and duration of payments and other support obligations, including arrearages. In proceedings to collect arrearages under support orders, the statute of limitation that applies is whichever is longer, this state's or the issuing state's.[35]

Enforcement and Modification of Support Order After Registration

Under the UIFSA, jurisdiction to enforce or modify another state's child support order in a registration proceeding in this state is proper if all parties, including children, reside here.[36]

[31] 23 AM. JUR. 2D *Desertion and Nonsupport* § 73.
[32] Section 88.2021, F.S.; 67A C.J.S. *Parent and Child* §247.
[33] Sections 88.5011 and 88.50211(2), F.S.
[34] Section 88.6011, F.S.
[35] Section 88.6041(1) and (2), F.S.
[36] Section 88.6131(1), F.S.

To modify a support order from another state, an agency or party must register it in Florida.[37] Once the recipient meets personal jurisdiction and other factors, the court can enforce the order just as if it had been issued in-state.[38]

To enforce orders involving a foreign country, the UIFSA authorizes:

- A tribunal of this state to assume jurisdiction to modify an order and make it the controlling order if a foreign country lacks or refuses jurisdiction to modify its own order.[39]
- A party or support enforcement agency seeking to modify or enforce a foreign order which is not governed by an international convention to register the order in this state.[40]

The UIFSA requires courts to recognize and enforce foreign support orders and agreements, unless:

- A court finds that a registered convention support order is manifestly incompatible with public policy. Incompatibility with public policy includes the failure of the issuing court to maintain minimum standards of due process such as notice and an opportunity to be heard.[41]
- A court finds that a registered foreign support agreement is manifestly incompatible with public policy."[42]

Use and Acceptance of Religious Law by U.S. Courts

The U.S. Constitution does not permit official adoption of religious law by federal, state or local governments.[43] Examples exist, however, of judicial deference to religious edicts.

In the seminal case of *Wisconsin v. Yoder*, the U.S. Supreme Court reviewed a challenge by Amish parents of a Wisconsin law requiring mandatory school attendance.[44] At the time, the law did not recognize home schooling as an alternative education. The parents asserted that high school would negatively impact their children through exposure to "worldly" views, self-distinction, and social life, all antithetical to Amish religion.[45] The Court noted the reputable work ethic, law-abiding nature, and potentially-compromised survival of the Amish.[46] The Court found the parents' violation of compulsory school attendance to be firmly rooted in Amish religion. [47] Requiring high school attendance would violate the defendants' rights to religious Free Exercise, under the First Amendment of the U.S. Constitution.[48]

[37] Section 88.6091, F.S.
[38] Section 88.6101, F.S.; Requirements for modification of child support orders issued out-of-state are provided in s. 88.6111, F.S.
[39] Section 88.6151(1) and (2), F.S.
[40] Section 88.6161, F.S.
[41] Section 88.7081(1) and (2)(a), F.S.
[42] Section 88.7101(3), F.S.
[43] Jaron Ballou, *Sooners vs. Shari'a: The Constitutional and Societal Problems Raised by the Oklahoma State Ban on Islamic Shari'a Law*, 30 LAW & INEQ. 309, 314 (Summer 2012).
[44] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[45] *Id*. at 210-11 (1972).
[46] *Id*. at 212-13.
[47] *Id*. at 213-16.
[48] *Id*. at 234.

Scholars suggest that the Court is inclined to uphold a religious practice that violates a law if the statute unduly burdens religious First Amendment rights. This is particularly so where the practice cannot be said to harm others.[49] Still, "American laws impose behavioral mandates on all citizens, regardless of faith, and to the extent that religious regimes tolerate behaviors that fall outside those mandates, the secular court system will always come down on the side of secular laws."[50]

Another group that the Court recognizes is the Beth Din of America (BDA), or a Jewish rabbinic court. The BDA established itself as a limited court alternative to civil disputes.[51] Functioning primarily as a court of arbitration, the court has undergone significant changes since its inception 50 years ago.[52] Present day proceedings before the BDA include:

- A detailed and standardized rules of procedure.
- An internal appellate process.
- Consideration of choice of law.
- Testimony from experts on secular law and commercial practice.
- Recognition of common commercial custom.
- Belief in communal governance, as reflected in multiple individual arbitration.[53]

As noted, the BDA incorporated these features over time. "Recognizing this secular focus on procedure and procedural fairness, the BDA adopted detailed rules and procedures that contributed tremendously to the eventual secular acceptance of BDA decisions."[54] To date, no U.S. court has overturned a BDA case.[55]

BDA cases apply to situations in which:

