

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 186

INTRODUCER: Senator Diaz de la Portilla

SUBJECT: Jurisdiction of the Courts

DATE: March 15, 2013 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siples	Hrdlicka	CM	Favorable
2.	Brown	Cibula	JU	Pre-meeting
3.			RC	
4.				
5.				
6.				

I. Summary:

SB 186 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.

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
- Involve a party who is either a resident or is incorporated in this state.

Specifically, the bill amends s. 48.193, F.S., referred to as the long-arm statute, by extending 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 Florida courts from enforcing of choice-of-law provisions found in contracts where:

- The parties are not residents of this state.
- The parties are not residents of the United States.
- The transaction does not bear a substantial or reasonable relation to the state.

Additionally, the term “foreign judgment” found in s. 55.502, F.S., of the Florida Enforcement of Foreign Judgment Act, is amended to include judgments, decrees, and orders that are entitled to full faith and credit in the state.

The Florida International Commercial Arbitration Act, ch. 684, F.S., is amended to correct cross-references within the act to conform exactly to the UNCITRAL Model Law on Commercial Arbitration.

The bill creates s. 684.0049, F.S., to extend personal jurisdiction of Florida's courts to parties who initiate arbitration in Florida or enter into written contracts that provide for arbitration in this state for any action that may arise out of the arbitration or a resulting award.

This bill substantially amends the following sections of the Florida Statutes: 48.193, 55.502, 684.0002, 684.0003, 684.0019, 684.0026, 685.101, and 685.102.

The bill creates the following section of the Florida Statutes: 684.0049, F.S.

II. Present Situation:

Jurisdiction

The ability of a court to assert personal jurisdiction over a nonresident is subject to the constitutional Due Process Clause of the Fourteenth Amendment.¹ The test for determining whether a court may assert personal jurisdiction over a nonresident is whether the nonresident has “minimum contacts” in the forum so that commencing a proceeding against that individual does “not offend traditional notions of fair play and justice.”² Foreseeability is key; therefore, 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 limit on a court's ability to assert personal jurisdiction is derived from a state's long-arm statute. Such statutes can be drafted broadly⁴ to reach the maximum bounds of the Due Process Clause or narrowly by enumerating specific acts or activities that would allow a court to assume personal jurisdiction in a particular case. Florida's statute falls into 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

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 *Id.* 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 As an example of a broad long-arm statute, California's long-arm statute 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.” Cal. Civ. Proc. s. 410.10 (2012).

contacts has been met. As a practical matter, it could not do so because each case will depend upon the facts.⁵

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

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

Florida's choice-of-law and forum selection statutes 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.

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 to limit the power of a court to enforce a contractual provision designating Florida law as the law that will govern contract disputes. 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., excludes:

- Any transaction which does not bear a substantial or reasonable relation to this state in which every party is either or a combination of a U.S. resident and citizen, or where a business is incorporated or organized under the laws of another state and does not maintain a place of business in this state.
- Labor or employment contracts.
- Certain transactions involving trusts for personal, family, or household purposes.

In interpreting the collorary of s. 685.101, F.S., the court in *Jetbroadband WV, LLC v. MasTec North America, Inc.*, stated that the section only applies if:

- The contract bears a substantial or reasonable relation to Florida;
- At least one of the parties is either a resident or citizen of Florida (if a person); or
- A business is incorporated, organized under the laws of Florida, or maintains a place of business in Florida.⁷

Forum Selection Statute

The Florida Legislature adopted the forum selection statute, s. 685.102, F.S., together with its counterpart, the 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

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).

⁷ *Jetbroadband*, 13 So. 3d at 162 (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)).

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 generally favors forum selection clauses, unless it can be shown that enforcement would be unreasonable or unjust, or that the clause is invalid as a result of fraud or overreaching.⁸ As it relates to personal jurisdiction and the minimum contacts analysis, the Court has also held that the minimum contacts standard is met if parties freely negotiated the forum selection clause and is not unreasonable or 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, ss. 685.101-.102 operate irrespective of whether the underlying contract bears any relation to Florida and notwithstanding any law to the contrary.⁹

Modern Trends Regarding Choice-of-Law Clauses

To promote predictability and certainty in commercial relation disputes, the use of choice-of-law provisions in contracts has increased significantly. As such, judicial enforcement of choice-of-law clauses has now become the norm.¹⁰ As one writer comments, states appear to compete for legal business by enforcing contractual choice-of-law.¹¹

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 4,507 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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⁸ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

⁹ *Jetbroadband*, 13 So. 3d at 162 (footnote omitted).

¹⁰ Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 382 (Winter 2003).

¹¹ *Id.* at 431.

