

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1209 Application of Foreign Law in Certain Cases

**SPONSOR(S):** Metz and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1360

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N	Caridad	Bond
2) Judiciary Committee			

### SUMMARY ANALYSIS

Limited to lawsuits relating to dissolution of marriage and those under the Uniform Interstate Family Support Act, the bill:

- Provides that any court, arbitration, tribunal, or administrative agency ruling or decision is void and unenforceable if the entity bases its decision in whole or in part on any foreign law that does not grant the parties the same fundamental liberties, rights and privileges guaranteed by the state and federal constitutions.
- Provides that a severable contract or contractual provision 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 Constitution of the United States, then the provision must be construed to preserve the constitutional rights of the person against whom enforcement is sought.
- 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.

This bill does not appear to have a fiscal impact on state or local governments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

Although the majority of civil suits are decided under Florida or federal law, occasionally, a court is required to consider foreign law in reaching a decision. There are various doctrines and laws designed to address such circumstances. For instance, 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*

Under the political question doctrine, a court may determine 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.<sup>1</sup>

#### *Act of State Doctrine*

The act of state doctrine provides that, out of respect for other states' sovereignty, U.S. courts should not judge the acts of a foreign head of state made within his or her states' sovereign territory. 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.<sup>2</sup>

The act of state doctrine applies only to "official" acts of a sovereign.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup>

#### *International Comity Doctrine*<sup>7</sup>

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.<sup>8</sup>

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<sup>1</sup> Jay M. Zitter, *Construction and Application of Political Question Doctrine by State Courts*, 9 A.L.R. 6th 177 (2005).

<sup>2</sup> 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> (last accessed Jan. 26, 2012).

<sup>3</sup> *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."

<sup>4</sup> 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.proskauguide.com/litigation/9/XV>.

<sup>5</sup> 9 U.S.C. s. 15.

<sup>6</sup> O'Donnell, *supra* note 4.

<sup>7</sup> Information concerning the international comity doctrine was adapted from 44B AM. JUR. 2D *International Law* s. 8 (2011).

<sup>8</sup> *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).

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, the doctrine allows a court with 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.<sup>9</sup>

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.<sup>10</sup>

## Florida Law

### *Uniform Out-of-Country Foreign Money-Judgment Recognition Act*

The Uniform Out-of-Country Foreign Money-Judgment Recognition Act (Florida Recognition Act) governs recognition of foreign judgments in Florida.<sup>11</sup> The Supreme Court of Florida has noted that the Florida Recognition Act was adopted to "ensure the recognition abroad of judgments rendered in Florida."<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup>

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.

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<sup>9</sup> 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).

<sup>10</sup> *Id.* at 1000.

<sup>11</sup> Sections 55.601-55.607, F.S.

<sup>12</sup> *Nadd v. Le Credit Lyonnais, S.A.*, 804 So. 2d 1226, 1228 (Fla. 2001).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

- 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.<sup>16</sup>

#### *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.<sup>17</sup>

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.<sup>18</sup>

#### *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.<sup>19</sup>

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.

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<sup>16</sup> *Id.*

<sup>17</sup> Section 44.104(1), F.S.

<sup>18</sup> Section 44.104(10)(c), F.S.

<sup>19</sup> 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.

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.<sup>20</sup>

### 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 provides that:

- Any court, tribunal, or administrative agency ruling or decision that bases its 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.
- 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 Constitution of the United States, then the provision must be construed to preserve the constitutional rights of the person against whom enforcement is sought.
- 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 aforementioned provisions only apply to actual or foreseeable denials of a natural person's constitutional rights.

The bill allows for an individual to voluntarily restrict his or her fundamental liberties, rights, and privileges guaranteed by the Florida and U.S. constitutions; however, the language of any such contract or other waiver must be strictly construed in favor of preserving an individual's liberties, rights and privileges.

The bill provides that it is not to be construed to:

- Require or authorize a court to adjudicate, or prohibit and religious organization from adjudicating, ecclesiastical matters if such adjudication or prohibition would violate Art. I s. 3, Fla. Const., or the First Amendment of the U.S. Constitution.
- Conflict with any federal treaty or other international agreement to which the United States is a party and such treaty or agreement preempts state law on the matter at issue.

The bill only applies to proceedings brought under chs. 61 and 88, F.S., relating to dissolution of marriage and the Uniform Interstate Family Support Act, respectively. It does not apply to a corporation, partnership, or other form of business association.

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.

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<sup>20</sup> Section 61.506, F.S.

**B. SECTION DIRECTORY:**

Section 1 creates s. 45.022, F.S., relating to application of foreign law contrary to public policy in certain cases.

Section 2 provides the act takes effect upon becoming law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill does not appear to have any direct economic impact on the private sector.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

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. A federal court has recently held that, even if a state statute is not preempted by a direct conflict with federal law, 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."<sup>21</sup>

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<sup>21</sup> *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,"<sup>22</sup> and the action must pose a "great potential for disruption or embarrassment"<sup>23</sup> 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.

### B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

n/a

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<sup>22</sup> *Zschernig v. Miller*, 389 U.S. 429, 433 (1968).

<sup>23</sup> *Id.* at 435.