- A contract contains an arbitration provision that designates the BDA as the preferred forum for arbitration; or
- A party to a dispute invites an opposing party to bring the case to the BDA.[56]

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[49] Omar T. Mohammedi, *Sharia-compliant Wills: Principles, Recognition, and Enforcement*, 57 N.Y.L. SCH. L. REV. 259, 280 (2012-13).
[50] Michael J. Broyde, *Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of American Precedent*, 57 N.Y.L. SCH. L. REV. 287, 303 (2012-13).
[51] *Id*. at 288.
[52] *Id.* at 288.
[53] Broyde, *supra* note 50, at 288-89. "Traditionally, Jewish law did not offer an appellate process like the American secular court system … . Over time, however, the BDA came to find that if it did not provide an internal mechanism by which parties could appeal perceived errors, secular judges would interject and substitute their own judgment. Because the ultimate goal for litigants submitting to a religious tribunals' jurisdiction (and for the tribunal itself) is to have matters resolved internally from start to finish, the BDA added an appellate process to its arbitration services." *Id*. at 293.
[54] *Id.* at 290.
[55] *Id.* at 288.
[56] *Id.* at 291-92.

Anti-Foreign Law

In recent years, state legislatures have moved to limit Sharia law, or the applicability of foreign law through choice of law and choice of forum clauses in contracts. Starting with Louisiana and Tennessee, 21 states have considered some limits on the application of foreign law, either through legislation or ballot initiative.[57]

Scholars generally classify initiatives or legislation in one of three ways:

- Bills that singularly restrict the use of Sharia law;[58]
- Bills that include Sharia as one of several banned types of law or tradition;[59] or
- Prohibitions on foreign law generally, commonly known as a foreign or international law bill.[60]

Proposals passed through initiative or legislation in Arizona,[61] Kansas,[62] Louisiana,[63] Oklahoma, and Tennessee.

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[57] Asma T. Uddin and Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363, 370 (Winter 2012).

[58] Alabama's proposed language read, in part: "The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia." H.R. 597 (Ala. 2011). Iowa, Missouri, and New Mexico proposed virtually the same language. Language before the Wyoming legislature would ban both direct use of Sharia law, and citing other states that use Sharia law. H.R. 8, (Wyo. 2011). Udder and Pantzer, *supra* note 57, at 371-73.

[59] An example of this was the language initially proposed in Arizona, which provided, in part: "… court shall not use, implement, refer to or incorporate [a] tenet of any body of religious sectarian law in to any decision, finding or opinion as controlling or influential authority." And further, the bill defines "religious sectarian law", as "a tenet or body of law evolving within and binding a specific religious sect or tribe. Religious sectarian law includes sharia law, canon law, halacha and karma … ." H.R. 2582 (Ariz. 2011). Udder and Pantzer, *supra* note 58, at 373-74.

[60] *Id*. at 373-74. An example of the more generalist approach was tried in Michigan. It defined foreign law as "any law, rule or legal code or system other than the constitution, laws and ratified treaties of the United States and the territories of the United States, or the constitution and laws of this state …. a court … shall not enforce a foreign law if doing so would violate a right guaranteed by the constitution of this state or of the United States, or the constitution and laws of this state." *Id*. at 375.

[61] Ariz.Rev.Stat. §12-3103, provides, in part: "A court, arbitrator, administrative agency or other adjudicative, mediation or enforcement authority shall not enforce a foreign law if doing so would violate a right guaranteed by the Constitution of this state or of the United States … ."

[62] Kan. Stats. §§60-5103, 60-5104, and 60-5105 (a) and (b), provide, in part: "Any court, arbitration, tribunal or administrative agency ruling … shall violate the public policy of this state and be void and unenforceable if the court … bases its rulings … on any foreign law, legal code or system that would not grant the parties affected … the same fundamental liberties, rights and privileges granted under the … constitutions, including … equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage. … . A contract or … provision … which provides for the choice of a foreign law, legal code or system to govern … shall violate the public policy of this state and be void and unenforceable if the foreign law, legal code or system chosen … would not grant the parties the same fundamental liberties, rights and privileges granted under the … constitutions, including … equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage. … . A contract or … provision … which provides for a jurisdiction for … in personam jurisdiction … shall violate the public policy of this state and be void and unenforceable if the jurisdiction … includes any foreign law, legal code or system … that would not grant the parties the same fundamental liberties, rights and privileges granted under the … constitutions, including … equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage. … . If a resident … subject to personal jurisdiction in this state, seeks to maintain litigation, … in this state and if the courts … find that granting … forum non conveniens or a related claim violates … the fundamental liberties, rights and privileges granted under the United States and Kansas constitutions of the nonclaimant in the foreign forum … including … equal protection,

