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 Judiciary Committee

BILL:	SB 486
INTRODUCER:	Senator Diaz de la Portilla
SUBJECT:	Jurisdiction of the Courts
DATE:	January 11, 2012 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Juliachs	Hrdlicka	CM	**Favorable**
2.	White	Cibula	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

Senate Bill 486 amends 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. As such, the bill expands the jurisdiction of the courts of this state to hear actions that do not bear a substantial or reasonable relation to this state or that do not involve a party who is resident of this state or incorporated in this state. The amendments to ss. 685.101 and 685.102, F.S., will 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 substantially amends the following sections of the Florida Statutes: 48.193, 55.502, 684.0019, 684.0026, 685.101, and 685.102.

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 does "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. and Placement,* 326 U.S. 310, 316 (1945).
[2] *International Shoe*, 326 U.S. at 316.
[3] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *World-Wide Volkswagen Co. v. Woodson,* 444 U.S. 286, 297 (1980)).
[4] An example of a broad long-arm statute can be found in Cal. Civil Code s. 410.10 (2011), which states: "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 (Fla. 1989).
[6] *Jetbroadband WV, LLC v. Mastec North America, Inc.*, 13 So. 3d 159, 161 (Fla. 3rd DCA 2009).

Florida' Choice-of-Law and Forum-Selection Statutes

Florida's choice-of-law and forum selection statutes, adopted in 1989, allow parties to a contract to choose Florida law to govern disputes relating to the contract and to select this state's courts as the forum for the resolution of any disputes. These statutes are based on a recommendation of the International Banking and Trade Study Commission which was created by the Legislature in 1988 to "advise on possible measures to reduce impediments to commerce in Florida."[7] The House Staff Analysis for the legislation creating the statutes stated that the bill would "enhance Florida's attractiveness as an international commercial center."[8]

Choice-of-Law Statute

Florida's choice-of-law statute is drafted as a limitation on the power of persons to enter into contracts. However, the provision acts as a limitation on the power of a court to enforce a contractual provision designating Florida law as the law that will govern disputes relating to a contract.

Section 685.101(1), F.S., effectively grants broad authority to courts to enforce "to the extent permitted under the United States Constitution" a contractual provision designating Florida law as the law that will govern a contract valued at not less than $250,000. Section 685.101(2), F.S., provides a list of exceptions to the broad grant of authority. Specifically, under s. 685.101(2)(a), F.S., the authority of a court to enforce a choice of law provision:

> does not apply to any contract, agreement, or undertaking:
> (a) Regarding any transaction which does not bear a substantial or reasonable 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 . . . .

In interpreting s. 685.101, F.S., the court in *Jetbroadband WV, LLC v. MasTec North America, Inc.*, stated that the section only applies if: "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 (if a business)."[9]

Additionally, the choice-of-law statute does not apply to contracts for labor, employment or relating to any transaction for personal, family, or household purposes.[10]

[7] Fla. H. R. Comm. on Commerce, SB 109 (1989) Staff Analysis (June 27, 1989).
[8] *Id.*
[9] *Jetbroadband WV, LLC v. MasTec North America, Inc.*, 13 So. 3d 159, 162 (Fla. App. 3d DCA 2009) (quoting Edward M. Mullins & Douglas J. Giuliano, *Contractual Waiver of Personal Jurisdiction Under F.S. § 685.102: The Long-Arm Statute's Little-Known Cousin*, 80 FLA Bar J. 36, 37 (May 2006)).
[10] Section 685.101(2)(b), and (c), F.S.

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. The forum-selection statute grants Florida courts jurisdiction to hear cases relating to any contracts that have been made consistent with s. 685.101, F.S., which with some exceptions, authorizes parties to choose Florida law to govern a contract.

Regarding enforceability, the United States Supreme Court has held that a forum-selection clause 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.[11] 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.