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 place¹²

In addition, a cited benefit enjoyed by jurisdictions that have adopted statutes to authorize the enforcement of choice-of-law provisions found in contracts includes the attraction of business activity into the forum state.¹³ Some propose that choice-of-law clauses reduce parties' litigation costs to the extent 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.¹⁴

The American Law Institute has promulgated the Restatement (2d) of Conflict of Laws.¹⁵ Section 187 provides a 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."¹⁶ 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.¹⁷ 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" 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."¹⁸

Several jurisdictions, including New York, Delaware, California, and Illinois, have removed the substantial relationship requirement from their choice-of-law statutes.¹⁹

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."²⁰ Accordingly, under the Florida Enforcement of Foreign Judgments Act (Act),

¹² *Id.* at 432-434.

¹³ 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). *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 prerequisite 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.").

¹⁴ *Id.* at 403.

¹⁵ Restatement Second of Conflict of Laws (1971).

¹⁶ 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.

¹⁷ Restatement Second of Conflict of Laws at s. 187(2)(a).

¹⁸ *Id.* at s. 187(2)(b)

¹⁹ 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).

²⁰ U.S. CONST. art. IV, cl 1.

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.**²¹

Foreign judgments enforceable 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.”²² The Act is silent regarding whether territories or possessions are also entitled to full faith and credit under federal law.²³

In *Rodriguez v. Nasrallah*,²⁴ a Florida court clarified 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.

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 International 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, 7, 8, and 9)

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.²⁵ As a result, Florida courts may have personal jurisdiction in contracts cases

²¹ Section 55.503, F.S.

²² Section 55.502(1), F.S.

²³ 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.”).

²⁴ *Rodriguez v. Nasrallah*, 659 So. 2d 437, 439 (Fla. 1st DCA 1995).

²⁵ 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-

involving all 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 repealing the substantial relationship requirement from the choice-of-law statute.²⁶ This repeal appears to expand the jurisdiction of the courts of this state.

The changes to the choice-of-law and forum-selection statutes apply to contracts entered into on or after July 1, 2013.

Section 684.009, F.S., provides that initiating arbitration in Florida or the making of a written contract agreeing to arbitrate in this state constitutes consent for the courts of this state to assert personal jurisdiction over the parties. Personal jurisdiction applies to any action arising out of or in connection with the arbitration and any resulting order or award. This provision previously existed in statute and was removed upon the enactment of the UNCITRAL Model law.²⁷

Florida Enforcement of Foreign Judgments Act (Section 2)

The bill amends s. 55.502(1), F.S., relating to the definition of a foreign judgment to remove the limitation to only those orders from the 50 states that comprise the Union. This expressly allows Florida courts to recognize judgments, orders, and decrees from U.S. territories, such as Puerto Rico.

Section 10 provides an effective date of July 1, 2013.

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:

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

214 (2011) (“Entering into a contract for services to be rendered or for materials to be furnished in [this state] by such person.”).

²⁶ For further discussion of the current Choice-of-Law Statute, see the Choice-of-Law Statute subsection under the Present Situation section of this report.

²⁷ See s. 684.30, F.S. (2009).

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.”²⁸ 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 the *Hague* case did not include a contract where 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 a state’s law as governing.

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.”²⁹ 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 or unjust.³⁰

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private sector impact of this bill cannot be accurately determined. The Florida Bar, International Law Section, indicates that the bill enhances the business climate in Florida by clarifying and streamlining existing legislation related to international law matters which will increase Florida’s attractiveness as a business friendly state.

C. Government Sector Impact:

According to the Office of the State Courts Administrator’s 2013 Judicial Impact Statement, SB 186 could increase the number of contract actions filed in circuit court. While the bill would likely impact workload, the extent is unknown.³¹

²⁸ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981).

²⁹ 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.”).

³⁰ *Burger King*, 471 U.S. at 473, n. 14; *See also, Elandia International, Inc. v. Ah Koy, et al.*, 690 F. Supp. 2d 1317, 1340 (S.D. Fla. 2010).

³¹ Office of the State Courts Administrator, *2013 Judicial Impact Statement* (Jan. 11, 2013) (on file with the Senate Commerce and Tourism Committee and the Judiciary Committee).

VI. Technical Deficiencies:

None.

VII. Related Issues:

The 2012 Legislature passed the substance of this bill in HB 917 (Senate Bill 486 contained the Senate version.) Governor Scott subsequently vetoed the bill on the basis that the bill would permit individuals and businesses with no ties to Florida to litigate in our court system. “Establishing Florida as a destination for lawsuits by entities outside of the state of Florida is unattractive for the business climate.”³² The Governor also noted that increasing litigation in the state may add to a backlog of cases and increased judicial workload. The bill filed this year, SB 186, adds as a basis for personal jurisdiction the initiation of arbitration in this state.

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

³² Executive Office of the Governor, *House Bill 917 Veto Message* (April 13, 2012).