FIU Law Review

Volume 8 | Number 1 Article 14

Fall 2012

The Impact of "Anti-Sharia" Legislation on Arbitration and Why Judge Nielsen in Florida Got It Right

Katherine A. Sanoja

Online ISSN: 2643-7759

Recommended Citation
Katherine A. Sanoja, *The Impact of "Anti-Sharia" Legislation on Arbitration and Why Judge Nielsen in Florida Got It Right*, 8 FIU L. Rev. 181 (2012).
DOI: https://dx.doi.org/10.25148/lawrev.8.1.14

The Impact of "Anti-Sharia" Legislation on Arbitration and Why Judge Nielsen in Florida Got It Right

*Katherine A. Sanoja**

INTRODUCTION

Several cases in the past few years,[1] in addition to growing anti-Muslim sentiment in the aftermath of the 9/11 attacks, have sparked a wave of debates over the role of foreign and international law in many of the states' legislatures.[2] In an effort to ban the application of Sharia law, almost half of the states have proposed legislation containing blanket prohibitions against the application of foreign or international law by state courts.[3] Although most of the bills and proposed constitutional amendments have died in committees or have failed adoption,[4] the impulsive reaction of legislatures to draft this type of legislation demonstrates a distrust and misunderstanding about the relationship between domestic law and international and foreign law.[5]

Beginning in 2010, legislators across the United States proposed bills and/or constitutional amendments limiting the application and

---

* J.D., Florida International University College of Law, 2012.

1 *See, e.g.*, Mansour v. Islamic Educ. Ctr., No. 08-CA-3497 (Fla. 13th Cir. Ct. Mar. 22, 2011); S.D. v. M.J.R., 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010) (reversing lower court's decision denying a wife's request for a restraining order against her husband and rejecting lower court's finding that husband's religious views caused him to lack criminal intent); Abd Alla v. Mourssi, 680 N.W.2d 569 (Minn. Ct. App. 2004); Jabri v. Qaddura, 108 S.W.3d 404 (Tex. App. 2003).

2 Elizabeth Flock, *Sharia Law Ban: Is Oklahoma's Proposed Ban Discriminatory or Needed?*, WASH. POST (Jan. 11, 2012, 11:55 AM), http://www.washingtonpost.com/blogs/blogpost/post/sharia-law-ban-is-oklahomas-proposal-discriminatory-or-useful/2012/01/11/gIQAGFP1qP_blog.html.

3 Robert P. Jones, *The State of Anti-Sharia Bills,* WASH. POST (Feb. 29, 2012, 3:55 PM), http://www.washingtonpost.com/blogs/figuring-faith/post/the-state-of-"anti-sharia"-bills/2012/02/29/gIQAql5miR_blog.html.

4 Bill Raftery, *Bans on Court Use of Sharia/International Law: Law in Arizona, Bills Advance in Missouri and Texas, Failing in Most States,* GAVEL TO GAVEL (May 3, 2011), http://gaveltogavel.us/site/2011/05/03/bans-on-court-use-of-shariainternational-law-law-in-arizona-bills-advance-in-missouri-and-texas-failing-in-most-states.

5 *See, e.g.*, Flock, *supra* note 2; William R. Levesque, *Judge Explains Use of Islamic Law*, TAMPA BAY TIMES, Mar. 23, 2011, at 1B.

use of foreign and international law.[6] Although so far only four states adopted the proposed legislation,[7] many of the bills that were introduced in 2011 made a comeback in the 2012 legislative session.[8] Thirty-three bills in total are being considered, fifteen of which were carried over from the 2011 legislative session.[9] The most recent states to propose bills in this area are Georgia, Mississippi, Kentucky, New Jersey, and Virginia.[10]

The move to propose bans or limitations on the use of international or foreign law has significant constitutional implications under the First and Fourteenth Amendments and has the potential to undermine commercial and social intercourse through private arbitration. Part I briefly touches on the political and social contours that prompted legislatures to consider this issue. Part II offers a historical reflection on arbitration and the choice-of-law clause, and the limitations on the recognition of party autonomy and choice-of-law provisions under the principle of "freedom to contract." Part III provides an analysis of relevant case law on the recognition of choice of foreign law clauses and the application of international law in domestic cases. Finally, Part IV is a critical analysis of legislation that has been enacted into law, and the impact such legislation will have on arbitration and international business transactions.

I. BACKGROUND

In Florida, Circuit Court Judge Richard A. Nielsen was severely criticized by conservatives and the media after his decision to uphold the application of Sharia law to a dispute between parties involved

---

6 Aaron Fellmeth, *International Law and Foreign Laws in the U.S. State Legislatures*, INSIGHTS (May 26, 2011), http://www.asil.org/insights110526.cfm (22 states proposed legislation by 2011).

7 H.B. 2064, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (approved on Apr. 12, 2011, effective Apr. 13, 2011) (codified at 2011 Ariz. Sess. Laws Ch. 22); H.J.R. 1056, 52d Leg., 2d Sess. (Okla. 2010) (Okla. "Save Our State" Const. Amend., amending art. 7, §1); H.B. 785, 2010 Reg. Sess. (La. 2010) (approved June 29, 2010; effective Aug. 15, 2010) (codified at 2011 La. R.S. 9:6000); H.B. 3768, 106th Gen. Assemb., Reg. Sess. (Tenn. 2010) (approved May, 27, 2010) (codified at 2010 Tenn. Pub. Act. 983).

8 Bill Raftery, *Bans on Court Use of Sharia/International Law: 33 Bills in 20 States to Start 2012; Review of All Efforts since 2010,* GAVEL TO GAVEL (Jan. 30, 2012), http://gaveltogavel.us/site/2012/01/30/bans-on-court-use-of-shariainternational-law-33-bills-in-20-states-to-start-2012-review-of-all-efforts-since-2010.

9 *Id.*

10 H.B. 631, 2012 Reg. Sess. (Va. 2012) (introduced Jan. 11 2012); A919, 215th Leg., Reg. Sess. (N.J. 2012) (Pre-filed on Jan. 10, 2012); H.B. 698, 106th Gen. Assemb., 2012 Reg. Sess. (Miss. 2012); 2012 Reg. Sess. H.B. 386 (Ky. 2012); S.R. 926, 2011-2012 Reg. Sess. (Ga. 2012) (Const. Amend.).

with the Islamic Education Center in Tampa.[11] Both parties had initially agreed to the application of Sharia law to their dispute in arbitration.[12] However, after the arbitration, the losing party sought to invalidate the award in state court on the basis that the application of Sharia law was unconstitutional and that Florida law should decide the dispute.[13] The judge ruled that the two parties were bound by the rules they set forth in their own arbitration agreement and that the court's only role was to ensure that the rules agreed upon, in this case based on Sharia, were followed.[14] Even though the judge affirmed the application of Sharia law, he applied Sharia only because the principles of United States' contract law dictated that result.[15]

This Florida case is the type of case cited by "anti-Sharia" legislation proponents as an example of the intrusion of Sharia into our legal system.[16] David Yerulshami, general counsel for the Center for Security Policy, a Washington-based research institute, has been at the forefront of the anti-Sharia movement.[17] Much of the proposed legislation has been modeled after "anti-Sharia" legislation drafted by Mr. Yerulshami himself.[18]

---

11 Levesque, *supra* note 5; *see also Should Rulings Under Any Law but US Law Be Allowed?*, RUSH LIMBAUGH REPORT (Mar. 24, 2011), http://rushlimbaughreport.blogspot.com/2011/03/should-rulings-under-any-law-but-us-law.html.

12 Mansour v. Islamic Educ. Ctr., No. 08-CA-3497, at *3 (Fla. 13th Cir. Ct. Mar. 22, 2011).

13 *See id.* at *2.

14 *Id.* at *4; *see also* William R. Levesque, *Appeals Court Will Not Stop Hillsborough Judge from Considering Islamic Law,* TAMPA BAY TIMES (Oct. 25, 2011), http://www.tampabay.com/news/courts/civil/appeals-court-wont-stop-hillsborough-judge-from-considering-islamic-law/1198321 (appellate court denied a petition filed by the Islamic Education Center challenging Judge Nielsen's decision).

15 *Mansour,* No. 08-CA-3497, at * 4 (judge ruled based on neutral principles of contract law which grant deference to the parties' choice of law as long as it does not violate public policy).

16 CENTER FOR SECURITY POLICY, SHARIAH LAW AND AMERICAN STATE COURTS: AN ASSESSMENT OF APPELLATE COURT CASES 11, 165-69 (May 20, 2011), *available at* http://shariahinamericancourts.com.

17 Andrea Elliott, *Behind an Anti-Shariah Push,* N.Y. TIMES, Jul. 31, 2011, at A1; *see also Dispelling the Sharia Threat Myth: Implications of Banning Courts from Referencing Religious, Foreign or International Law* [hereinafter *Dispelling Sharia Threat*],Webinar held by the American Bar Association Section of Individual Rights and Responsibilities and the ABA Center for Continuing Legal Education (Dec 7, 2011) (CD-ROM on file at Florida International University Library); Pamela Geller, *Oklahoma's Amendment Banning Shariah,* ATLAS SHRUGS (Nov. 29, 2010), http://atlasshrugs2000.typepad.com/atlas_shrugs/2010/11/oklahoma-amendment-banning-shariah.html.

18 Elliott, *supra* note 17; *see also* Matt Sedensky, *Florida Foreign Law Ban: Measure Banning Shariah, Other Foreign Law Progresses in Statehouse,* HUFFINGTON POST (Mar. 2, 2012), http://www.huffingtonpost.com/2012/03/02/florida-foreign-law-ban-shariah_n_1315873.html.

Although most of the laws proposed contain blanket provisions banning the application of foreign or international law,[19] the real impetus behind this type of legislation is an increasing fear that Sharia law will enter the United States' judicial system.[20] One need only take a look at the language of Tennessee's 2011 proposed House Bill No. 1353 and Senate Bill No. 1028 to understand the political "reality" that is fueling this type of legislations.[21] Politicians have capitalized on increasing anti-Muslim sentiment[22] and the proposal of anti-Sharia law provisions as an opportunity to reinforce a concern for United States' sovereignty and national security.[23] The media and politicians have grasped onto the country's anti-Muslim sentiment, exaggerating and misconstruing the reality and place of Sharia in the United States.[24] Illustrating the political xenophobia fueling the proposal of anti-Sharia legislation, Oklahoma State Representative Rex Duncan stated, "understand that this is a war for the survival of America. It's a cultural war, it's a social war, it's a war for the survival of our country."[25]

In order to avoid constitutional issues, states proposing this type of legislation have done so under the premise of banning the application of all international or foreign law domestically in their courts.[26]

---

19 *See, e.g.*, S.B. 84, 2012 Reg. Sess. (Ala. 2012) (const. amend.); H.B. 1209, 2012 Reg. Sess. (Fla. 2012); S.B. 1360, 2012 Reg. Sess. (Fla. 2012); S.B. 676, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012).

20 *See generally* Sedensky, *supra* note 18.

21 S.B. 1028, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011); H.B 1353, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011) (effective June 16, 2011) (codified at 2011 Tenn. Pub. Act. 497) (Both bills contain the following language: "Jihad and sharia are inextricably linked . . . [t]he unchanging and ultimate aim of jihad is the imposition of sharia on all states and nations, including the United States and this state; further, pursuant to its own dictates, sharia requires the abrogation, destruction, or violation of the United States and Tennessee Constitutions and the imposition of sharia through violence and criminal activity.").

22 *See* Amaney Jamal, *Muslim Americans: Enriching or Depleting American Democracy?*, *in* RELIGION AND DEMOCRACY IN THE UNITED STATES: DANGER OR OPPORTUNITY? 89, 95 (A. Wolfe & I. Katznelson eds., 2010). A 2005 survey showed that "36 percent of the American population believes Islam encourages violence; another 36 percent reported that they have unfavorable opinions about Islam."

23 *See* Russell Goldman, *Bachmann Opposed to Sharia Law, Says it 'Usurps' Constitution*, ABC NEWS (Nov. 2. 2011), http://abcnews.go.com/blogs/politics/2011/11/bachmann-opposed-to-sharia-law-says-it-usurps-constitution.