Perhaps the most notable attempt to limit court use of foreign law was the constitutional amendment placed on the ballot in Oklahoma in 2010. The amendment restricted courts to the use of federal and state law, and expressly banned consideration of international and Sharia laws. The initiative defined Sharia law as Islamic law, based on the Koran and the teachings of Mohammed.[64] Fewer than 1 percent of Oklahoma's population self-identifies as Muslim.[65] Known as the "Save our State" amendment, the measure passed handily both in the legislature and through adoption by voters.[66]

A Muslim Oklahoma resident challenged the amendment on the basis that it violated his First Amendment rights under the Establishment Clause and the Free Exercise Clause of the U.S. Constitution. The U.S. District Court for the Western District of Oklahoma ruled in favor of the plaintiff. The plaintiff argued that the initiative unconstitutionally interfered with his ability to indicate his wishes as detailed in his will. Specifically, the will provided for:

> charitable allotments to be made "in a manner that does not exceed the proscribed limitations found in Sahih Bukhari … a highly respected collection of the "sayings and deeds of Prophet Muhammed," and the cited provision appears to set a cap on the amount of property that a decedent may give to charity by will. It also provides for the preparation of Awad's body in a manner that "comports precisely with … Sahih Bukhari" … and for "a burial plot that allows my body to be interned [sic] with my head pointed in the direction of Mecca."[67]

His will, the plaintiff argued, would be rendered unenforceable under the amendment.[68]

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due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage … the claim shall be denied.

[63] La. Rev. Stat. §9:6001B, provides: " … it shall be the public policy of this state to protect its citizens from the application of foreign laws when the application … will result in the violation of a right guaranteed by the constitution ... including … due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the constitution of this state. … A court, arbitrator, administrative agency, or other adjudicative, mediation, or enforcement authority shall not enforce a foreign law if doing so would violate a right guaranteed by the constitution. … If any contractual provision or agreement provides for the choice of a foreign law … would result in a violation of a right guaranteed by the constitution …, the agreement or contractual provision shall be modified or amended … to preserve the constitutional rights of the parties. … If any contractual provision or agreement provides for the choice of venue or forum outside of the states or territories of the United States, and if the enforcement or interpretation … would result in a violation of any right guaranteed by the constitution … that contractual provision or agreement shall be interpreted … to preserve the constitutional rights of the person against whom enforcement is sought. … if a natural person subject to personal jurisdiction in this state seeks to maintain litigation … in this state, and … granting a claim of forum non conveniens or a related claim violates or would likely lead to the violation of the constitutional rights of the nonclaimant in the foreign forum with respect to the matter in dispute, the claim shall be denied.

[64] *Id*. at 367-68.

[65] Ballou, *supra* note 43, at 310.

[66] Udder and Pantzer, *supra* note 57, at 377-78.

[67] *Id*. at 390.

[68] *Id*. at 390.

The court noted that the amendment language subjected the plaintiff and other Muslims in the state to disfavored treatment. [69] In determining the proper test to apply, the Court reviewed the principles of the tests established in *Lemon v. Kurtzman*[70] and *Larson v. Valente*.[71] The Court cited *Larson* for the proposition that *Lemon* applies to laws providing a uniform benefit to all religions, while *Larson* applies in instances where a law discriminates among religions. Therefore, *Larson* provided the proper test in the Oklahoma challenge.[72] The *Larson* test requires both strict scrutiny, and more narrowly, language "closely fitting" to a compelling interest.[73]

> This case presents even stronger 'explicit and deliberate distinctions" among religions than the provision that warranted strict scrutiny in *Larson* …. *Larson* involved a … statute that imposed certain registration and reporting requirements upon only those religious organizations that solicited more than 50 percent of their funds from nonmembers …. Unlike the provision in *Larson*, the Oklahoma amendment specifically names the target of its discrimination.[74]

The court selected the *Larson* test as the proper test. To satisfy strict scrutiny, the state must show that the interest addresses a real, identified problem, rather than a mere perception of harm.[75] As the state could not identify even a single time when an Oklahoma court applied Sharia law, the court found that the state failed to illustrate an actual problem, and therefore, failed to show a compelling state interest.[76] As the state failed the first prong, the court did not reach whether the state complied with the "close fit" required of the second prong.[77]

Of the four states having laws in this area, Kansas and Louisiana are the most similar to SB 58.

