

**FLORIDA BAR INTERNATIONAL LAW SECTION
LEGISLATIVE COMMITTEE**

II. Amendment to Florida Statutes Chapter 685, Contract Enforcement: Choice of Law

A. Sections 685.101 and 685.102, Florida Statutes (2004)

685.101 Choice of law.--

(1) The parties to any contract, agreement, or undertaking, contingent or otherwise, in consideration of or relating to any obligation arising out of a transaction involving in the aggregate not less than \$250,000, the equivalent thereof in any foreign currency, or services or tangible or intangible property, or both, of equivalent value, including a transaction otherwise covered by s. 671.105(1), may, to the extent permitted under the United States Constitution, agree that the law of this state will govern such contract, agreement, or undertaking, the effect thereof and their rights and duties thereunder, in whole or in part, whether or not such contract, agreement, or undertaking bears any relation to this state.

(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;

(b) For labor or employment;

(c) Relating to any transaction for personal, family, or household purposes, unless such contract, agreement, or undertaking concerns a trust at least one trustee of which resides or transacts business as a trustee in this state, in which case this section applies;

(d) To the extent provided to the contrary in s. 671.105(2); or

(e) To the extent such contract, agreement, or undertaking is otherwise covered or affected by s. 655.55.

(3) This section does not limit or deny the enforcement of any provision respecting choice of law in any other contract, agreement, or undertaking.

(4) This section applies to:

(a) Contracts entered into on or after June 27, 1989; and

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(b) Contracts entered into prior to June 27, 1989, if an action or proceeding relating to such contract is commenced on or after June 27, 1989.

685.102 Jurisdiction.--

(1) Notwithstanding any law that limits the right of a person to maintain an action or proceeding, any person may, to the extent permitted under the United States Constitution, maintain in this state an action or proceeding against any person or other entity residing or located outside this state, if the action or proceeding arises out of or relates to any contract, agreement, or undertaking for which a choice of the law of this state, in whole or in part, has been made pursuant to s. 685.101 and which contains a provision by which such person or other entity residing or located outside this state agrees to submit to the jurisdiction of the courts of this state.

(2) This section does not affect the jurisdiction of the courts of this state over any action or proceeding arising out of or relating to any other contract, agreement, or undertaking.

(3) This section applies to:

(a) Contracts entered into on or after June 27, 1989; and

(b) Contracts entered into prior to June 27, 1989, if an action or proceeding relating to such contract is commenced on or after June 27, 1989.

B. Proposed Amendments

685.101 Choice of law.

(1) The parties to any contract, agreement, or undertaking, contingent or otherwise, in consideration of or relating to any obligation arising out of a transaction involving in the aggregate not less than \$250,000, the equivalent thereof in any foreign currency, or services or tangible or intangible property, or both, of equivalent value, including a transaction otherwise covered by s. 671.105(1), may, to the extent permitted under the United States Constitution, agree that the law of this state will govern such contract, agreement, or undertaking, the effect thereof and their rights and duties thereunder, in whole or in part, whether or not such contract, agreement, or undertaking bears any relation to this state.

(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;~~

(ab) For labor or employment;

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~~(be) Relating to any transaction for personal, family, or household purposes, unless such contract, agreement, or undertaking concerns a trust at least one trustee of which resides or transacts business as a trustee in this state, in which case this section applies;~~

~~(cd) To the extent provided to the contrary in s. 671.105(2); or~~

~~(de) To the extent such contract, agreement, or undertaking is otherwise covered or affected by s. 655.55.~~

(3) This section does not limit or deny the enforcement of any provision respecting choice of law in any other contract, agreement, or undertaking.