24 Amy Sullivan, *The Myth of Sharia Law in America*, HUFFINGTON POST ONLINE (Jun. 15, 2011), http://www.huffingtonpost.com/amy-sullivan/sharia-myth-america_b_876965.html ("We should have a federal law that says under no circumstances in any jurisdiction in the United States will sharia be used," Gingrich announced at last fall's Values Voters Summit).

25 Leah Nelson, *Oklahoma's Shariah Law Ban Creates Controversy,* INTELLIGENCE REPORT, Spring 2011, *available at* http://www.splcenter.org.

26 Although most states have proposed blanket prohibitions without singling out Sharia law, the titles of some of the proposed legislation demonstrate the political impetus for enacting these laws. *See, e.g.*, H.J.R. 1056, 52d Leg., 2d Sess. (Okla. 2010) (Okla. "Save Our State" Const.

However, most of the legislations proposed ban the application of foreign law only if its application would not afford the same constitutional rights guaranteed by the United States and the respective state's constitution.[27] Only one state, whose legislation was passed, expressly mentions Sharia law in its legislation.[28] Since 2010, six states have passed legislation or constitutional amendments that ban the use of international and foreign law in their domestic courts.[29] In 2012, Alabama, among other states, sought to introduce a constitutional amendment banning the application, use, or enforcement of foreign law that would contravene the state's public policy.[30] Two states, South Dakota and Kansas, enacted anti-Sharia legislation in 2012.[31] South Dakota's law expressly outlawed the application or enforcement of any religious law.[32] Prior to the end of the 2012 legislative session, Michigan was attempting to pass its own controversial legislation.[33]

The United States' disdain for the application of foreign law is not imbedded in our judicial history to the extent that it is purported

---

Amend., amending art. 7, §1); S.B. 33, 2012 Reg. Sess. (Ala. 2012) ("American and Alabama Laws for Alabama Courts Amendment").

27 *See, e.g.*, S.R. 926, 2011-2012 Reg. Sess. (Ga. 2011) (No recognition or enforcement of any foreign or religious law that is "contrary to or incompatible with" the U.S. Constitution or the Constitution of Georgia and the laws, including common law, recognized by the State of Georgia).

28 OKLA. STATE ELECTION BD., STATE QUESTIONS FOR GENERAL ELECTION 7 (Nov. 2, 2010) (Oklahoma passed a constitutional amendment OK HJR 1056, Nov. 2010, which expressly bans courts from considering Sharia or international law in their decisions.), *available at* http://www.ok.gov/elections/documents/sq_gen10.pdf; *see also* H.B. 698, 106th Gen. Assemb., 2012 Reg. Sess. (Miss. 2012) (like the Constitutional Amendment in Okla. this bill expressly singled out Sharia law in its language; bill died in committee).

29 H.B 2064, 50th Leg., 1st. Reg. Sesss. (Ariz. 2011) (approved on Apr. 12, 2011, effective Apr. 13, 2011) (codified at 2011 Ariz. Sess. Laws Ch. 22); H.J.R. 1056, 52d Leg., 2d Sess. (Okla. 2010) (Okla. "Save Our State" Const. Amend., amending art. 7, §1); H.B. 785, 1st Reg. Sess.(La. 2010) (approved June 29, 2010; effective Aug. 15, 2010) (codified at 2011 La. R.S. 9:6000); H.B. 3768, 106th Leg. Assemb., Reg. Sess. (Tenn. 2010) (approved May, 27, 2010) (codified at 2010 Tenn. Pub. Act. 983; 2012); H.B. 1253, 87th Leg., Reg. Sess. (S.D. 2012) (signed into law March 12, 2012); S.B. 79, 2011 Reg. Sess. (Kan. 2011) (signed into law May 21, 2012).

30 *See, e.g.*, S.B. 33, 2012 Reg. Sess. (Ala. 2012); S.J.R. 14, 2012 Reg. Sess. (N.M 2012) (all to be considered during the 2012 legislative session).

31 H.B. 1253, 87th Leg., Reg. Sess. (S.D. 2012) (signed into law March 12, 2012); S.B. 79, 2012 Reg. Sess. (Kan. 2011) (signed into law May 21, 2012).

32 H.B. 1253, 87th Leg. , Reg. Sess. (S.D. 2012) (prevents any court or administrative body, including a private arbitration tribunal, from entering a judgment "predicated on a religious code, or enforce any provisions of any religious code").

33 H.B. 4769, 96th Leg., Reg. Sess. (Mich. 2011) (on calendar for a vote on December 14, 2012); '*Anti-Sharia' Supporters Push for Action on Michigan House Bill Targeting Islamic Ideology*, HUFFINGTON POST ONLINE (Nov. 26, 2012), http://www.huffingtonpost.com/2012/11/26/anti-sharia-law-michigan-house-bill_n_2192221.html (Several groups spoke out against Michigan's legislation including the ACLU and Council on American-Islamic of Michigan).

today.[34] In 1820, Justice Joseph Story cited more than twenty-five sources of foreign law.[35] Justice Livingston criticized Justice Story not for his reliance on foreign law, but rather for the open definition that international law provided.[36] The role of international or foreign law in domestic judicial decision-making has in recent years been hotly debated.[37] In her 2009 confirmation hearings, Justice Sonia Sotomayor was asked several times to state her position on the role of international or foreign law in judicial decision making.[38]

It is not unusual for domestic courts to enforce foreign law through choice-of-law clauses that are usually found in contracts or private law instruments such as wills, trusts, and financial instruments.[39] Legislation proposed or adopted in regards to a blanket prohibition on the use of foreign or international law by a domestic court would infringe on a court's ability to enforce choice-of-law clauses.[40] This type of legislation is bound to have its greatest impact on the utilization of international dispute resolution mechanisms in the United States because these inevitably involve at least one foreign party and in many instances the application of foreign law.[41] The legislation would specifically undermine arbitration proceedings because it would allow ex post facto attacks by the losing party on any award rendered on the basis of the foreign law chosen by the parties.[42] In other words, the losing party could claim that the application of the foreign law would be contrary to the state's public policy.[43]

The haste in which states proposed these legislative provisions demonstrates a lack of proper consideration of the consequences of

---

34 David J. Seipp, *Our Law, Their Law, History and the Citation of Foreign Law,* 86 B.U. L. REV. 1417, 1427 (2006).

35 *Id.* at 1428.

36 United States v. Smith, 18 U.S. (5 Wheat) 153, 181-82 (1820) (Livingston, J., dissenting) (pointing out that Congress declared piracy to be defined by the "law of nations," given how difficult it was hard for a defendant to figure out what constitutes the "law of nations").

37 *Supreme Court Justices Spar Over International Law*, ASSOCIATED PRESS (Jan. 18, 2005), http://www.law.com/jsp/article.jsp?id=1105364112559&slreturn=1.

38 *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be An Associate Justice of the Supreme Court of the United States*: *Hearing before the S. Comm. on the Judiciary*, 111th. Cong. 132-33 (2009) (explaining her position on the role of international law in domestic legal decision-making) [hereinafter *Sotomayor Confirmation Hearing*].

39 Aziz Z. Huq, *Private Religious Discrimination, National Security, and the First Amendment,* 5 HARV. L. & POL'Y REV. 347, 370 (2011).

40 *Id.*

41 Stephen T. Ostrowski & Yuval Shany, Chromalloy*: United States Law and International Arbitration at the Crossroads*, 73 N.Y.U. L. REV. 1650, 1650-51 (1998) ("Arbitration as a means of effective international dispute resolution has grown rapidly over the last twenty-five years, and most transnational contracts today contain some provision for arbitration.").

42 *See, e.g.*, Mansour v. Islamic Educ. Ctr., No. 08-CA-3497 (Fla. 13th Cir. Ct. Mar. 22, 2011).

43 *Id.*

enacting them into law.[44] This type of legislation seeks to prevent state courts from exercising some of their most basic functions, including enforcement of commercial contracts, inter-country adoptions, foreign marriages, Native American treaties, foreign judgments, faith-based dispute resolution mechanisms, and cases of international child abduction.[45] In addition to the intended goal of banning the application of Sharia by the courts, this type of legislation carries with it many unintended consequences including far-reaching effects on the enforceability of international arbitration agreements and an increased uncertainty in the outcome of litigation or arbitration.[46]

II. HISTORICAL UNDERPINNINGS OF CONTRACTUAL LAW

Capitalism has flourished under a principle of "freedom to contract,"[47] which is protected by the Fourteenth Amendment.[48] Freedom of contract represents the ultimate exercise of liberty, as embodied in the Declaration of Independence,[49] between two parties to exchange resources.[50] Contracts are based on the common law principle that "private agreements should be enforced in accordance with their terms."[51] Therefore, the ability of parties to enter into private agreements and to resolve their private disputes through private arbitration is a legitimate exercise of the freedom guaranteed under the Fourteenth Amendment.[52]

The Supreme Court has recognized that "[t]here are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect."[53] In the words of Justice Erle, "[e]very man is the master of the contract he may choose to make: and it is of the highest importance that every contract should be construed ac-

---

44 *See* Dara Kam, *Anti-Sharia Law Bill Heads to Senate Floor,* PALM BEACH POST (Mar. 5, 2012, 5:58 PM), http://www.palmbeachpost.com/news/state/"anti-sharia"-law-bill-heads-to-senate-floor-2218704.html. Although the bill eventually died in the Senate on Mar. 9, 2012, the Senate Committee only deliberated three minutes before signing off on the bill.

45 *Dispelling Sharia Threat*, *supra* note 17.

46 *Id.*

47 *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 2-3 (40th ed. 2002).

48 *See* Lochner v. New York, 198 U.S. 45, 53 (1905).

49 THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

50 ENCYCLOPEDIA OF BUSINESS ETHICS AND SOCIETY 444 (Robert W. Kolb ed. 2008).

51 Richard A. Epstein, *Unconscionability: A Critical Reappraisal,* 18 J. L. & ECON. 293 (1975).

52 *See generally Lochner*, 198 U.S. at 45.

53 M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-13 (1972); *see also* Larry E. Ribstein, *Choosing Law by Contract,* 18 J. CORP. L. 245, 246-55 (1993) ("Uncertainty about choice-of-law at the time of litigation can increase both the costs and frequency of litigation.").

cording to the intention of the contracting parties."[54] On that same note, in order to protect the reasonable expectations of the parties and increase judicial economy and predictability, courts generally give full effect to a parties' valid choice-of-law clause.[55]

Courts have found few exceptions to the policy of non-interference with the freedom of contract, setting aside the provisions agreed upon by parties of a dispute only under certain limited circumstances.[56] The common law has recognized grounds for disregarding contractual provisions under fraud, duress, incompetence, and unconscionability.[57]

The general rule is that parties should enjoy complete freedom to contract.[58] In other words, "competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."[59] Courts have long held a view of non-interference with this freedom unless necessary, based on public policy grounds.[60]

This power to void a contract based on public policy is limited as recognized in *Richmond v. Dubuque*.[61] In that case, the court noted the limits on its power to void a contract that contravenes public policy stating that this power "is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."[62]

Similarly, a result contrary to that which might result in a domestic court under domestic law is an insufficient ground to reject a choice-of-law clause.[63] Courts have recognized that the "fact that an international transaction may be subject to laws and remedies different and less favorable than those of the United States" is not sufficient to justify the denial of that choice of law unless the law is inherently unfair.[64]

---

54 Clarke v. Watson, [1865] 18 C.B. (N.S.) 278, 284, 144 Eng. Rep. 450, 452.

55 *See, e.g.*, *M/S Bremen,* 407 U.S. at 12-15 (finding that "[t]he elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting").

56 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

57 *See generally* Epstein, *supra* note 51.

58 Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 356 (1931).

59 *Id.*

60 *See* Syester v. Banta, 133 N.W.2d 666, 668 (Iowa 1965) ("Since the beginning of recorded history men and women have persisted in selling their birthrights for a mess of pottage and courts cannot protect against the folly of bad judgment.").