Constitutional Impairment of Contracts

Article 1, Section 10, of the Florida Constitution provides, "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."

As a result of the constitutional limitation, the courts typically invalidate statutes that retroactively apply to existing contracts. In a 1940 Florida Supreme Court case, the Court ruled any statute enacted by the Legislature void which would impair the obligation of a contract.[78] Subsequent courts, however, carved out limited exceptions.

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[69] *Awad v. Ziriax*, 670 F.3d 1111, 1123 (10th Cir. U.S.C.O.A. 2012).
[70] 403 U.S. 602 (1971). The *Lemon* test of constitutionality requires the language in question to have a secular legislative purpose, a primary effect that neither advances nor inhibits religion, and that does not foster an excessive government entanglement with religion. *Id.* at 612-13.
[71] *Larson v. Valente*, 456 U.S. 228 (1982).
[72] *Awad*, 670 F.3d at 1126-27, 1128.
[73] *Larson*, 456 U.S. at 246-47.
[74] *Awad*, 670 F.3d at 1128.
[75] *Awad*, 670 F.3d at 1129-30.
[76] *Awad v. Ziriax*, 670 F.3d at 1111.
[77] *Awad*, 670 F.3d at 1130-31.
[78] *Bedell v. Lassiter*, 143 Fla. 43 (Fla. 1940).

In *Pomponio v. Claridge of Pompano Condo, Inc.*, the Florida Supreme Court recognized that the state may have a legitimate interest in amending a law that impacts existing contracts based on its police power.[79] In determining legitimacy, the Court employed a balancing test to "weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy."[80]

The Court then applied the test established in the U.S. Supreme Court case of *Allied Structural Steel Co. v. Spannaus* to determine whether a law may apply to existing contracts.[81] Under the test, a law is more likely to be upheld if it meets the following three prongs of the test, which are, cumulatively that:

- The law was enacted to deal with a broad, generalized economic or social problem.
- The law operates in an area already subject to state regulation at the time the parties' contractual obligations were originally undertaken, rather than invading an area not previously subject to regulation by the state.
- The law effects a temporary alteration of the contractual relationships of those within its coverage, instead of working a severe, permanent, and immediate change in those relationships irrevocably and retroactively.[82]

In an impairment of contracts challenge to a municipal ordinance, the Fifth District Court of Appeal reiterated the principle that laws that are reasonable and necessary to preserve public health, safety, and welfare are constitutional even if obligations of a private contract are impaired.[83] However, "the government's authority in this regard is not unrestrained."[84]

In *Cohn v. Grand Condominium Association, Inc.*, the statute changed voting arrangements in condominium governance. In employing the *Pomponio* test, the court determined that the state failed to identify a current social problem, the law did not regulate the specific area at issue at the time that the condo organized, and the resulting change from the law would be severe, permanent, and immediate.[85] Therefore, the state failed to meet its burden.[86] On appeal, the Florida Supreme Court affirmed but recognized that new laws apply to related contracts with provisions which incorporate future changes to the law.[87]

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[79] *Pomponio v. Claridge of Pompano Condo, Inc.*, 378 So. 2d 774 (Fla. 1979).
[80] *Id*. at 780.
[81] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978). "Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." *Id.* at 245.
[82] *Pomponio*, 378 So. 2d at 779.
[83] *Brevard County v. Florida Power & Light Co*., 693 So. 2d 77, 81 (Fla. 5th DCA 1997).
[84] *Id*. at 81.
[85] *Cohn v. Grand Condominium Assoc.*, 26 So. 3d 8, 11 (Fla. 3d DCA 2009).
[86] *Id.* at 11.
[87] *Cohn v. Grand Condominium Assoc.*, 62 So. 3d 1120 (Fla. 2011).

III. Effect of Proposed Changes:

This bill restricts courts from applying foreign law to dissolution of marriage cases and issues involving multiple-state child support enforcement actions.

Specifically, under the bill, the courts of this state may not:

- Base a decision on a foreign law that does not grant the parties to litigation the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Enforce a choice of law clause in a contract which requires a dispute to be resolved under a foreign law that does not grant the parties the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Enforce a forum selection clause in a contract which requires a dispute to be resolved in a forum in which a party would be denied his or her fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Grant a motion to dismiss a lawsuit based on forum non conveniens if granting the motion would likely result in the denial of a party's fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.

This bill does not apply to:

- Corporations, partnerships, and other types of business associations; and
- Ecclesiastical matters.

Although this bill recognizes that a party may waive his or her rights through a contract, the bill requires a court to narrowly construe the scope of the waiver.

