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 and Tourism Committee

BILL:	SB 486
INTRODUCER:	Senator Diaz de la Portilla
SUBJECT:	Jurisdiction of Courts
DATE:	December 6, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Juliachs	Hrdlicka	CM	**Favorable**
2.			JU	
3.			BC	
4.				
5.				
6.				

I. Summary:

Senate Bill 486 proposes to amend Florida's long-arm, choice-of-law, and forum-selection statutes, as well as provisions of the Florida Enforcement of Foreign Judgment Act and Florida International Commercial Arbitration Act.

Specifically, the bill amends s. 48.193, F.S., commonly referred to as the long-arm statute, by including language that extends the court's jurisdiction to individuals entering into a contract that complies with Florida's forum-selection statute. The bill also amends s. 685.101, F.S., by removing statutory language that prevents the enforcement of choice-of-law provisions found in contracts where each party is a nonresident. Sections 685.101 and 685.102, F.S., stipulate that the newly amended provisions would apply to contracts entered into on or after July 1, 2012.

Additionally, the term "foreign judgment" found in s. 55.502, F.S., of the Florida Enforcement of Foreign Judgment Act is amended to mean "any judgment, decree, or order of a court which is entitled to full faith and credit in this state."

Lastly, provisions from the Florida International Commercial Arbitration Act, ch. 689, F.S., are amended to correct cross-references within the act in order to conform exactly to the UNCITRAL Model Law on Commercial Arbitration.

This bill amends ss. 48.193, 55.502, 684.0019, 684.0026, 685.101, and 685.102, F.S.

II. Present Situation:

Jurisdiction

The ability of a court to assert personal jurisdiction over a nonresident is subject to the constitutional requirements of the Due Process Clause of the Fourteenth Amendment.[1] The test for determining whether a court is able to assert personal jurisdiction over a nonresident is whether the nonresident has "minimum contacts" in the forum such that the commencement of a proceeding against that individual "would not offend traditional notions of fair play and justice."[2] Foreseeability is key; thus, the principal inquiry is whether the nonresident's conduct and connection with the forum state would lead him or her to believe that they could "reasonably anticipate being haled into court."[3]

Florida Long-Arm Statute

The second limitation on a court's ability to assert personal jurisdiction is derived from a state's long-arm statute. Such statutes can be drafted broadly[4] to reach the maximum bounds of the Due Process Clause or narrowly by enumerating specific acts or activities that would allow for a court to assume personal jurisdiction in a particular case. Florida's statute falls in the latter category.

In *Venetian Salami Co. v. J.S. Parthenais,* the Florida Supreme Court described the interplay between Florida's long-arm statute and the due process requirements of the Fourteenth Amendment as follows:

> By enacting section 48.193, the legislature has determined the requisite basis for obtaining jurisdiction over nonresident defendants as far as Florida is concerned. It has not specifically addressed whether the federal constitutional requirement of minimum contacts has been met. As a practical matter, it could not do so because each case will depend upon the facts.[5]

Therefore, two inquiries must be satisfied. The first is whether there is a jurisdictional basis under the Florida long-arm statute to assert personal jurisdiction; and if so, whether the necessary minimum contacts exist.[6]

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[1] U.S. Const. amend. XIV, s. 2 ("No state shall . . . deprive any person of life, liberty, or property without due process of law."); See, *International Shoe Co. v. Washington, Office of Unemployment Comp. & Placement,* 326 U.S. 310, 316 (1945).
[2] *Id.*
[3] *Burger King Co. v. Rudzewicz,* 471 U.S. 462, 474 (1985) (citing *World-Wide Volkswagen Co. v. Woodson,* 444 U.S. 286, 297 (1980)).
[4] Cal. Civil Code s. 410.10 (2011) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.").
[5] *Venetian Salami Co. v. J.S. Parthenais,* 554 So. 2d 499, 500 (1989).
[6] *Jetbroadband WV, LLC v. Mastec North America, Inc.* 13 So. 3d 159, 161 (2009) (quoting *Unger v. Publisher Entry Serv., Inc.,* 513 So. 2d 674, 675 (Fla. 5th DCA 1986)).