61 Richmond v. Dubuque, 26 Iowa 191, 202 (1868).

62 *Id.*

63 *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985); Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1297 (11th Cir. 1998).

64 Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 958 (10th Cir. 1992), *cert. denied*, 506 U.S. 1021 (1992).

The Supreme Court has relied on "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" as a basis for its decision to enforce a party's agreement.[65]

The question then becomes whether the application of foreign law or international law in the arbitration of disputes goes against public policy. As a starting point, the following section will provide an exploration of the limitations imposed on choice-of-law clauses.

The Restatement (Second) of Conflict of Laws enumerates two main considerations for limiting the application of the contract's choice of law.[66] First, the contract's choice of law should be utilized if the issue in dispute is one that the parties could have resolved by explicit provision in their agreement.[67] Second, the law will be applied to the issue, even if an explicit provision would not have resolved it, unless (1) the chosen forum has no reasonable relationship to the parties or the contract and no other reasonable basis is apparent or (2) the application of the law would be contrary to the state's public policy, an interest that outweighs that of the state whose law was contractually chosen, and the determination of the issue, in the absence of a valid choice-of-law clause, would by default be governed by the law of that state.[68] This latter exception has broad implications and requires the exploration of what is meant by "public policy."

The general rule is that any contract or foreign law that contravenes a state statute or constitution can be said to violate that state's public policy.[69] There are, however, instances where the contract itself does not violate a statute or constitutional provision, particularly where there is no statute on point to regulate the conduct at issue, but the court nevertheless finds the contract to be against the public policy of that forum.[70]

---

65 *Mitsubishi,* 473 U.S. at 629; *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 518-19 (1974).

66 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1988).

67 *Id.*

68 *Id.*

69 *See, e.g.*, Harris v. Gonzalez, 789 So. 2d 405, 409 (Fla. 4th DCA 2001) ("A contract which violates a provision of the constitution or a statute is void and illegal, and, will not be enforced in our courts.").

70 *See, e.g.*, Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1396 (9th Cir. 1991) (balancing the public interest that would served by enforcement versus the public interest that would be furthered by non-enforcement); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981) (If no legislation regulates the conduct at issue, courts must weigh the parties' and public interest in enforcement of the contract against the strength of the public policy implicated by the contract and the furtherance of such policy by failure to enforce the contract.).

The term "public policy" itself is ambiguous.[71] In the 1800s, William W. Story recognized this ambiguity when he pointed out that the nature of public policy is "so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness."[72] In a more recent case in Florida, the court acknowledged that "public policy" is not easily defined.[73] The court in that case referred to public policy as "the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like."[74]

If foreign law is implicated, a court determining which law to apply should reject the foreign law if it violates public policy.[75] In the words of Justice Cardozo, one would need to find that the foreign law would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[76] Contracts governed by foreign law may be found void or unenforceable if contrary to the forum state's public policy.[77] Florida has recognized that it cannot impose its public policy to prohibit the enforcement of a foreign contract outside its borders, but within its courts it may do so.[78] In Alabama, a proposed constitutional amendment defines its public policy "to prohibit anyone from requiring Alabama courts to apply and enforce foreign laws."[79] By defining the application of foreign law itself as against the state's public policy, Alabama has expressly excluded foreign law, regardless of whether the "foreign law" actually contravenes public policy as traditionally defined by the courts. In other words, Alabama's knee-jerk reaction to enact legislation in this area has removed any discretion from the judges to consider public policy in their decisions.

Notwithstanding Alabama's proposed legislation, the definition of public policy generally remains vague and limitless in most states, and the issue now is whether our courts have done a good job of protecting judicial decisions from the influence of foreign law that con-

---

71 WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS § 675 (5th ed. 1874).

72 *Id*.

73 Harris v. Gonzalez, 789 So. 2d 405, 409 (Fla. 4th DCA 2001).

74 *Id*.

75 *See, e.g.*, Willard v. Aetna Cas. & Sur. Co., 193 S.E.2d 776, 778 (Va. 1973).

76 Herbert F. Goodrich, *Foreign Facts and Local Fancies,* 25 VA. L. REV. 26, 33-34 (1938).

77 *See, e.g.*, Turner v. Capitol Motors Transp. Co., 214 F. Supp. 545, 547 (D. Me. 1963).

78 *Harris*, 789 So. 2d at 409 (finding a contract unenforceable in Florida between a doctor and a supplement wholesaler because it violated public policy since the doctor would receive a portion of the profits in return for referring patients in violation of state legislation).

79 S.B. 33 § (b)(7), 2012 Reg. Sess. (Ala. 2012).

travenes United States' public policy. In other words, does our public policy warrant additional protections as zealously advanced by anti-Sharia organizations that fear the infiltration of foreign law into our judicial decisions?

After looking at case law in various states where "anti-Sharia" legislation has been proposed, the only reasonable conclusion is that this type of legislation is not justified and only demonstrates a distrust of our judicial system.[80] Before addressing this in more detail, an overview of United States courts' treatment of choice-of-law clauses will demonstrate the historical and current practice of courts to allow parties to enter into contracts voluntarily, and, with very little limitation, to allow parties to decide the law that will apply to their dispute.

III. CASE LAW: GIVING EFFECT TO CHOICE-OF-LAW CLAUSES

Courts in the United States have a long history of giving effect to choice-of-law clauses unless doing so would violate a matter of public policy.[81] Under the principle of freedom to contract, choice-of-law clauses are generally enforced so long as they do not violate a public policy and there is a reasonable basis for the parties' choice of law.[82]

A choice-of-law clause allows parties to a contract to choose the law that will govern their contract and that which will apply should a dispute arise.[83] Legislation banning the use or application of foreign, Sharia, or international law would have a significant effect on parties' ability to freely choose the norms by which to govern their contracts and to freely consent to the application of a particular law.[84] Respect for a party's choice-of-law provides predictability and confidence to the parties that the court will enforce their contractual rights based on the norms to which they have consented.[85] Otherwise, parties' expec-

---

80 *See Nothing to Fear: Debunking the Mythical "Sharia Threat" to Our Judicial System*, 1, 5 ACLU (May 2011), *available at* http://www.aclu.org/files/assets/Nothing_To_Fear_Report_FINAL_MAY_2011.pdf*; Dispelling Sharia Threat*, *supra* note 17.

81 *See, e.g.*, L'Arbalete, Inc. v. Zaczac, 474 F. Supp. 2d 1314, 1321 (S.D. Fla. 2007) (noting that choice-of-law provisions are presumed valid unless the party seeking to avoid enforcement of them sufficiently carries the burden of showing that the foreign law contravenes strong public policy of the forum jurisdiction).

82 Applera Corp. v. MP Biomedicals, LLC, 93 Cal. Rptr. 3d 178 (Cal. Ct. App. 2009) (finding that there was a reasonable basis for the choice of Swiss law and application of Swiss law to award attorney fees to prevailing party would not violate public policy).

83 BLACK'S LAW DICTIONARY 275 (9th ed. 2009) (choice-of-law clause is defined as "a contractual provision by which the parties designate the jurisdiction whose law will govern any disputes that may arise between the parties").

84 *See Dispelling Threat of Sharia*, *supra* note 17.

85 Charles R. Calleros, *Toward Harmonization and Certainty in Choice-of-Law Rules For International Contracts: Should the U.S. Adopt the Equivalent of Rome I?*, 28 WIS. INT'L L. J. 639, 641-42 (2011).

tations would be unprotected, and the resulting lack of certainty and unpredictability would undermine the contractual relationship and commitment to perform as agreed upon.[86]

The Supreme Court has consistently recognized the presumptive validity of choice of forum and choice-of-law provisions.[87] In *M/S Bremen v. Zapata Offshore Co.*, the Court held that courts should enforce choice of law clauses in cases of "freely negotiated private international agreement[s]."[88] The Court, in essence, affirmed the right of contracting parties to choose their method of dispute resolution.[89]

The Court went on to state that choice-of-law clauses are generally enforceable, subject to the following limitations: (1) choice of law must be unaffected by fraud, undue influence, or overweening bargaining power; (2) enforcement of chosen laws must not be unreasonable or unjust to the party seeking a remedy; and (3) enforcement of the choice of law must not be contrary to public policy.[90]

States have also recognized choice-of-law provisions granting them presumed validity[91] "unless the party seeking to avoid enforcement of them sufficiently carries the burden of showing that the foreign law contravenes strong public policy of the forum jurisdiction."[92] Placing the burden on the party attempting to avoid enforcement of a foreign law in an international transaction reinforces the premise "that American parochialism would hinder the expansion of American business and trade, and more generally, interfere with the smooth functioning and growth of global commerce."[93]

A. Choice of Law in Arbitration

In arbitration, the freedom of the parties is generally broader than in traditional judicial proceedings because party autonomy is at the heart of arbitration.[94] A voluntary and consensual process drives arbitration.[95] Parties have the ability to agree to choose procedural

---

86 *Id*.

87 M/S Bremen v. Zapata Offshore Co., 407 U.S. 1, 10 (1972).

88 *Id.* at 12.

89 *Id.* at 12-14.

90 *Id.* at 14-18.

91 *See, e.g.*, Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co., 761 So. 2d. 306, 311 (Fla. 2000); Phillips v. Audio Active Ltd., 494 F.3d 378, 384 (2d Cir. 2007); Richards v. Lloyd's of London, 135 F.3d 1289, 1294 (9th Cir. 1998).

92 *See, e.g.*, L'Arbalete Inc. v. Zaczac, 474 F. Supp. 2d. 1314, 1321 (S.D. Fla. 2007).

93 GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 420 (1996); *see M/S Bremen*, 407 U.S. at 9.

94 *See* Cindy G. Buys, *The Arbitrators' Duty to Respect the Parties' Choice-of-Law in Commercial Arbitration*, 79 ST. JOHN'S L. R. 59, 59-61 (2005).

95 *See id.* at 59.

rules, control the range of the remedies to some extent, and choose the substantive law to govern their contract.[96] In part, this is due to the need to assure predictability in the commercial contractual setting.[97]

Historically, choice-of-law clauses in arbitration agreements were not greeted as warmly in the United States as choice-of-law clauses in contracts seeking enforcement in judicial settings.[98] This attitude has since changed.[99] This shift was best reflected in the *Mitsubishi* opinion:

> As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. . . . If [arbitration tribunals] are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration," (citation omitted) and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal.[100]

Now in conflict of law decisions, party autonomy has become increasingly respected by jurisdictions across the world.[101]

In contracts involving interstate commerce, which include an arbitration clause, federal law prempts state law in governing the enforceability of those contracts. Specifically, the Federal Arbitration Act ("FAA")[102] applies to interstate contracts and "establishes a national policy favoring arbitration when the parties contract for that

---

96 U.N. Comm. on Int'l Trade Law, UNCITRAL Model Law on International Commercial Arbitration, art. 5, 8, 19, 28, 34, 36, U.N. Sales No. E.08.V.4 (2006).

97 *See generally* Kuehn v. Childrens Hospital, Los Angeles, 119 F.3d 1296 (7th Cir. 1997). Generally, choice-of-law clauses are enforced because of the need to provide predictability to the parties and to protect the parties' expectations, and therefore in the absence of a valid choice-of-law clause, the parties expectations would not be frustrated by the court's choice-of-law determination.

98 Buys, *supra* note 94, at 63-64 (quoting J. Stewart McClendon & Rosable E. Everard Goodman, INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 114 (1986); *see also M/S Bremen*, 409 U.S. at 9-10 (recognizing that historically "[m]any courts, federal and state, have declined to enforce such clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction of the court'").

99 Scherk v. Alberto-Culver Co., 417 U.S. 506, 507 (1974) (finding that "a contractual provision specifying in advance the forum for litigating disputes and the law to be applied is an almost indispensable precondition to achieving the orderliness and predictability essential to any international business transaction").

100 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985) (quoting Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942)).

101 Matthias Lehmann, *Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT'L L. 381, 385 (2008). The Institute of International Law calls party autonomy "one of the fundamental principles in private international law." *Id.*; Institute of International Law, *Resolution on the Autonomy of the Parties in International Contracts Between Private Persons or Entities*, 64 II Y.B. 383 (1991).