Interaction of the Choice-of-Law and Forum-Selection Statutes

Read together, the choice-of-law and forum-selection statutes:

> stand for the proposition that, if certain requirements are met, parties may, by contract alone, confer personal jurisdiction on the courts of Florida. To satisfy the statutory requirements, the contract, agreement, or undertaking must (1) include a choice of law provision designating Florida Law as the governing law, (2) include a provision whereby the non-resident agrees to submit to the jurisdiction of the courts of Florida, (3) involve consideration of not less than $250,000, (4) not violate the United States Constitution, and (5) either bear a substantial or reasonable relation to Florida or have at least one of the parties be a resident of Florida or incorporated under its laws. Thus, as long as one of the parties is a resident of Florida or incorporated under its laws, and the other statutory requirements are met, sections 685.101-.102 operate irrespective of whether the underlying contract bears any relation to Florida and notwithstanding any law to the contrary.[12]

Modern Trends Regarding Choice-of-Law Clauses

In an effort to promote predictability and certainty in commercial relation disputes, the use 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.[13] As one writer comments, there is evidence that states do compete for law business by enforcing contractual choice-of-law.[14] 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

[11] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).
[12] *Jetbroadband*, at 162 (footnote omitted).
[13] Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 382 (Winter 2003).
[14] *Id.* at 431.

> 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 4,507 of 8,583 contracts of various types had choice-of-law clauses. 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 - all have adopted statutes providing for enforcement of contractual choice of law in relatively large contracts, with the remaining statute state, Florida, in eighth place …."[15]

In addition, the cited benefits enjoyed by jurisdictions that have adopted statutes to 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.[16, 17] Moreover, some propose 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.[18]

The American Law Institute has promulgated the Restatement (2d) of Conflict of Laws.[19] Section 187 begins with the presumption that a contract's choice-of-law provision will be enforced, but sets out two exceptions referred to as the "nexus test" and the "fundamental policy test."[20] Under the nexus test, choice-of-law clauses will not be enforced if the chosen jurisdiction bears "no substantial relationship" to the parties or transaction, and there is "no other reasonable basis" for the choice.[21] Under the fundamental policy test, choice-of-law clauses will not be enforced if the application of the chosen law would offend "the fundamental policy of a state"

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[15] *Id.* at 432-434.
[16] Garrett L. Pendleton & Michael A. Tessitore, *Foreign Litigants Seek Forum to Litigate – Is Florida Open for Business?*, 79 FLA. BAR J., 20, 24 (Mar. 2005).
[17] *But see,* Ribstein *supra* note 13, 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.").
[18] *Id.* at 403.
[19] Restatement Second of Conflict of Laws (1971).
[20] 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 Law J., Feb. 2002.
[21] Restatement Second of Conflict of Laws at s. 187(2)(a)

with an interest in the transaction materially greater than that of the chosen jurisdiction and whose law would apply "in the absence of an effective choice-of-law by the parties."[22]

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 removed the substantial relationship requirement from their choice-of-law statutes.[23]

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."[24] 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.[25]

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."[26] Absent from this definition is any reference to territories or possessions of the United States that are also entitled to full faith and credit under federal law.[27]

In *Rodriguez v. Nasrallah*,[28] 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* 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 Model Law on International Commercial Arbitration (UNCITRAL Model Law) as amended in 2006 by the General Assembly.

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[22] *Id.* at s. 187 (2)(b)
[23] N.Y. GEN OBLIG. LAW ss. 5-1401, 1402 (2011); DEL. CODE ANN. Tit. 6, s. 2708(a) (2011), CAL. CIVIL CODE s. 1646.5 (2011), 735 IL COMP. STAT. ANN. 105/5-5 (2011).
[24] U.S. CONST. art. IV, cl 1.
[25] Section 55.503, F.S.
[26] Section 55.502(1), F.S.
[27] *See* 28 U.S.C. s. 1738 ("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.").
[28] *Rodriguez v. Nasrallah*, 659 So. 2d 437, 439 (Fla. 1st DCA 1995).