Important Court Rulings

The Florida Third District Court of Appeal recently held in *Jetbroadband WV, LC v. Mastec North America, Inc.*, that by promulgating ss. 685.101 and 685.102, F.S., the Legislature created a separate jurisdictional basis for asserting personal jurisdiction over a nonresident that was outside the ambit of the long-arm statute. In that case, the court declared that the nonresident defendant was subject to the jurisdiction of Florida's courts by virtue of the forum-selection clause that designated Florida as the appropriate venue to commence an action or proceeding regarding a dispute arising from the parties' agreement.[7]

The court distinguished its ruling from an earlier Florida Supreme Court case, *McRae v. J.D./M.D., Inc.*, that was decided 12 years earlier. There, the court refused to enforce a forum-selection clause and denied jurisdiction on the grounds that there was no jurisdictional basis for doing so under the 1987 version of the Florida long-arm statute.[8] At the time of that court's decision, ss. 685.101 and 685.102, F.S., had not been enacted; rather, those statutes would be passed 2 years following the Court's decision in *McRae*.[9] As such, the Third District Court of Appeal reasoned in *Jetbroadband* that Florida courts were now equipped with the jurisdictional authority to hear cases involving forum-selection clauses that designated Florida as the venue of choice for the commencement of a proceeding by the legislature's subsequent passage of ss. 685.101 and 685.102, F.S.

Florida Choice-of-Law Statute

Florida's choice-of-law statute, s. 685.101, F.S., was adopted in 1989 and provides that a contract will be enforced by the courts of this state where Florida law has been designated as the governing law in the agreement and the transaction is valued at no less than $250,0000.[10] In its current form, the statute provides that such contracts will only be enforced if the "1) the contract bears a substantial or reasonable relation to Florida or 2) at least one of the parties is either a resident or citizen of Florida (if a person), or is incorporated or organized under the laws of Florida or maintains a place of business in Florida." [11]

The American Law Institute has promulgated the Restatement (2d) of Conflict of Laws.[12] Section 187 begins with the presumption that a contract's choice-of-law provision will be valid, but then states:

> That such clauses will not be enforced if the chosen jurisdiction "bears no substantial relationship to the parties or transaction or if the application of the chosen law would offend the fundamental policy of a state with an interest in the transaction materially greater than that of the chosen

[7] *Jetbroadband,* 13 So. 3d at 162-163.
[8] *McRae v. J.D./M.D., Inc.* 511 So. 2d 540, 542 (1987).
[9] *Id.* at 543 ("Conspicuously absent from the long-arm statute is any provision for submission to in personam jurisdiction merely by contractual agreement.").
[10] *Id.*
[11] *Jetbroadband,* 13 So. 3d at 162.
[12] Restatement Second of Conflict of Laws (1971).

> jurisdiction and whose law would apply in the absence of an effective choice-of-law by the parties.[13,14]

Although persuasive and instructive, it should be noted that a Restatement is not considered to be a primary source of law, but serves as general resource for understanding and researching a specific area of the law. As such, several jurisdictions, including New York, Delaware, California, and Illinois, have elected to remove the substantial relationship requirement from their choice-of-law statutes.[15]

As presently drafted, Florida's statute is confusing as it relates to whether a substantial relationship is required between the agreement, parties, and Florida. In subsection (1) it provides *". . . that any contract, agreement or undertaking . . . may, to the extent permitted under the United States Constitution, agree that the law of this state will govern such contract, agreement or undertaking . . . whether or not [it] bears any relation to this state."*[16] Yet, in subsection (2), the statute later provides, *"that this section does not apply to any contract, agreement, or undertaking regarding any transaction which does not bear a substantial or reasonable relation to the state in which every party is either or a combination of [a nonresident of this state or incorporated or organized under the laws of another state.]"* In short, Florida appears to require no substantial connection between the subject matter of the agreement and Florida in subsection (1), but then later requires a connection between the parties and Florida in subsection (2).