102 9 U.S.C. § 1 (2006).

mode of dispute resolution."[103] Even when parties have chosen state law to control the contract, the arbitration clause is governed by the FAA.[104] The Supreme Court has held that in interstate commercial transactions, the FAA preempts state law in enforcing an agreement to arbitrate.[105] Although the FAA contains preemptive force in favor of arbitration, this power may be limited in state court proceedings.[106] For example, the FAA's procedural rules do not necessarily apply in state proceedings.[107] However, FAA's substantive rules would apply in federal as well as state courts.[108] This would lead to the conclusion that the FAA preempts any state law, including any anti-Sharia legislation that would bar the enforcement of a party's choice-of-law clause in a contract or arbitration agreement.

In *Preston v. Ferrer*, the United States Supreme Court reinforced the federal policy favoring arbitration by emphasizing that this "national policy . . . applies in state as well as federal courts [and] forecloses any state legislative attempts to undercut the enforceability of arbitration agreements."[109] This language strongly suggests that parties attempting to stay arbitration proceedings on the grounds that foreign law is being applied would be forced, unless otherwise provided for in their contract, to decide those issues before an arbitration panel.[110]

Turning to the anti-Sharia and anti-foreign or international law statutes promulgated by a large portion of the states' legislatures, the issue then becomes not whether the arbitration tribunal would not enforce the parties' choice of law, but if they did, would the arbitral award be enforceable? In a hypothetical situation, two parties sign a contract with both arbitration and choice-of-law clauses that require that the arbitration be governed by Sharia law. Subsequently, the par-

---

103 Preston v. Ferrer, 552 U.S. 346, 349 (2008).

104 *Id.*

105 Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 275-76, 281 (1995) (holding where object of contract containing arbitration clause involves interstate commerce, clause is enforceable under FAA).

106 *See* Howard S. Suskin & Stuart D. Polizzi, *A Cautionary Reminder About the Unique Application of the Federal Arbitration Act in State Court Proceedings*, 38 SEC. REG. & L. REP. 2066 (2006).

107 *Id.*; *see also* Atl. Painting & Contracting Inc. v. Nashville Bridge Co., 670 S.W.2d 841, 846-47 (Ky. 1984); Simmons Co. v. Deutsche Fin. Servs. Corp., 532 S.E.2d 436, 439-40 (Ga. Ct. App. 2000).

108 M. Praveen Chakravarthy, *Philosophy of Commercial Arbitration,* FINANCIAL TIMES (June 4, 1999).

109 *Preston*, 552 U.S. at 353 (citing Southland Corp., v. Keating, 465 U.S. 1, 16 (1984)).

110 *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-49 (2006) (finding that "regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator"); *see generally* Archis A. Parasharami & Kevin Ranlett, *Supreme Court Addresses Volt's Choice-of-Law Trap: Is the End of the Problem in Sight?*, 64 DISP. RESOL. J. 22, 26 (2009).

ties submit their dispute to an arbitral tribunal. The arbitration panel applies Sharia law and issues an award in favor of one party. Thereafter, the winning party seeks enforcement of that award in Oklahoma which has enacted anti-Sharia legislation.[111] Following these hypothetical facts, the court in Oklahoma would now have to vacate the award on the basis that it violates state law because the court, under the new constitutional amendment, "shall not consider international law or Sharia law."

Anti-Sharia legislation banning the application of foreign or international law has implications for judicial comity between states and foreign nations. Legislation banning the application of foreign or Sharia law would violate the Full Faith and Credit Clause of the U.S. Constitution.[112] This clause requires that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[113] Therefore, if a court in a state that does not have this outright ban on the consideration of foreign or Sharia law enforces an arbitration award that relied on foreign or Sharia law, the parties in that arbitration may be at risk of not having that judgment recognized in another state.

Although the Full Faith and Credit Clause does not apply to foreign judgments,[114] the United States under a principle of comity enforces foreign judgments domestically.[115] However, except where preempted by federal law,[116] enforcement of foreign judgments is left to the discretion of state courts.[117] Therefore, state legislation that bans the consideration of foreign law would threaten this long-standing

---

111 Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012) (upholding the district court's preliminary injunction preventing certification of State Question 755 "Save our State" Amendment to Oklahoma's Constitution banning the application of international or Sharia law by the state's courts).

112 U.S. CONST. art. IV, § 1.

113 *Id.*

114 *Id*. ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); Perrin v. Perrin, 408 F.2d 107, 109 (3d Cir. 1969) (the recognition of a foreign decree is based on principles of comity, rather than full faith and credit).

115 *See, e.g.*, Laskosky v. Laskosky, 504 So. 2d 726, 729 (Miss. 1987) (upholding Canadian judgment in child custody case that involved a mother from Mississippi); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1988).

116 The United States is a signatory to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which has been in force since June 7, 1959. The New York Convention requires members to domestically recognize foreign arbitral awards. For the Convention's text, *see* http://www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention.html. In addition, the United States is signatory to the Hague Convention on Choice of Court Agreements, which requires members to recognize each other's judgments in cases between parties to an international commercial transaction. The Hague Convention on Choice of Court Agreements was concluded on Jun. 30, 2005, but has not entered into force as of Jan. 1 2012. For a list of signatories as of February 23, 2012, *see* http://www.hcch.net/upload/statmtrx_e.pdf.

117 *Laskosky*, 504 So. 2d at 729.

practice of judicial comity and make enforcement vulnerable for any United States judgment seeking recognition abroad.[118] These and other effects would be many of the unintended consequences of enacting blanket prohibitions on the application of foreign or international law.

B. Domestic Application of Choice of Law

The anti-Sharia movement cites a sample of fifty appellate court cases, claiming that judges in these cases deferred to Sharia law contrary to the United States Constitution and state public policy.[119] A look at some of those cases that involved either arbitration agreements or contracts, in keeping with this paper's focus, will demonstrate that the fear of Sharia infiltrating the United States' justice system is unfounded.

In *Abd Alla v. Mourssi*, the parties had agreed to Islamic arbitration in the event that a dispute arose involving their partnership agreement.[120] One of the parties filed a motion to vacate the Islamic Arbitration Committee's award.[121] In addition to the fact that the defendant had failed to file a challenge within the time limitation, the court found that absent "any fraud, corruption or other undue means," the court was required to enforce the award.[122] The court simply applied "neutral principles" of contract law to enforce a valid agreement, as it would do in any other arbitration agreement dispute regardless of whether the parties had chosen secular or religious law to govern their dispute.[123]

Another case cited by proponents of anti-Sharia law[124] is a case involving a former Islamic minister who sued an Islamic center and its members alleging defamation and other contractual claims, including breach of contract.[125] The court in that case found that because the claims required the interpretation of Islamic law, the court lacked subject-matter jurisdiction to hear the dispute.[126] Not able to apply neu-

---

118 *See, e.g.*, *Dispelling Sharia Threat, supra* note 16; *see also* Republic of the Phil. v. Westinghouse Elec. Corp., 43 F.3d 65, 75 (3d. Cir. 1995) ("But while it is true that principles of comity cannot compel a domestic court to uphold foreign interests at the expense of the public policies of the forum state, it can—and does—force courts in the United States to tailor their remedies carefully to avoid undue interference with the domestic activities of other sovereign nations.").

119 CENTER FOR SECURITY POLICY, *supra* note 16, at 8.

120 Abd Alla v. Mourssi, 680 N.W.2d 569, 570-71 (Minn Ct. App. 2004).

121 *Id.* at 571-72.

122 *Id.* at 573.

123 *Id.*

124 CENTER FOR SECURITY POLICY, *supra* note 16, at 36.

125 El-Farra v. Sayyed, 226 S.W.3d 792, 793 (Ark. 2006).

126 *Id.* at 795-96.

tral principles of law to decide the issue in accordance the First Amendment, the court affirmed the lower court's decision that it did not have subject-matter jurisdiction to decide the claim.[127] Contrary to the fact that it was cited among the top twenty cases to demonstrate that Sharia law is "infiltrating" the United States legal system,[128] this case demonstrates that current domestic law and the application of United States constitutional principles by domestic courts already serve to protect our constitutional rights.

IV. EFFECT OF PROPOSED & ENACTED LEGISLATION

Oklahoma became the first state to enact a constitutional amendment on this issue.[129] Voters in Oklahoma overwhelmingly voted in support of a constitutional amendment that banned the consideration of international law, expressly mentioning Sharia law.[130]

Other states followed suit in proposing similar legislation.[131] However, most states in an attempt to avoid First Amendment issues eliminated any specific reference to Sharia law.[132] Proposed legislation

---

127 *Id.* at 796-97.

128 CENTER FOR SECURITY POLICY, *supra* note 16, at 10, 36.

129 Joel Siegel, *Islamic Sharia Law to be Banned in, Ah, Oklahoma*, ABC NEWS (Jun. 14, 2010), http://abcnews.go.com/US/Media/oklahoma-pass-laws-prohibiting-islamic-sharia-laws-apply/story?id=10908521#.T15ZoMxYKKw.

130 James C. McKinley Jr., *Oklahoma Surprise: Islam as an Election Issue*, N.Y. TIMES, Nov. 15, 2010, at A12.

131 In 2010, Oklahoma, Tennessee and Louisiana all passed legislation banning application of international or foreign law. In 2011, Arizona passed H.B. 2064. The 2012 legislative session has seen about 15 bills return from the 2011 legislative session, in addition to 18 new bills, making the total 33 bills in 20 states.

132 *See, e.g.*, S.B. 33, 2012 Reg. Sess. (Ala. 2012) (const. amend.); S.B. 40, 2012 Reg. Sess. (Ala. 2012); S.B. 84, 2012 Reg. Sess. (Ala. 2012); H.B. 88, 27th Leg., 2012 Reg. Sess. (Alaska 2012) (carried from 2011 leg. sess.); H.B. 2064, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (approved on Apr. 12, 2011, effective Apr. 13, 2011) (codified at 2011 Ariz. Sess. Laws Ch. 22); H.B. 1209, 2012 Reg. Sess. (Fla. 2012); S.B. 1360, 2012 Reg. Sess. (Fla. 2012); H.B. 45, 2011-2012 Reg. Sess. (Ga. 2011); H.B. 242 2011-2012 Reg. Sess. (Ga. 2012); S.B. 51 (Ga. 2012) (all carried over from 2011 leg. session); H.B. 1166, 117th Gen. Assemb., 2012 Reg. Sess. (Ind. 2012); S.B. 36, 117th Gen. Assemb., 2012 Reg. Sess. (Ind. 2012); H.B. 489, 84th Gen. Assemb., 2011-2012 Reg. Sess. (Iowa 2011); H.B. 575, 84th Gen. Assemb., 2011-2012 Reg. Sess. (Iowa 2011); H.J.R. 14 , 84th Gen. Assemb., 2011-2012 Reg. Sess. (Iowa 2011) (all carried over from 2011 leg. sess.); H.B. 2087, 2012 Reg. Sess. (Kan. 2011) (carried over from 2011 leg. sess.); H.B. 4769, 2011-2012 Reg. Sess. (Mich. 2011) (carried over from 2011 leg. sess.); S.B. 701, 2011-2012 Reg. Sess. (Mich. 2012); L.B. 647, 102nd Leg, 2011 Reg. Sess. (Neb. 2011) (carried over from 2011 leg. sess.); H.B. 1512, 96th Gen. Assemb., 2d. Reg. Sess. (Mo. 2012); S.B. 676, 96th Gen. Assemb., 2nd. Reg. Sess. (Mo. 2012); H.B. 1422, 2012 Reg. Sess. (N.H. 2012); S.J.R. 14, 2012 Reg. Sess. (N.M. 2012); H.B. 640, 2011-2012 Reg. Sess. (N.C. 2011) (carried over from 2011 leg. sess.); A919, 215th Leg., Reg. Sess. (N.J. 2012); H.B. 1552, 50th Leg., 1st Reg. Sess. (Okla. 2011) (carried over from 2011 leg. sess.); H.B. 3490, 119th Gen. Assemb., 2011-2012 Reg. Sess. (S.C. 2011); S.B. 444, 119th Gen. Assemb., 2011-2012 Reg. Sess. (S.C. 2011) (all carried over from 2011 leg. sess.); H.B. 2029, 2012 Reg. Sess. (Penn. 2011) (carried over from 2011 leg. sess.); H.B. 631, 2012 Reg. Sess. (Va. 2012); H.B. 3220, 80th Leg., 2012 Reg. Sess. (W. Va. 2011) (carried over from 2011 leg. sess.).