(4) This section applies to:

(a) Contracts entered into on or after ~~[effective date of statute]~~ June 27, 1989; and,

~~(b) Contracts entered into prior to June 27, 1989, if an action or proceeding relating to such contract is commenced on or after June 27, 1989.~~

685.102 Jurisdiction.

(1) Notwithstanding any law that limits the right of a person to maintain an action or proceeding, any person may, to the extent permitted under the United States Constitution, maintain in this state an action or proceeding against any person or other entity residing or located outside this state, if the action or proceeding arises out of or relates to any contract, agreement, or undertaking for which a choice of the law of this state, in whole or in part, has been made pursuant to consistent with s. 685.101 and which contains a provision by which such person or other entity residing or located outside this state agrees to submit to the jurisdiction of the courts of this state.

(2) This section does not affect the jurisdiction of the courts of this state over any action or proceeding arising out of or relating to any other contract, agreement, or undertaking.

(3) This section applies to:

(a) Contracts entered into on or after ~~[effective date of statute]~~ June 27, 1989; and,

~~(b) Contracts entered into prior to June 27, 1989, if an action or proceeding relating to such contract is commenced on or after June 27, 1989.~~

III. Amendment to Florida Statutes Chapter 48, Service of Process

The following proposed legislative amendments for Chapter 48 are scheduled to be discussed at the International Law Section, Executive Council meeting in June, 2005.

Background

We have proposed for legislative review defects in portions of Florida Statutes Chapter 48 dealing with service of process in the context in which international litigators often find themselves: (1) service on entities that are no longer in Florida or (2) having been here, the entities have disappeared leaving damage or contractual liability behind. Chapter 48 attempts to deal with the issue; however, the problem is the lack of continuity among all of the sections of Chapter 48 dealing with service of process and the resulting

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uncertainty among plaintiffs and defendants as to whether service was effective. The key sections for legislative review and possible amendment would comprise at a minimum §§ 48.081, 48.091, 48.101, 48.151, 48.161 and 48.181, Florida Statutes.

Problems

Setting aside the issue of service of process on foreign individuals, it is useful to test Chapter 48 with reference to 3 common scenarios faced by plaintiffs in Florida attempting service.

(1) Service on a foreign corporation or LLC that did business in Florida but is not registered here. Service in this scenario is generally dealt with under § 48.181, Fla. Stat. Some preliminary problems identified are:

- A. Section 48.181 does not specify that it applies to limited liability companies.
- B. Section 48.181 only specifies “foreign corporations” doing business in FL; perhaps statute should apply to all entities, domestic and foreign, doing business in Florida.

(2) Service on a Florida-registered (foreign or domestic) corporation (or LLC) that has disappeared from Florida leaving none of the officers, employees, registered agent or agents listed in § 48.081, Fla. Stat. A preliminary problem identified is:

- A. Under § 48.081, Fla. Stat., a plaintiff does not have the option of serving a domestic corporation by service on Florida’s Secretary of State if all of the enumerated individuals in the statute cannot be located or have disappeared. By contrast, a plaintiff may serve a foreign corporation by serving Florida’s Secretary of State under § 48.181, Fla. Stat.

(3) Service on a foreign corporation or LLC that has caused damage in Florida but may not have done business in the state. Some preliminary problems are:

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- A. In this scenario, a plaintiff must generally use substituted service statute for individuals causing harm in Florida. *See, e.g.*, §§ 48.171 and 48.181, Fla. Stat. Alternatively, a plaintiff may obtain service outside the state under § 48.194, Fla. Stat. What if the foreign corporation cannot be located? Chapter 48 is unclear as to when a plaintiff may invoke the substituted service statute as a mechanism for service on a foreign corporation in this scenario?
- B. Section 48.161, Fla. Stat. is difficult to understand starting with the first phrase “When authorized by law...”

Conclusion

A fundamental overhaul of Chapter 48 could simplify service of process by adopting a unified approach rather than the fractured unmatched set of statutory sections presently in place. In the near term, however, without requiring an overhaul of the chapter, the subcommittee should be willing to live with changes to the statute that will at least offer a clear, if circuitous, answer to the question of the validity of the service for the searching litigant.