Modern Trend

In an effort to promote predictability and certainty in commercial relation disputes, the utilization of choice-of-law provisions in contracts has increased significantly. As such, the judicial enforcement of choice-of-law clauses has now become the norm.[17] As one writer comments, there is evidence that states do compete for law business by enforcing contractual choice-of-law.[18] His findings are summarized below:

> First, there is evidence of the existence of a market for contractual choice. Many relatively large companies use choice-of-law clauses, thereby suggesting that there is a significant demand for enforcement. The University of Missouri's Contracting and Organizations Research Institute (CORI) has collected such contracts from publicly traded companies that disclose contracts in filings with the Securities and Exchange Commission . . . A search of CORI's web database indicates that 4,407 or 8,483 contracts of various types had choice- of-law clauses.

[13] *Id.* at s. 187.
[14] Language taken from Richard T. Franch, et. al., *Choice of law and choice of forum are both crucial: Parties to international agreement should give careful thought to each,* The Nat'l l Law J., Feb. 2002.
[15] N.Y. Gen Oblig. Law ss. 5-1401, 1402 (McKinney 2011); Del. Code Ann. Tit. 6, s. 2708(a) (2011), Cal. Civil Code s. 1646.5 (West Supp.2011), 735 IL Comp. Stat. Ann. 105/5-5 (West 2011).
[16] Section 685.101(1), F.S. (2011).
[17] Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law,* 37 Ga. L. Rev. 363, 382.
[18] *Id.* at 431.

> Second, a further indication of the existence of a choice-of-law market is that parties often contract for the law of one of a relatively small group of states, indicating that they are not choosing a party's domicile or the jurisdiction where the particular transaction is based. Eighty-nine percent of the contracts with choice-of-law clauses select the law of only ten states, seventy-two percent select the law of four states, and twenty-six percent select the law of Delaware, one of the smaller states.
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> . . . .
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> Fourth, and most importantly for present purposes, the parties tend to choose states that have signaled their intent to compete in the choice-of-law market. The top five states, with a combined eighty percent market share - Delaware, New York, California, Texas, and Illinois - have all adopted statutes providing for enforcement of contractual choice-of-law in relatively large contracts, with the remaining statute state, Florida, in eighth place. . ."[19]

In addition, the cited benefits enjoyed by jurisdictions who have adopted statutes that authorize the enforcement of choice-of-law provisions found in contracts include the attraction of business activity into the forum state, as well as increased tourism.[20, 21] Moreover, it has also been proposed that choice-of-law clauses reduce parties' litigation costs seeing that fewer resources will be devoted to presenting conflict-of-law arguments before the courts in an effort to determine which state law is applicable in the absence of a choice-of-law provision that designates the governing law.[22]

Florida Forum-Selection Statute

The forum-selection statute, s. 685.102, F.S., was also adopted in 1989 along with its counterpart, the Florida choice-of-law statute. This particular statute grants Florida courts jurisdiction to hear cases relating to any contracts that have been made pursuant to s. 685.101, F.S.

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[19] *Id.* at 432-435.
[20] Garrett L. Pendleton & Michael A. Tessitore, *Foreign Litigants Seek Forum to Litigate – Is Florida Open for Business?*, Fla. Bar J., March 2005, at 24.
[21] *But see, supra* note 17, at 429. ("States have incentives not only to avoid repelling firms, but also to encourage them to establish significant local contacts, such as headquarters. The relevance of this factor depends on whether the rule regarding enforcement of contractual choice requires significant contacts in a state as a perquisite to enforcing a contract applying that state's law. This depends on states' willingness not only to apply their own law where it is designated in the contract, but also to apply another state's law where it is designated and the state has contacts with the contracting parties, and to refuse to apply their own state's law where it is designated in the contract but where the state lacks significant contacts with the parties.").
[22] *Id.* at 403.

As to the extent of their enforceability, the United States Supreme Court has held that such clauses should be upheld, unless it can be shown that its enforcement would be unreasonable or unjust, or that the clause was invalid as a result of fraud or overreaching.[23] As it relates to personal jurisdiction and the minimum contacts analysis, the United States Supreme Court has also held that the minimum contacts standard is met if a forum-selection clause exists that is "freely negotiated and is not unreasonable and unjust."[24]

Florida Enforcement of Foreign Judgments Act

Article IV, clause 1 of the United States Constitution provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. . ."[25] Accordingly, under the Florida Enforcement of Foreign Judgments Act (act), ss. 55.501-55.509, F.S., foreign judgments from sister jurisdictions may be enforced in Florida upon being recorded in the office of the clerk of the circuit court of any county.[26]