by other states provided for a blanket prohibition of any "foreign law, legal code or system."[133] States preempting any constitutional attacks on First Amendment grounds opted for the blanket ban with the aim of preventing the use and application of Sharia law.[134] This focus on Sharia is ironic considering that many legislators were unable to cite to a single decision where a court imposed Sharia law contrary to public policy[135] and in some instances could not even provide a definition of Sharia law.[136]

A. What is "foreign law"?

States purporting to ban the application of Sharia law through a ban on foreign law must first look to whether Sharia law can be considered "foreign law" under the proposed and enacted legislation.[137] Louisiana, in its legislation, defined "foreign law" as any "law, rule, or legal code of a jurisdiction outside of the states and territories of the United States."[138] While other states specifically included religious law as part of their definition of "foreign law."[139] However, those states that enacted their proposed bills or constitutional amendments interestingly did not include religious law as part of their definition of "foreign law."[140]

Textually, foreign law under that above definition captures any law promulgated by a foreign sovereign, but it is less clear whether that would include religious law.[141] Sharia law, in particular, has influenced the legal codes in most Muslim countries.[142] It is based on the

---

133 *See, e.g.*, H.B. 2064, 50th Leg., 1st. Reg. Sess. (Ariz. 2011) (approved on Apr. 12, 2011, effective Apr. 13, 2011) (codified at 2011 Ariz. Sess. Laws Ch. 22).

134 *Bill Banning Sharia Law Meets Protests, Questions of Constitutionality*, NEWS SERVICE OF FLORIDA (Feb. 29, 2012), http://www.sunshineslate.com/2012/02/29/bill-sharia-law-protests.

135 Awad v. Ziriax, 670 F.3d 1111, 1129-30 (10th Cir. 2012) (in considering whether the State of Oklahoma had asserted a compelling interest, the court found that the state did not identify an actual problem based on the fact that "they did not know of even a single instance where an Oklahoma court had applied Sharia law").

136 *Dispelling Sharia Threat, supra* note 17.

137 *Id.* (discussing Missouri H.R. Hearing).

138 *See* S.B. 1274, 2012 Reg. Sess. (Fla. 2012); H.B. 785, 2010 Reg. Sess. (La. 2010). Similar definitions also adopted by H.B. 3490, 119th Gen. Assemb., 2011-2012 Reg. Sess. (S.C. 2011); S.B. 308, 96th Gen. Assemb., 2011 Reg. Sess. (Mo. 2011); H.B. 525, 2011 Reg. Sess. (Miss. 2011); H.B. 4769, 2011 Reg. Sess. (Mich. 2011); L.D. 1076, 125th Leg., 2011 Reg. Sess. (Me. 2011); H.B. 2087, 2011 Reg. Sess. (Kan. 2011); H.F. 489, 84th Gen. Assemb., 2011 Reg. Sess. (Iowa 2011); H.B. 242, 2011-2012 Reg. Sess. (Ga. 2011); H.B. 45, 2011-2012 Reg. Sess. (Ga. 2011).

139 *See e.g.,* H.F. 575, 84th Gen. Assemb., 2011-2012 Reg. Sess. (Iowa 2011); H.B. 301, 2011 Reg. Sess. (Miss. 2011).

140 *See e.g.,* H.B. 785, 2010 Reg. Sess. (La. 2010) (codified at LA. REV. STAT. § 9:6000).

141 BLACK'S LAW DICTIONARY (9th ed. 2009) (defines foreign law, generally as "the law of another country").

142 Toni Johnson, *Islam: Governing Under Sharia,* COUNSEL ON FOREIGN RELATIONS, http://www.cfr.org/religion/islam-governing-under-sharia/p8034 (last updated Oct. 24, 2011).

Qur'an and the teachings of the Prophet Mohammed.[143] While in some countries Sharia is the source of the law, in many other Muslim countries it operates as a separate legal system and is applied at the discretion of the parties in certain familial and financial conflicts.[144]

It is important to note that the Qur'an requires Muslims to be loyal to their state of residence and that religion must not be a matter of the state.[145] Under this doctrine, Muslims living in the United States, as a sign of their loyalty, would then necessarily be inclined to adhere to the United States Constitution.[146] This proposition has also been supported by other United States experts on Sharia law who have recognized that Sharia law, except for some fundamental tenets, is expected to change depending on time and place and will not be applied if it goes against an individual or community's public interest.[147]

Sharia does not fit the formal definition of "foreign law" for the following reasons: (1) it exists separate from a sovereign state;[148] (2) it is founded upon religions edicts, not on the democratic consensus of individuals; (3) it provides moral guidance for individuals in areas beyond the normal boundaries of state law, providing duties rather than rights to individuals;[149] and (4) religious rules are usually not codified and can vary between different religious communities observing the same faith.[150]

Critics have urged that it would be a mistake to consider Sharia law as simply a religious code because it governs all behavior in the secular sphere.[151] However, Sharia, like Jewish law or Catholic Canon, is imbedded in our society through an individual's religious choice and is not imposed on individuals by a foreign state or government.[152] A federal district court in Oklahoma interpreted Oklahoma's recently

---

143 *Id.*

144 *Id.*

145 Qasim Rashid, *Sharia Law: The Five Things Every Non-Muslim (and Muslim) Should Know,* HUFFINGTON POST/MUSLIM WRITERS GUILD OF AMERICA, (Nov. 4, 2011), http://www.huffingtonpost.com/qasim-rashid/shariah-law-the-five-things-every-non-muslim_b_1068569.html.

146 *Id.*; *see also Dispelling Sharia Threat*, *supra* note 17.

147 *Dispelling the Sharia Threat*, *supra* note 17.

148 Sharia law is a religion, which therefore exists separate from the existence of state laws and regulations. However, many states, such as Egypt, have based their laws on Sharia principles.

149 Sharia addresses personal matters such as sexual intercourse, hygiene, adultery, diet, prayer and fasting.

150 *See generally Dispelling Sharia Threat*, *supra* note 17.

151 *See* Bill Gertz, *Shariah a Danger to U.S., Security Pros Say,* THE WASH. TIMES (Sept. 14, 2010), http://www.washingtontimes.com/news/2010/sep/14/shariah-a-danger-to-us-security-pros-say/?page=all.

152 U.S. CONST. amend. I; *see generally Dispelling Sharia Threat*, *supra* note 17.

enacted Constitutional amendment's reference to Sharia law as a reference to religious beliefs rather than a legal system.[153]

In light of the above definition of Sharia law, proposed and enacted state legislation creating blanket prohibitions on the application of foreign law may be subject to a wide variety of interpretations by the courts including one that may find that Sharia is not considered "foreign law." This would undermine the entire objective of some of these "anti-Sharia" laws which cloaked themselves under otherwise neutral and seemingly non-discriminatory language.[154]

B. Redundancy of Legislation

The application of foreign and international law has already been limited by the requirement that it not contradict state and Federal constitutions.[155] This has been the guiding principle in the United States' history of jurisprudence without the need for enacting an additional all-out ban on the application of foreign law.[156] The law, prior to the proposed legislation, already gave guidance to judges on exercising their discretion when applying foreign law by requiring the application to be consistent with constitutional principles.[157] In essence, effective mechanisms are already in place in the United States' judicial system to prevent courts from impermissibly becoming entangled in religion or considering a religious code as a basis for their decisions.[158]

The United States was founded on the adoption of foreign law.[159] For example, Florida declared the common law of England, prior to

---

153 Awad v. Ziriax, 754 F. Supp. 2d 1298, 1303-04 (W. D. Okla. 2010) (court found that Oklahoma resident had proved substantial likelihood of success on the merits that amendment to the Oklahoma Constitution to forbid state courts from considering or using international law or Sharia law violated the Establishment Clause and the Free Exercise Clause of the First Amendment); *See also,* John R. Crook, *Oklahoma Constitutional Amendment Barring Consideration of Sharia and International Law Overwhelmingly Approved by Voters, Preliminarily Enjoined by U.S. Court,* 105 AM. J. INT'L L. 123 (2011).

154 Most legislation in order to appear neutral does not single out a prohibition against Sharia, but rather prohibits the application of foreign law that would be against a State's public policy. *See, e.g.*, H.B. 2064, 50th Leg., 1st Reg. Sess. (Ariz. 2011)(approved on Apr. 12, 2011, effective Apr. 13, 2011) (codified at 2011 Ariz. Sess. Laws Ch. 22).

155 *Dispelling Sharia Threat*, *supra* note 17.

156 *Id.*

157 Omar Scaribery, *Islamic Law Ban in State Court Petitioned by Muslims*, HUFFINGTON POST (Sept. 12, 2011), http://www.huffingtonpost.com/2011/09/12/muslims-ban-islamic-law_n_959104.html.

158 *Dispelling Sharia Threat, supra* note 17.

159 *See, e.g.*, Ind. Code § 1-1-2-1 (2000) (Indiana's reception statute: "the law governing this state is declared to be . . .(4) The common law of England, and statutes of the British Parliament made in aid thereof prior to the fourth year of reign of James the First. . .and which are of general

the Declaration of Independence, to be in force provided that it was not inconsistent with the Constitution and laws of the United States and the acts of Florida's legislature.[160]

The legislation being proposed is based upon an unfounded fear that judges will disregard their constitutional duties and exercise their discretion in favor of applying foreign law or, as the majority seems to fear, Sharia law.[161] While courts have applied foreign law, the application has occurred with the limitation that it not be inconsistent with domestic laws and state and federal constitutions.[162]

Contrary to what critics cite as a justification for the enactment of anti-Sharia type legislation,[163] Sharia law is not infiltrating our judicial system.[164] In fact, Oklahoma, the first to enact such anti-Sharia legislation, admitted to not having any evidence that Sharia law is being imposed by their state courts.[165]

As far as religion is concerned, the First Amendment already limits the role that courts may undertake when resolving disputes involving religious doctrine or practice.[166] However, the First Amendment does not prevent the resolution of religious disputes so long as the court bases its decision on "neutral principles of law."[167] In other words, the court cannot perform an "inquiry into religious doctrine," but rather has to base its decision on secular principles such as con-

---

nature, not local to that kingdom, and not inconsistent with the first, second, and third specifications of this section").

160 Fla. Stat. § 2.01 (2011).

161 *Dispelling Sharia Threat*, *supra* note 17 (every judge takes an oath to uphold the laws of the State/United State and the U.S. Constitution).

162 Chamara v. Yatim, 937 N.E.2d 490, 495 (Mass. App. Ct. 2010) (no deference was due to the custody order issued by a Jaafarite religious tribunal (Jaafarite Court) in Lebanon because the custody order was not made in "substantial conformity" with Massachusetts law); Amin v. Bakhaty**,** 798 So. 2d 75, 86 (La. 2001) (refusing to enforce Egyptian court order granting custody to father since that order was not based on "best interests of the child" and therefore against Louisiana's public policy); *see generally* ACLU Report, *Nothing to Fear, supra* note 80.

163 *See generally* CENTER FOR SECURITY POLICY, *supra* note 16.

164 ACLU Report, *Nothing to Fear*, *supra* note 80 at 1.

165 *Dispelling Sharia Threat*, *supra* note 17; *see also* Awad v. Ziriax, 670 F.3d 1111, 1130 (10th Cir. 2012).

166 U.S. CONST. amend. I, cl. 1 ("Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.."); *see also* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1968) (holding that "restraints of First Amendment, as applied to states through Fourteenth Amendment, forbid a civil court from awarding church property on basis of interpretation and significance the civil court assigns to aspects of church doctrine").