Chapter 684, F.S., in accordance with the UNCITRAL Model Law, 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 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 in the Florida Commercial Arbitration Act contain inadvertent clerical errors as they relate to cross-references. As such, in its current form, the statute does not conform exactly to the UNCITRAL Model Law.

III. Effect of Proposed Changes:

Jurisdiction (Sections 1, 5, and 6)

The bill amends s. 48.193, F.S., to provide an express jurisdictional basis for Florida courts to assert personal jurisdiction over a nonresident who enters into a contract that complies with s. 685.102, F.S.[29] As a result, courts may have personal jurisdiction in contracts cases involving only nonresidents if they enter into a contract where the parties agree to designate Florida law as governing the contract, and contractually agree to personal jurisdiction in this state.

The bill amends s. 685.101, F.S., by deleting the following italicized language from the choice-of-law statute:

> (2) This section does not apply to any contract, agreement, or undertaking:
> *(a) Regarding any transaction which does not bear a substantial or reasonable 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;* [30]

This language was interpreted in *Jetbroadband WV, LLC v. MasTec North America, Inc.*, to limit the jurisdiction of Florida courts to hear certain contractual disputes to those that "bear a substantial or reasonable relation to Florida or have at least one of the parties be a resident of Florida or incorporated under its laws."[31] As such, the deletion of the limitation appears to expand the jurisdiction of the courts of this state accordingly.

The changes to the choice-of-law and forum-selection statutes apply to contracts entered into on or after July 1, 2012.

[29] Several other jurisdictions have similar language in their respective long-arm statutes. 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 into a contract for services to be rendered or for materials to be furnished in [this state] by such person.").
[30] Section 685.101(2)(a), F.S.
[31] *Jetbroadband*, at 162.

Florida Enforcement of Foreign Judgments Act (Section 2)

The bill amends s. 55.502, F.S., to 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 will allow for the judgments, orders, and decrees from U.S. territories, such as Puerto Rico, to be recognized.

Florida International Commercial Arbitration Act (Sections 3 and 4)

The bill amends ss. 684.0019 and 684.0026, F.S., to correct cross-references to conform the Florida International Commercial Arbitration Act to the UNCITRAL Model Law on Commercial Arbitration.

Effective Date (Section 7)

The bill provides that it will 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.

D. Other Constitutional Issues[32]

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."[33] 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.

[32] The constitutional analysis was adapted, in part, from Pendleton, *supra* note 16.
[33] *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 312-313 (1981).

To date, committee staff is unaware of any constitutional challenges to the New York choice-of-law statute, which is the model for the amendments in SB 486. In any event, ss. 685.101 and 685.102, F.S., will continue to preserve existing language that limits the application of the statutes *"to the extent permitted under the United States Constitution."*[34]

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."[35] Sections 685.101 and 685.102, F.S., as amended by this bill, under the statutes will have that effect, allowing them 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.[36]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private sector impact of SB 486 cannot be accurately determined. 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.[37]

C. Government Sector Impact:

The government sector impact of SB 486 cannot be accurately determined. According to the Office of the State Courts Administrator's 2012 Judicial Impact Statement, SB 486 could increase the number of contract actions filed in circuit court.[38] While the bill would likely impact workload, the office was unable to quantify to what extent.

[34] Sections 685.101 and 685.102, F.S.
[35] Franch, *supra*, note 20 ("This is especially true in jurisdictions such as New York where the courts give substantial recognition to the parties' freedom to contract.").
[36] *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).
[37] Eduardo Palmer, Summary of Proposed Legislation Submitted on Behalf of The Florida Bar International Law Section Addressing Legal Actions. (Nov. 2011) (on file with the Senate Committee on Judiciary).
[38] Office of the State Court Administrator, 2012 Judicial Impact Statement for SB 486 (Oct. 17, 2011) (on file with the Senate Committee on Judiciary).

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.