In its current statutory form, the foreign judgments that may be enforced under the act include "*any judgment, decree, or order of a court of any other State or of the United States if such judgment, decree, or order is entitled to full faith and credit in this State."*[27] Absent from this definition is any reference to territories or possessions of the United States who are also entitled to full faith and credit under federal law.[28]

In *Rodriguez v. Nasrallah,*[29] a Florida court held that "[j]udgments of courts in Puerto Rico are entitled to full faith and credit in the same manner as judgments from courts of sister states." As a result, the court permitted the enforcement of a Puerto Rican judgment in Florida. However, taken literally, a judgment from a Puerto Rican court would not qualify as a judgment from a *state court* as currently stipulated under s. 55.502(1), F.S.

Florida International Commercial Arbitration Act

Chapter 2010-60, L.O.F., repealed the then current law relating to international commercial arbitration and adopted instead the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law) as amended in 2006 by the General Assembly.

Chapter 684, F.S., in accordance with the UNCITRAL Model Law on International Commercial Arbitration, applies to any international commercial arbitration subject to an agreement between the United States of America and any other country. The law provides definitions, principles

[23] *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 15 (1972).
[24] *Burger King,* 471 U.S. at 473 n. 14.
[25] U.S. Const. art. IV, cl.1.
[26] Section 55.503, F.S. (2011).
[27] Section 55.502(1), F.S. (2011).

[28] *See* 28 U.S.C. s. 1738 (2006) (". . . The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form . . .").

[29] *See* 659 So. 2d 437, 439 (Fla. 1st DCA 1995).

under which the law is to be interpreted, procedural requirements, discovery and evidentiary requirements, as well as arbitral tribunal powers and immunity.

Presently, two of the statutes contain inadvertent clerical errors as they relate to cross-references. As such, in its current form, the statute does not conform exactly to the Model Law.

III. Effect of Proposed Changes:

Jurisdiction

Section 1 amends s. 48.193, F.S., (Florida's long-arm statute) to now provide an explicit jurisdictional basis for Florida courts to assert personal jurisdiction over a nonresident when he or she enters into a contract that complies with s. 685.102, F.S.[30, 31] Under the proposed changes, courts would have personal jurisdiction over nonresidents when they enter into a contract where the parties agree to both designate Florida law as governing under the requirements of s. 685.101, F.S., and commence an action in Florida under s. 685.102, F.S. As has already been noted, the Florida Third District Court of Appeal has *implicitly* found that the Legislature has already granted Florida courts the authority to hear such cases by reading ss. 685.101 and 685.102, F.S., in tandem. Thus, the addition of this language to Florida's long-arm statute would codify that court's interpretation of the statute.

Section 5 amends s. 685.101, F.S., by removing the following italicized language from the statute:

> (2) This section does not apply to any contract, agreement, or undertaking:
> *(a) Regardless of any transaction which does not bear a substantial relation to this state in which every party is either or a combination of:*
> *1. A resident and citizen of the United States, but not of this state, or*
> *2. Incorporated or organized under the laws of another state and does not maintain a place of business in this state.*[32]

The effect of this change is to expand the court's jurisdiction to hear cases concerning a commercial dispute that has arisen from the parties' contract where Florida law is designated as governing, regardless of whether or not the parties have any substantial or reasonable connection to Florida. This change aligns Florida's choice-of-law statute with that of New York, which also authorizes its state courts to enforce provisions found in agreements that designate New York law as governing irrespective of whether or not the parties to the dispute have any reasonable or

[30] Several other jurisdictions have similar language in their respective long-arm statutes. *See* Mich. Comp. Laws s. 600.705 (2011); Mont. Code Ann s. 25-20-4(b)(1)(E) (2011); S.D. Codified Laws s. 15-7-2(5) (2011); Tenn Code Ann. s. 20-2-214 (2011) ("Entering entering into a contract for services to be rendered or for materials to be furnished in [this state] by such person.").
[31] Recall that statutory reference to s. 685.102, F.S., is to the forum-selection statute.
[32] Section 685.101(2)(a), F.S. (2011).

substantial connection to New York.[33] Finally, this section provides that the statute would apply to contracts entered into on or after July 1, 2012.