167 Jones v. Wolf, 443 U.S. 595, 602-03 (1979) (establishing that the "neutral principles approach" prevents courts from entanglement with religious doctrine while granting flexibility to resolve the dispute).

tractual rights.[168] States have recognized this doctrine in domestic arbitration cases.[169]

In *Avitzur v. Avitzur*, a Jewish couple signed a "Ketubah" with an agreement that recognized the Beth Din, a rabbinical tribunal, as having authority over their marriage.[170] Although the husband had obtained a divorce through a civil court, the wife was not considered divorced until she obtained a Jewish divorce or "Get" in accordance with their marital agreement.[171] The court in *Avitzur* found that the First Amendment did not prevent it from enforcing the couples' marriage agreement, which required them to go before the Beth Din.[172] A "neutral principles of law" approach allowed the court to enforce the secular portions of the Ketubah, which required the enforcement of the husband's promise to refer any marital disputes to the Beth Din.[173] The court reinforced the Supreme Court's precedent when it stated that "to the extent that an enforceable promise can be found by the application of neutral principles of contract law," the court may resolve the dispute without interfering with religious practice or law.[174]

Similar protections against enforcing any contract or law that would be against public policy also exist in the world of international arbitration. The United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention") is the main instrument governing the enforcement of commercial international arbitration agreements and awards.[175]

Under the New York Convention, state signatories would enforce an international award arising from another party-state to the Convention.[176] The United States ratified the New York Convention and thus is bound to domestically recognize foreign arbitration awards from other party-states.[177] Federal courts, in addition to state courts, have jurisdiction to enforce arbitral awards.[178] The Convention already

---

168 *Id.*

169 *See, e.g.*, Avitzur v. Avitzur, 446 N.E.2d 136, 137 (N.Y. 1983) (deciding whether the court had a proper role in deciding the enforceability of a *Ketubah*, an agreement entered into as part of a Jewish marriage).

170 *Id.*

171 *Id.*

172 *Id.* at 138-39.

173 *Id.* at 139.

174 *Id.*

175 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION, Jun. 10, 1958, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf. [hereinafter *N.Y. Convention*].

176 *Id.* at art. 1.

177 United States ratified the N.Y. Convention in Sept. 30, 1970.

178 9 U.S.C.A. § 205 (2012); *see also* Fiske, Emery & Ass'n v. Ajello, 577 A. 2d 1139 (Conn. Super Ct. 1989).

allows a state signatory to refuse recognition of the award if it is contrary to the enforcing state's own public policy.[179] State legislation purporting to limit the application of foreign law to recognize a foreign arbitration award would be preempted by this Convention under the Supremacy Clause.[180]

C. Separation of Powers

The language utilized in some of the proposed legislation threatens to violate the separation of powers doctrine. Restricting the judiciary from considering foreign law may infringe upon the judiciary's ability to be the sole interpreter of the nation's laws.[181] This would be exemplified where a court is facing the enforcement of a foreign judgment, arbitral award, or a choice-of-law clause in a private contract between parties.[182]

It has long been recognized by many state courts that the legislature is not permitted to restrict, encroach, or infringe the inherent powers of the judicial body.[183] Interpretation of a statute, choice-of-law clause, or foreign arbitral award is within the inherent powers of the judiciary, which may require the interpretation and application of foreign law.[184] The question is whether the proposed legislation unduly impairs an exercise of inherent judicial powers.[185]

One of the inherent powers recognized is the "power to take actions reasonably necessary to administer justice efficiently, fairly, and eco-

---

179 N.Y. Convention, *supra* note 175 at art. V. (2)(b) (Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought find that (b) the recognition or enforcement of the award would be contrary to the public policy of that country).

180 *See* Southland Corp. v. Keating, 465 U.S. 1, 2 (1984) ("[I]n enacting § 2 of the Federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration").

181 *Cf.* Florida Senate Bill Analysis and Fiscal Impact Statement, Feb 29, 2012, *available at* http://www.flsenate.gov/Session/Bill/2012/1360.

182 *See, e.g.*,Mansour v. Islamic Educ. Ctr. of Tampa, No. 08-CA-3497 (Fla. 13th Cir. Ct. Mar. 22, 2011).

183 Schoenvogel ex rel. Schoenvogel v. Venator Grp. Retail, Inc., 895 So. 2d 225 (Ala. 2004); Kerns v. CSE Ins. Grp., 106 Cal. App. 4th 368, 130 Cal. Rptr. 2d 754 (1st Dist. 2003); State v. McCahill, 261 Conn. 492, 811 A.2d 667 (2002); Adair Architects, Inc. v. Bruggeman, 346 Ill. App. 3d 523, 281 Ill. Dec. 938, 805 N.E. 2d 306 (3d Dist. 2004); Hoag v. State, 889 So. 2d 1019 (La. 2004); Querubin v. Com., 440 Mass. 108, 795 N.E. 2d 534 (2003); Spitznas v. State, 1982 OK CR 115, 648 P.2d 1271 (Okla. Crim. App. 1982); DeMendoza v. Huffman, 334 Or. 425, 51 P.3d 1232 (2002); State v. Holmes, 106 Wis. 2d 31, 315 N.W. 2d 703 (1982).

184 *See generally* Parasharami, *supra* note 110 (discussing the Supreme Court's interpretation of choice-of-law clauses).

185 Ex parte Dozier, 262 Ala. 197, 199, 77 So. 2d 903, 905 (1953).

nomically."[186] Legislation that bans courts from considering international, Sharia, or foreign law would infringe upon this power.[187]

In Iowa, the proposed bill includes limiting the sources that judges could utilize for interpreting the Constitution,[188] which is contrary to Supreme Court precedent in *Lawrence v. Texas,*[189] *Roper v. Simmons,*[190] *Thompson v. Oklahoma*,[191] and *Graham v. Florida,*[192] all of which considered foreign and international norms in reaching their decisions.[193] In the most recent case of *Graham v. Florida,* the Court reflected on its consideration of foreign law, by stating that it has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it.[194]

While it must be acknowledged that members of the Supreme Court are often at odds with each other over whether international law can serve as a judicial source for interpretation,[195] it must also be recognized that these "anti-Sharia" laws would prevent not only international and foreign source reference but would also prevent enforcement of validly entered contracts and arbitration awards.[196]

---

186 *See, e.g.*, Matter of Dunleavy, 769 P.2d 1271, 1272 (Nev. 1988).

187 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 577 (2003) (The court looked to international human rights standards and other countries treatment of the issue in reaching a decision that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.").

188 H. J.R. 14, 84th Gen. Assemb., Reg. Sess. (Iowa 2011) (constitutional amendment prohibiting the courts of this state from using international law when exercising judicial power) (legislation was carried over from 2011 session).

189 Lawrence v. Texas, 539 U.S. 558 (2003).

190 Roper v. Simmons, 543 U.S. 551 (2005) (holding that the death penalty should not be applicable if the offense was committed when the individual was under the age of eighteen).

191 Thompson v. Oklahoma, 487 U.S. 815, 868 (1988).

192 Graham v. Florida, 130 S. Ct. 2011 (2010) (court acknowledged law of foreign nations in support of its finding that a particular punishment is cruel and unusual in violation of the Eight Amendment).

193 *See, e.g.*, *Graham*, 130 S. Ct. at 2033; *Lawrence*, 439 U.S. at 598; *Roper,* 543 U.S. at 554; *Thompson*, 487 U.S. at 868.

194 *Graham,* 130 S. Ct. at 2033.

195 *See* Transcript of Constitutional Relevance of Foreign Court Decisions, Scalia-Breyer Debate, presented by U.S. Association of Constitutional Law, at American University, Jan. 13, 2005, *transcript available at* http://www.freerepublic.com/focus/news/1352357/posts (last visited Jan 28, 2012).

196 *Dispelling Sharia Threat*, *supra* note 17.

D. Contrary to Existing Laws and U.S. Policy

Some of the states proposing anti-Sharia laws have failed to notice how this legislation will interact with other legislation already in place.[197] Take for instance, Missouri, which proposed a ban on state court's consideration of foreign law, including Sharia law.[198] The Missouri Constitution contains a prohibition against enacting any law that would impair a contract.[199] The Constitution specifically states, "[t]hat no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."[200] However, legislation banning the application or use of foreign law will do just that to parties who voluntarily enter into contracts that apply foreign law.[201]

Legislation that seeks to ban the interpretation and/or application of foreign law also undermines our history of international comity.[202] Comity in the United States "has served as a principle of deference to foreign law and foreign courts."[203] While comity is not without its limitations, it has given courts discretion to enforce foreign judgments. Treaties now regulate much of comity where countries have agreed to recognize each other judgments in cases of international arbitration and commercial contract disputes.[204] In fact, courts now justify their application of comity out of deference of party autonomy, demonstrating a shift in the view of international comity.[205] This shift has signaled a view that comity is exercised less out of judicial discretion and more out of legal obligation.[206] The Supreme Court has recognized the importance of protecting the autonomy of private parties by finding that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require enforcement of the parties' agreement,

---

197 *Id.*

198 H.B. 708, 96th Gen. Assemb., Reg. Sess. (Mo. 2011) (passed by House, died on Senate floor).

199 MO. CONST. art. I, § 13 (2011).

200 *Id.*

201 *Dispelling Sharia Threat*, *supra* note 17.

202 *Id.*

203 Joel R. Paul, *The Transformation of International Comity,* 71 LAW & CONTEMP. PROBS. 19, 20 (2008); *see generally* Hilton v. Guyot, 159 U.S. 113 (1895).

204 *See, e.g.*, N.Y. Convention, *supra* note 175. *But cf.*, Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (recognizing a divorce decree issued in a foreign country on the basis of comity).

205 Paul, *supra* note 203, at 20, 27.

206 *Id.* at 29-30.

even assuming that a contrary result would be forthcoming in a domestic context.[207]

While the principle of comity is not obligatory on a court, new legislation either prohibiting the consideration of foreign law or requiring the foreign law to adhere to our constitutional standards will likely decrease judicial economy and make judges more hesitant in granting comity to foreign judgments.

E. A Look at Bills Signed into Law

1. Oklahoma's Constitutional Amendment

Out of those states that have enacted legislation in this area, Oklahoma is unique in that it specifically singled out Sharia law.[208] Although there has not been a single case in which Sharia law has been applied,[209] legislators characterize the law as a necessary "preemptive" strike.[210]

The constitutional amendment has yet to be certified to the Oklahoma Supreme Court due to a pending constitutional challenge on the grounds that it violates the Establishment Clause of the United States Constitution.[211] The Tenth Circuit recently affirmed the U.S. District Court's decision to issue an injunction finding that the constitutional amendment, forbidding courts from considering Sharia or international law, violated the First Amendment's Establishment and Free Exercise Clause.[212]

On the merits of the issue, the plaintiff in this case have put forth arguments that this amendment is tantamount to the government disapproving of his religion because it specifically singles out Sharia

---

207 *Id.* at 30 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985).

208 *See generally,* Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012). Only one other state has specifically singled out Sharia, but the bill died in committee. *See* H.B. 698, 106th Gen. Assemb., 2012 Reg. Sess. (Miss. 2012) (the bill defined "foreign law" as including Sharia law).

209 Steve Benen, *Oklahoma Bar Imaginary Sharia Threat,* WASHINGTON MONTHLY (Nov. 3, 2010), http://www.washingtonmonthly.com/archives/individual/2010_11/026460.php.

210 Stephen Clark, *Group Launches Media Blitz in Oklahoma for Anti-Shariah Ballot Initiative*, FOX NEWS (Oct 20, 2010), http://www.foxnews.com/politics/2010/10/20/anti-islamic-group-launches-media-blitz-oklahoma-anti-shariah-ballot-initiative/.

211 The Associated Press, *Oklahoma: New Amendment Is Delayed*, N.Y. TIMES, Nov. 9, 2010, at A21 (Okla. State Bd. of Elections is appealing decision by federal district judge in the W.D. of Oklahoma in *Awad v. Ziriax* to the 10th Cir. Ct. of Appeals.); *See also OK Election Board Seeks to Appeal Shariah Law Ruling* (Nov. 30, 2010), http://politics.blogs.foxnews.com/2010/11/30/ok-election-board-seeks-appeal-shariah-law-ruling.