The bill does not identify any laws or conduct authorized under foreign laws within the family law context which would deny a person's fundamental liberties, rights, and privileges. As such, courts will likely determine the impact of the bill on a case-by-case basis.

The bill requires a court to invalidate contractual provisions or judgments not based on laws that provide the parties with the "same" constitutional protections as the state and federal constitutions. As the "same" standard appears inflexible, the bill may result in the invalidation of contractual provisions or judgments based on foreign laws that grant the parties similar rights, privileges, and immunities as those granted by this country.

The bill declares in s. 45.022(4), F.S., that court orders based on disfavored foreign laws are void and unenforceable. However, the bill does not specifically address a situation in which a person seeks to enforce in this state a court order from a sister state which is based on a disfavored foreign law. In those situations, a court may likely rule that the Full Faith and Credit Clause of the U.S. Constitution requires enforcement of the order.

Similarly, the bill does not specifically address how a court would reconcile the bill with chapter 88, F.S., the Uniform Interstate Family Support Act, which was mandated by Congress. Under the bill, a support order entered in a foreign nation whose laws are inconsistent with this

nation's constitutional "fundamental liberties, rights, and privileges" is unenforceable. In contrast, chapter 88, F.S., renders foreign support orders and agreements unenforceable if they are "manifestly incompatible with public policy." Although the two provisions appear to overlap (for example, manifest incompatibility includes due process and opportunity to be heard), the scope of the bill is likely broader than the restrictions on foreign law under the UIFSA.

The bill takes 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.

D. Other Constitutional Issues:

Four constitutional issues may potentially be raised:

First Amendment

States that have proposed legislation to restrict courts from applying foreign law have banned the use of Sharia law, banned several types of law or tradition including Sharia law, or prohibited the use of foreign law generally. Of the three types of initiatives, this bill comes under the third category, as it contains no mention of Sharia or another specific type of banned law other than foreign law in general. In contrast to the law at issue in *Awad v. Ziriax*[88], the bill appears to carry the greatest merit constitutionally, as it does not specifically single out a particular religion for disfavor or preference. If this bill is challenged based on First Amendment grounds, a court following past precedents will initially review the language for facial discrimination. Again, as religion is not mentioned at all, the court will deem it facially neutral. A court will then apply the *Lemon* test, and likely find both a secular government purpose and that the law does not facilitate excessive governmental entanglement with religion. Because of this, a court will likely uphold the law.

Impairment of Contracts

The bill takes effect upon becoming a law and is silent regarding whether it applies retroactively or prospectively. Therefore, as it does not contain a clause providing for retroactive application, it will likely operate prospectively. Still, if a party attempts to apply the law to invalidate provisions in existing contracts, he or she must demonstrate

[88] 670 F.3d 1111, 1123 (10th Cir. U.S.C.O.A. 2012).

that the law is a legitimate use of the state's police power and that the change operates in less than a severe, permanent, and immediate fashion, as required under *Pomponio v. Claridge of Pompano Condo, Inc*.[89] This test places a very high burden on the state. Alternatively, this bill may reach back to existing contracts, if a contractual provision expressly incorporates future changes to the law.

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,"[90] and the action must pose a "great potential for disruption or embarrassment"[91] 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.[92] 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.[93]

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

[89] 378 So. 2d 774 (Fla. 1979).
[90] *Zschernig v. Miller*, 389 U.S. 429, 433 (1968).
[91] *Id*. at 435.
[92] Articles I, II, III, U.S. Const.
[93] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

Because of this language, Florida's separation of powers doctrine is even stronger than the federal concept of separation of powers. Therefore, the bill may face an additional separation of powers inquiry.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Although private parties will be impacted by the bill, the extent of the impact is unknown at this time.

C. Government Sector Impact:

The Office of the State Courts Administrator anticipates that the bill will not have a fiscal impact on judicial workloads. However, the bill may require the drafting of new or amended jury instructions in family law cases, but no significant impact is expected.

VI. Technical Deficiencies:

The bill appears to provide different remedies for a court to apply to foreign choice of law and choice of forum clauses that compromise constitutional liberties, rights, and privilege.

- For choice of law clauses, this bill makes the contractual provision severable or the entire contract void and unenforceable.
- For choice of forum clauses, this bill provides for an interpretation in favor of preserving a party's constitutional protections.

A court may find it cumbersome to apply the second remedy to choice of law clauses choosing a disfavored law. Also, for parity purposes, staff recommends that choice of law clauses be rendered void and unenforceable, like the choice of forum clauses.

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.