Section 6 amends s. 685.102, F.S., to provide that the statute would apply to contracts entered into on or after July 1, 2012.

Florida Enforcement of Foreign Judgments Act

Section 2 amends s. 55.502, F.S., to more succinctly define a foreign judgment as any *"judgment, decree, or order of a court which is entitled to full faith and credit."* Accordingly, by removing from the definition of "foreign judgment" any reference to only those orders from the 50 states that compromise the Union, it would allow for the judgments, orders, and decrees from U.S. territories, such as Puerto Rico, to be recognized.

Florida International Commercial Arbitration Act

Section 3 amends s. 684.0019, F.S., to correct a cross-reference.

Section 4 amends s. 684.0026, F.S., to correct a cross-reference.

These changes would make the Florida International Commercial Arbitration Act conform exactly to the UNCITRAL Model Law on Commercial Arbitration.

Enactment Date

Section 7 provides that this act shall take effect on July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[33] See N.Y. Gen Oblig. Law ss. 5-1401 (McKinney 2011); *See also, supra* note 17.

D. Other Constitutional Issues[34]

With respect to choice-of-law conflicts, the United States Supreme Court, in *Hague v. Allstate Insurance Company*, held that "for a State's substantive law to be selected in a constitutionally permissible manner, the State must have significant contact or a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[35] Accordingly, the removal of the requirement of "significant contacts" or "reasonable relationship" from a state's choice-of-law statute could potentially trigger a due process challenge under the Fourteenth Amendment. However, it should be noted that when the Supreme Court rendered its holding in *Hague*, the facts presented in that case did not include a contract whereby the parties agreed to be governed by a specific state's law. Instead, the question before the Court was which state law applied in the absence of an agreement that designated any state's law as governing.

To date, there are no known constitutional challenges to the New York choice-of-law statute,[36] which is the very same statute that the amendments in SB 486 seek to pattern Florida's statute after. In any event, ss. 685.101 and 685.102, F.S., would continue to preserve existing language that limits the application of the statutes *"to the extent permitted under the United States Constitution."*[37]

Furthermore, it has been stated that the "choice of the law of an unrelated jurisdiction will often stand the best chance of being honored if it is reinforced with a forum-selection clause designating the same jurisdiction."[38] A reading of both ss. 685.101 and 685.102, F.S., as amended by this bill, reveals that the statutes would accomplish that very effect, allowing it to stand on stronger constitutional ground.

Lastly, the United States Supreme Court has already stated that in the commercial context the minimum contacts standard is met if a forum-selection clause exists that is "freely negotiated and is not unreasonable and unjust."[39]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[34] The constitutional analysis was adapted, in part, from Pendleton, *supra* note 20.
[35] *Allstate Ins. Co. v. Hague*, 499 U.S. 302, 308 (1981).
[36] Pendleton, *supra*, note 20.
[37] Section 685.101, F.S. (2011); s. 685.102, F.S. (2011).
[38] Franch, *supra*, note 14 ("This is especially true in jurisdictions such as New York where the courts give substantial recognition to the parties' freedom to contract.").
[39] *Burger King*, 471 U.S. at 473 n. 14; *See also, Elandia International, Inc. v. Koy, et al.*, 690 F. Supp. 2d 1317, 1340 (S.D. Fla. 2010) .

B. Private Sector Impact:

According to The Florida Bar, International Law Section, the bill enhances the business climate in Florida by clarifying and streamlining existing legislation related to international law matters in order to increase Florida's attractiveness as a business friendly state.[40]

C. Government Sector Impact:

According to the Office of the State Courts Administrator's 2012 Judicial Impact Statement, SB 486 would not fiscally impact or cause changes to court rules. With respect to workload impact, the office noted that the bill could increase the number of contract actions filed in circuit court but was unable to quantify to what extent.[41]

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.

[40] Memorandum to Senate Committee on Commerce and Tourism from International Law Section, Florida Bar. (November 17, 2011) (on file with the Senate Committee on Commerce and Tourism).
[41] Memorandum to Committee on Commerce and Tourism from Office of the State Court Administrator (November 17, 2011) (on file with the Senate Committee on Commerce and Tourism).