212 Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012).

law.[213] The Amendment is not neutral on its face, as it expressly prohibits the consideration of Sharia law.[214] It also fails to define Sharia law, leaving room for ambiguity in the application and interpretation of this constitutional amendment.[215]

The Tenth Circuit found that Oklahoma's constitutional amendment discriminated against religions despite appellant's argument that the amendment banned all religious laws from Oklahoma courts.[216] The court in this case focused on the fact that by its plain language, the amendment singled out Sharia law twice in its text.[217] In the end, the Tenth Circuit reiterated its position that "while the public has an interest in the will of the voter[s] being carried out…the public has a more profound and long-term interest in upholding an individual's constitutional rights."[218]

Besides banning the application of Sharia law, Oklahoma's constitutional amendment also enjoins the consideration of international law.[219] This provision in the amendment appears to violate Article VI of the U.S. Constitution.[220] Treaties signed by the United States constitute binding international law on all fifty states of the United States.[221] Unlike other proposed legislation, Oklahoma does not explicitly exclude treaties signed by the United States.[222] According to the current language of the Oklahoma constitutional amendment, a court could interpret it to prevent the application of an international treaty, in violation of the Supremacy Clause.[223]

There is also the issue of international customary law. While it has not been incorporated into federal law, the Supreme Court has declared certain international customary law norms which are sufficiently well defined and accepted by a wide majority of nation states,

---

213 Crook, *supra* note 153; Mitchell v. Helms, 530 U.S. 793, 828 (2000) ("courts should refrain from trolling through a person's or institution's religious beliefs").

214 H.J.R. 1056, 52d Leg., 2d Sess. (Okla. 2010) (Okla. "Save Our State" Const. Amend., amending art. 7, §1).

215 *Id.*

216 *Awad,* 670 F.3d at 1128.

217 *Id.*

218 *Id.* at 1132 (*quoting* G & V Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir. 1994)).

219 H.J.R. 1056, 52d Leg., 2d Sess. (Okla. 2010) (Okla. "Save Our State" Const. Amend., amending art. 7, §1) ("The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia law.").

220 U.S. CONST. art. VI ("All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.").

221 U.S. CONST. art. VI.

222 H.J.R. 1056, 52d Leg., 2d Sess. (Okla. 2010) (Okla. "Save Our State" Const. Amend., *codified in* OKLA. CONST., art. 7, § 1(c)).

223 *See id.*

as part of federal law.[224] This legislation would prohibit any court from enforcing any international customary norms already recognized by the United States and enforceable as Supreme Court precedent.[225] It would also likely restrict the judiciary from looking at sources of American law that are based on international norms.[226]

It is also unclear whether the legislative intent in banning the application of international law was also aimed at precluding the use of foreign law.[227] Foreign law, as previously discussed in part A of this section, is not international law.[228]

Finally, there is also a question of how this amendment would affect the enforcement of treaties with Oklahoma's Native American population.[229] This is particularly pertinent in Oklahoma, which has the second highest Native American population in the United States according to the 2010 Census.[230] Oklahoma legislation, along with other states' anti-Sharia legislation, could prevent courts from considering the law of a tribal nation in interpreting treaties[231] since this law lives in a separate realm to any state law.[232]

The language of Oklahoma's constitutional amendment demonstrates a lack of understanding of the interplay between international and domestic law because it ignores any pre-emption by federal and constitutional law, and fails to consider the unintended consequences of enacting this type of legislation into law.

---

224 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

225 *Id.*

226 This would include the application or interpretation of an international treaty by a court in Oklahoma.

227 2010 Okla. H.J.R. 1056, *codified in* OKLA. CONST., art. 7 § 1(c) (language of the constitutional amendment does not make reference to foreign law, only explicitly singles out international and sharia law).

228 *See, e.g.*, Frederic L. Kirgis, *Is Foreign Law International Law?*, ASILINSIGHTS (Oct. 31, 2005), http://www.asil.org/insights051031.cfm (foreign law is not necessarily international law; the former is defined as the law that is promulgated by an "individual foreign country or, in some instances, of an identifiable group of foreign countries that have a common legal system or a common set of rules in a particular field of law," and the latter "is the law in force between or among nation-states that have expressly or tacitly consented to be bound by it.").

229 *Dispelling Sharia Threat*, *supra* note 17.

230 Karen R. Humes, Nicholas A. Jones, Roberto R. Ramirez, *Race Alone or in Combination and Hispanic or Latino: 2010*, U.S. CENSUS BUREAU, Mar. 2011, available at www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

231 *See generally* Gale Courey Toensing, *Campaign Against Sharia Law a Threat to Indian Country,* INDIAN COUNTRY TODAY MEDIA NETWORK (Sept. 6, 2011), http://indiancountrytodaymedianetwork.com/2011/09/06/the-racists-are-coming-campaign-against-sharia-law-a-threat-to-indian-country-49166; *But cf.*, S.B. 1360, 2012 Reg. Sess. (Fla. 2012) (Florida has excluded Native American Law from the definition of foreign law).

232 *Native American Gaming,*NAT'L GAMBLING IMPACT STUDY COMMISSION, *available at* http://govinfo.library.unt.edu/ngisc/research/nagaming.html (last visited Mar. 9, 2012) (recognizing that state and local laws do not apply within the territory occupied by Native American tribes, even though that territory or reservation is under the protection of federal government).

2. South Dakota House Bill 1253

South Dakota, unlike many of the other states, enacted a blanket prohibition of the judicial enforcement of any religious codes.[233] The language of the statute reads, "no court, administrative agency, or other governmental agency may enforce provisions of any religious code."[234] The text was amended from, "[n]o court, arbitrator, administrative agency, or other adjudicative mediation or enforcement authority may render any judgment predicated on any religious code."[235] The language of the amendment would suggest that the legislature was confining the application of the statute to courts or government agencies, excluding the application of this statute to private domestic and commercial arbitrations.[236] However, the statute would still affect arbitration. If a party seeks to enforce an arbitral award in a court that is based upon Sharia, Jewish, Cannon, or other religious law, the enforcing court would be prevented, according to the language of this statute, from enforcing that award.[237] For example, the South Dakota legislation would prevent a judge in that state from enforcing an agreement to arbitrate if the parties had contractually agreed to have their dispute decided under a religious code or law, under similar circumstances as the facts in *Mansour*.[238]

F. Effects On Arbitration

Arbitration prides itself on efficiency, flexibility, lower costs, neutrality, privacy, and transparency.[239] Parties exercise their freedom by voluntarily entering into contracts with binding arbitration agreements because of the advantages that arbitration offers.[240] Legislation curtailing the enforceability of arbitration awards based on foreign, international, or religious code threatens to undermine the aforemen-

---

233 H.B. 1253, 87th Leg., Reg. Sess. (S.D. 2012) (signed into law Mar. 12, 2012).

234 *Id.*

235 *Id.*

236 *Id.*

237 The South Dakota bill explicitly prevents courts from enforcing any arbitration award that might have relied on religious precepts, which quite often occurs in divorce arbitration proceedings. It also would prevent anyone from getting their will probated if the will was based on a religious faith.

238 In *Mansour,* the judge upheld the arbitration award that was based on Sharia law because applying contract law principles that was the choice-of-law that the parties had contractually agreed on.

239 Joanne K. Lelewer, *International Commercial Arbitration as a Model for Resolving Treaty Disputes,* 21 N.Y.U. J. INT'L L. & POL. 379, 389 (1989).

240 Buys, *supra* note 94 at 59 (citing JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 69 (1978)).

tioned advantages.[241] For example, a party enforcing an arbitration agreement may have to defend itself against a challenge from the other party arguing that the foreign choice of law contravened the forum state's policy.[242] This would increase the time and costs of the dispute resolution and would likely require a collateral proceeding in court to make the constitutional determination before continuing the arbitration proceedings.[243]

Both domestic and international arbitration provide a consensual means to resolve a dispute by a non-governmental decision maker, which in turn produces an enforceable and binding ruling.[244] Being able to receive an enforceable and binding ruling is one of the most important aspects of arbitration.[245]

In arbitration, federal and state courts have adopted a strong policy towards arbitration, staying any litigation pending arbitration. Under the Federal Arbitration Act, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration whether the problem at hand is the construction of the contract language or an allegation of waiver, delay, or a similar defense to arbitrability."[246] Arbitration clauses serve to ensure that procedurally, parties adhere to the requirement to resolve the dispute in arbitration rather than in a judicial forum.[247]

If legislation banning the application of foreign, Sharia, or international law is enacted, the effect would be to severely constrain the effectiveness of arbitration by increasing the unpredictability and enforceability of arbitration awards based on foreign law.[248] Some statutes attempt to restrict the ability of arbitrators to consider foreign law in the arbitration of the issues,[249] undermining the neutrality of a non-government decision maker charged with deciding the issue in

---

241 *Dispelling Sharia Threat*, *supra* note 17.

242 *See, e.g.*, Mansour v. Islamic Educ. Ctr. of Tampa, Inc., No. 08-CA-3497 (Fla. 13th Cir. Ct. Mar. 22, 2011).

243 The constitutionality of a foreign law might be considered to be outside the scope of the arbitration agreement because it deals with sensitive matters that deal with the public policy of a state. *See* Yves Fortier, *Arbitrability of Disputes*, GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCIAL AND DISPUTE RESOLUTION 269, 276 (Gerald Aksen, et al eds., 2005) (state courts, in particular, are required to draw a line between arbitrable and non-arbitrable issues disputes. One of the basis to be considered is whether the issue deals with the state's public policy).

244 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, COMMENTARY AND MATERIALS 1-3 (2nd ed. 2001).

245 *Id.*

246 Moses H. Cone Mem'l Hosp. v. Mercury Constr., 460 U.S. 1, 24-25 (1983).

247 *See* Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614, 628 (1985).

248 *See, e.g.*, *Dispelling Sharia Threat*, *supra* note 17.

249 *See, e.g.*, S.R. 926, 2011-2012 Reg. Sess. (Ga. 2012); H.B. 3220, 2011 Reg. Sess (W.V. 2011); S.B. 33, 2012 Reg. Sess. (Ala.2012).

arbitration.[250] Under the Arizona bill, an arbitrator would be forced to first consider the constitutionality of the foreign law before proceeding in the application thereof.[251]

Choice-of-law clauses are extremely important in international commercial arbitration settings.[252] These clauses allow parties from different countries to contract with flexibility, transparency, and predictability.[253] They also allow parties to select a neutral and established system of law, preventing one or the other party from being subjected to a law that may favor one party over the other based on nationality.[254] In a survey conducted in 2010, fifty-eight% of those surveyed found that their choice of law was mostly guided by their familiarity and experience with the law chosen.[255] Although this survey was conducted with parties involved in international transactions, this finding might help explain why, in domestic settings, parties from the same religious faith may choose to be governed by religious law rather than secular rules, especially in cases where the parties are from different states.

Arbitrators have broad powers to determine the applicability of a choice-of-law clause.[256] If no particular law is chosen by the parties, arbitrators have the power to determine which set of conflict of law rules should apply.[257] There have also been increasing cases where the

---

250 *See. e.g.* H.B. 2064, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (approved on Apr. 12, 2011, effective Apr. 13, 2011) (codified at 2011 Ariz. Sess. Laws Ch. 22).

251 H.B. 2064, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (approved on Apr. 12, 2011, effective Apr. 13, 2011) (codified at 2011 Ariz. Sess. Laws Ch. 22)(art. 1 (b)) ("A court, arbitrator, administrative agency, or other adjudicative mediation or enforcement authority shall not enforce a foreign law if doing so would violate a right guaranteed by the Constitution of this state or of the United States or Conflict of Laws of the United States or of this state").

252 Choice-of-law clauses provide predictability in the resolution of disputes because the parties can agree to the law that will govern their contract. They also lower transaction costs because they allow parties the ability to access the risks that they will undertake when entering into an agreement with a foreign party and reducing those risks by avoiding the application of a law that may treat the non-foreign party more favorably.

253 *See generally* Buys, *supra* note 94.

254 One of the benefits of arbitration is being able to select a neutral forum or law so that neither party is given home-court advance by litigating the dispute in either their own law or forum. *See also 2010 International Arbitration Survey: Choices in International Arbitration*, WHITE & CASE, 11, Oct. 6, 2010, *available at* http://www.whitecase.com/files/upload/file Repository/2010-International-Arbitration-Survey-Choices-International-Arbitration.PDF (finding that when parties choose the law that will govern their contract they are mostly guided by the law that is perceived as neutral and impartial with regards to the parties and their contract).

255 *2010 International Arbitration Survey*, *supra* note 254, at 12.

256 *See, e.g.*, UNICITRAL Model Law Art. 28(1), (1995, amended 2006) *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf ("The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute").

257 *See, e.g.*, ICC Rules, Art. 21(1) (Jan. 1, 1998), http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Rules-of-Arbitration/#article_21 ("In the ab-

arbitrators have evoked international standards or international laws to reinforce the interpretation they have given to the applicable law.[258] States with legislation such as the one proposed in Oklahoma, banning the application of international law, would have detrimental effects on the enforceability of awards issued by arbitral tribunals relying on international standards or laws.

G. Unintended Consequences

1. Implications on Domestic Transactions

Blanket prohibitions on foreign or international law have the power to significantly interfere with a party's right to choose arbitration as a means to resolve commercial or domestic relations matters.[259] In the domestic arena, many individuals carry out their private domestic affairs under the direction of their respective religious faiths.[260] Take for example, United States' citizens who are married abroad or are divorced in another country, under some of these proposed laws, the court would be barred from recognizing their marriage because it would be an application or enforcement of a foreign or religious law.[261] Another issue is the recognition of an individual's will which may require distribution of property in accordance with his religious faith. A court, under this type of legislation, would be prevented from probating such a will under some of the proposed statutes.[262] This would override the principle of comity as previously discussed above.[263]

---

sence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate"); UNCITRAL Rules Art. 28(2) ("Failing such a designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.").

258 W. Laurence Craig, *Symposium: Arbitration and National Courts: Conflict and Cooperation: The Arbitrator's Mission and the Application of Law in International Commercial Arbitration*, 21 AM. REV. INT'L ARB. 243, 260 (2010).

259 The uncertainty of whether the law agreed upon by the parties will be enforced will likely dissuade many from utilizing arbitration to resolve commercial and domestic issues, thereby interfering with their individual rights to contract freely or practice religion without interference from the state.

260 *See, e.g.*, Brittany Alana Davis, *'"anti-sharia"' Bill Banning Foreign Law Passes House Over Protests*, MIAMI HERALD (Mar. 1, 2012), http://www.miamiherald.com/2012/03/01/2670398/"anti-sharia"-bill-banning-foreign.html (citing public opposition to the bill because it would invalidate marriages or divorces based no only on Sharia but also based on the Orthodox Jewish faith).

261 *Dispelling Sharia Threat, supra* note 17.

262 *See, e.g.*, H.B. 1253, 87th Leg., Reg. Sess. (S.D. 2012) (signed into law Mar. 12, 2012).

263 *See* infra § III.

2. Implications on International Business Transactions

In the last decade, business transactions have become increasingly globalized, increasing the number of American businesses engaging in international transactions.[264] It would be impossible for this expansion to occur if trade and commerce were to be effectuated only on terms governed by federal and state laws.[265] International arbitration has been strongly preferred by corporate entities over litigation.[266] In fact, "hardly any international contract of commercial, financial importance today is concluded without resort to an arbitration clause."[267]

The United States remains an attractive seat for international arbitration for those seeking to settle their disputes via arbitration. The American Arbitration Association ("AAA") has been reported as the institution most frequently used for international arbitration.[268] The main benefit of arbitration on the international level is the "desire to avoid the risk of litigating in the adversary's national courts and to profit from the *neutrality* of an international arbitration forum."[269] However, proposed and enacted legislation banning the use or consideration of foreign law would strip arbitration awards granted and enforced in the United States from possessing this neutrality.

International commerce and trade relies on the ability of parties to freely negotiate and enter into agreements with parties from other nation states, and in allowing this, states benefit from the inherent benefits of free commerce.[270] The application of foreign law is conducted for reasons of self-interest, where states want to ensure good commercial and diplomatic relationships with other states.[271]

Two recent cases reinforce the United States' position as a leading forum for international arbitration proceedings.[272] However, pro-

---

264 *U.S. International Transactions, 1960-present*, *International Economic Accounts*, U.S. DEP'T OF COMMERCE BUREAU OF ECONOMIC ANALYSIS, *available at* http://www.bea.gov/international/ (last visited Mar. 9, 2012).

265 Calleros, *supra* note 85, at 657.

266 *International Arbitration: Corporate Attitudes and Practices 2008*, PRICEWATERHOUSECOOPERS [hereinafter 2008 Report], *available at* http://www.pwc.co.uk/forensic-services/publications/international-arbitration-2008.jhtml.

267 W. Laurence Craig, *Arbitration and National Courts: Conflict and Cooperation: The Arbitrator's Mission and the Application of Law in International Commercial Arbitration,* 21 AM. REV. INT'L ARB. 243, 251 (2010).

268 2008 Report, *supra* note 266.

269 Craig, *supra* note 267, at 258.

270 Paul, *supra* note 203, at 30 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985)).

271 Lehmann, *supra* note 101, at 403-405.

272 Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 130 S. Ct. 1758 (2010); Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010).

posed anti-Sharia type legislation, in addition to pending federal legislation,[273] threatens to diminish the United States as an attractive forum for arbitration.

In *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp*,[274] the Supreme Court reinforced the consensual nature of arbitration and reversed the AAA arbitration award because the parties had not anticipated or contemplated class arbitration in their arbitration agreement.[275] Another important case reinforcing the friendly attitude the United States has towards arbitration is *Rent-A-Center, West, Inc. v. Jackson*.[276] In *Rent-A-Center*, the Court underscored the severability of arbitration clauses, leaving the question of the validity of the contract containing the arbitration clauses to the arbitration panel.[277]

Legislation in states banning the application or consideration of foreign law threatens to make the United States a hostile place for arbitration.[278] Although many of the bills limit the applicability of their laws to natural persons[279] but exclude application to corporations, partnerships, or other business associations, there are still implications to business transactions.[280] For example, various states do not treat partnerships as separate juridical entities; rather, they are seen as a group of individuals tied under a partnership agreement.[281] Thus, the issue becomes a definitional one. When is an entity considered a business association? What occurs when the dispute is between a group of individuals and a corporation? The same concern would arise when a sole proprietor in the United States enters into a contract with a foreign company whose arbitration agreement applies international or the foreign state's law. If that sole proprietor gets a favorable arbitra-

---

273 H.R. 1020 Arbitration Fairness Act of 2009 (Declares that no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of: (1) an employment, consumer, or franchise dispute, or (2) a dispute arising under any statute intended to protect civil rights).

274 Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp, 130 S. Ct. 1758 (2010).

275 *Id.* at 1775.

276 Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010).

277 *Id.* at 2778.

278 "Anti-Sharia" legislation creates unpredictability on the enforcement of choice-of-law clauses, necessarily making parties to international transactions wary of enforcing contractual provisions in the United States.

279 *See, e.g.*, S.B. 1294, 2012 Reg. Sess. (Fla. 2012); HB 2064, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (approved on Apr. 12, 2011, effective Apr. 13, 2011) (codified at 2011 Ariz. Sess. Laws Ch. 22).

280 *Dispelling Sharia Threat*, *supra* note 17.

281 *See, e.g.*, Allgeier, Martin & Assocs. v. Ashmore, 508 S.W. 2d 524, 525 (Mo. Ct. App.1974) (Missouri court recognized that under the laws of the state, a partnership is not recognized as a separate or juristic entity); In re Prestige Ltd. P'ship v. E Bay Car Wash Partners, 205 B.R. 427, 433 (9th Cir. 1997) (Finding that a partnership is not a separate legal entity under California law).

tion award based on foreign law, that individual may face a constitutional challenge from the other non-U.S. party arguing that the foreign law goes against the forum state's public policy.

Additionally, parties to an arbitration agreement with a foreign choice-of-law clause will be disadvantaged if their respective home state adopts restrictive legislation. For example, they will be required to spend more money and perhaps even hire foreign law experts to certify that the foreign law applied in the arbitration did not contravene the United States Constitution or any of that particular state's laws or public policy. Otherwise, they might find themselves with an award that they may not be able to enforce. This will be particularly disadvantageous to the winning party if the losing party has the most assets in a state that has adopted this type of restrictive legislation.

CONCLUSION

As echoed by many legal scholars, politicians, and organizations, including the American Bar Association, blanket prohibitions on the consideration of foreign or international law go against our own fundamental judicial principles.[282] This type of legislation is not a solution but rather exacerbates the problem. In effect, legislation of this type will infringe on party autonomy and will create many of the unintended consequences discussed above.

The irony of this type of legislation is that it seeks to protect United States citizens and their constitutional rights, but it in fact infringes upon them. In cases of similar legislation, as that enacted in Oklahoma or the proposed legislation in Mississippi, the statutes facially discriminate against those individuals practicing Sharia, thus infringing on the protections afforded by the First Amendment (Free Exercise Clause).

In some cases, this type of legislation will create a hostile environment for United States citizens attempting to enforce a judgment in a foreign state[283] and will create a larger backlog in the nation's courts as parties avoid arbitration and other alternative dispute

---

[282] *See*, *e.g.*, ABA Resolution 113A (Aug. 8, 2011), https://docs.google.com/a/fiu.edu/viewer?a=v&q=cache:oA-Ee37bhlkJ:www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2011_hod_annual_meeting_113a.authcheckdam.doc+&hl=en&gl=us&pid=bl&srcid=ADGEESjTzFSWK809wDSlY9wox4ef0VyditVx5bNrhatF-pka44WAWrxqBcqHrgdawN9waLLAl9VNRA0uIUHEGflKDGnW4pPxeBZTPMed5h_EWw14pMe1lDPI4PLqkw5Yhz9vVQ4BoF7Y&sig=AHIEtbRpHaffJYK37_obUomTyu6WdaWRKg (opposing federal or state laws imposing blanket prohibitions on consideration or use by courts or arbitral tribunals of foreign or international law).

[283] This is because judicial comity requires reciprocal recognition of foreign judgments.

mechanisms out of the fear that their decisions will not be enforced by a court in the United States.

A few things are apparent from the push to pass this type of legislation: (1) there exists a mistrust of the nation's courts, (2) proposed legislation is a result of political maneuver with no credible or legitimate basis, and (3) "anti-Sharia" legislation serves only to create further ethnic tension between U.S. Muslims and non-Muslims.[284]

The bottom line is that these laws are redundant and unnecessary. The Constitution and the laws in place already provide protection from the enforcement of any law or contract that would run afoul to the U.S. Constitution or laws. State legislatures across the country have begun to recognize this reality as most of the bills have died in committees or have failed adoption in past legislative sessions.[285]

---

[284] *See, e.g.*, Brian Schultz, *Bills of Imitation: Who is Behind the "anti-sharia" Movement?,* IMAGINE 2050 (Apr. 21, 2011), http://imagine2050.newcomm.org/2011/04/21/bills-of-imitation-who-is-behind-the-"anti-sharia"-movement/; Abraham H. Foxman, *"anti-sharia" Bill: Bigotry by Any Other Name,* N.J. JEWISH NEWS, *available at* http://njjewishnews.com/article/6192/"anti-sharia"-bills-bigotry-by-any-other-name#.T2EJ2MxYKKx; Rabbi Allen S. Maller, *Orthodox Jews and Muslims Unite to Fight "anti-sharia" Law,* IVIEWS.COM (Mar. 9 2012), http://www.iviews.com/Articles/articles.asp?ref=IV1203-5038.

[285] *See, e.g.*, S.B. 1360, 2012 114th Reg. Sess. (Fla. 2012); H.B. 1209, 2012 114th Reg. Sess. (Fla. 2012); H.B. 3220, 2011 8th Reg. Sess. (W. Va. 2011).