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Oklahoma's "Save Our State Amendment" and Related Legislative Developments in the United States

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Recent legislative developments in Oklahoma, and a few other U.S. states, reflect a growing mistrust of international and foreign law and legal systems. These proposed statutes and constitutional amendments are one aspect of parochial backlash in the United States and elsewhere against developments in international law and dispute resolution over the past decades. There are substantial doubts about the constitutionality of these legislative proposals under the U.S. Constitution, but they may prove to be the source of substantial mischief. For the moment, these legislative developments are more in the nature of eccentric curiosities than anything else. They nonetheless warrant careful monitoring – particularly if comparable legislative provisions begin to be proposed on a federal level in the U.S. Congress. Indeed, the proposed Arbitration Fairness Act, pending in Congress, has hints of a similar disregard for U.S. international obligations.

The leading example of legislative backlashes against international and foreign law is a proposed amendment to the Oklahoma State Constitution (1). Grandiosely titled the "Save our State Amendment," the proposed amendment would purport to forbid Oklahoma State courts from "look[ing] to the legal precepts of other nations or cultures" or from "consider[ing] international law or Sharia Law." The full text of the proposed amendment is available here.

The "Save our State Amendment" overwhelmingly passed in the Oklahoma House on 18 May 2010 (91 for – 2 against) and in the Senate just six days later, on 24 May 2010 (41 for – 2 against, 5 excused). The proposed amendment would provide:

"The [Oklahoma] Courts …, when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. 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. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression." (2)

The proposed amendment is to be submitted to a referendum of Oklahoma voters, likely in November 2010. News sources predict that the amendment will be adopted by a large margin.

If Oklahomans adopt the amendment, what will it mean (putting aside questions of validity under the U.S. Constitution)? This is not an issue that has drawn the attention of the amendment's sponsors, whose interest appears limited to stoking parochial bias and fear. Still, if adopted, courts will have to interpret the legislation.

One obvious area where the amendment may have application is conflict of laws. The amendment specifically provides that Oklahoma courts may not "consider" either international or Sharia law, and may only apply the law of sister states in the United States "provided the law of the other state does not include Sharia Law." That fairly clearly excludes application of, for example, the law of states which have adopted Sharia law – presumably in cases where there is a contractual choice-of-law clause, as well as in cases where there is not. Although principles of international law are less likely to arise in commercial litigation, particularly in state courts, in those instances where they do (e.g., some human rights litigation, cases raising issues concerning foreign territorial boundaries), the Oklahoma amendment would appear to preclude application of those principles. Exactly how the amendment's prohibition against the application of international law relates to the amendment's preliminary acknowledgment that Oklahoma courts must apply federal law (which, under well-settled U.S. precedent, includes international law) is not addressed by the amendment or its drafting history.

There is a further issue, of greater practical importance, particularly if the amendment's approach were adopted outside Oklahoma. Under the amendment, may an Oklahoma court apply any foreign law, as distinguished from international or Sharia law? In addition to providing that Oklahoma courts may not consider international and Sharia law, it also prohibits Oklahoma courts from "look[ing] to the legal precepts of other nations or cultures." A serious argument could be made that this text forbids the application of foreign law in Oklahoma courts – including, for example, in tort, contract and other commercial disputes. Thus, if a dispute arose under a contract with a choice of law clause selecting foreign law (e.g., French or Russian), there is a substantial argument that the amendment would forbid application of French or Russian law; the argument is at least as strong in tort or contract cases where no choice-of-law clause existed. In neither case, the argument would run, could an Oklahoma court apply "the legal precepts of other nations."

Choice of law issues in most contexts are, under domestic U.S. law, governed by state (not federal) law. That would appear to make the amendment's prohibition against application of foreign or Sharia law fully applicable in Oklahoma courts – absent some constitutional basis for invalidating the amendment (discussed below). Moreover, although the amendment applies, by its terms, only in Oklahoma state courts, at least arguably, U.S. federal courts in Oklahoma would be obliged to adopt the same rules as state courts in matters ordinarily governed by state law.

It is also not clear how the Oklahoma amendment might impact the recognition and enforcement of foreign judgments which are based on the application of foreign (or international) law by a foreign court. At least arguably, recognition of a foreign judgment would involve the indirect application of foreign (or international) law and, thereby, run afoul the Oklahoma amendment. For example, is a judgment from Egypt or Saudi Arabia capable of recognition in an Oklahoma court under the Oklahoma amendment? In the United States, the recognition of foreign judgments is largely the subject of state law and, as a consequence, the amendment would again appear prima facie to apply to the recognition and enforcement of foreign judgments in Oklahoma state and federal courts. Arguably, similar conclusions would apply to forum selection agreements providing for litigation in a foreign forum (particularly a forum where the Sharia might be applicable).

The impact of the proposed Oklahoma amendment on international arbitration would appear to be much more limited – reflecting in part the superior legal regime applicable to international arbitration, as compared to other means of dispute resolution. In particular, the Oklahoma amendment would not seem to preclude a party from enforcing a foreign award or international arbitration agreement, even if the award applied foreign or international law. The New York Convention and Federal Arbitration Act (Chapter 2) impose federal standards for most aspects of recognition of Convention awards and agreements, in either state or federal courts. The Oklahoma amendment would likely (very likely…) be preempted by the Convention and the FAA.

The immediate practical consequences of the amendment are limited. Oklahoma is not a forum for appreciable amounts of international commercial litigation and, if the amendment is adopted, Oklahoma choice-of-court and choice-of-law clauses will become (even) less common. In practical terms, few international disputes of any consequence are likely to be affected by the amendment.

There is also a substantial argument that various aspects of the Oklahoma amendment run afoul of constitutional limitations under the U.S. Constitution. As noted above, under well-settled U.S. authority, international law is both part of the law of the United States and is treated as federal law. As such, international law preempts, or supersedes, contrary state law and, if the Oklahoma amendment were interpreted to forbid application of international law in Oklahoma courts, it would likely be invalidated.

The amendment's prohibition against application of foreign or Sharia law raises more complex U.S. constitutional issues. The prohibition may well run afoul of restrictions on state involvement in national foreign relations, imposed by a series of U.S. Supreme Court decisions from the mid-20th century. Singling out the laws of particular foreign states (e.g., Sharia law, which is the foundation of several foreign states' law) and prohibiting their application in U.S. courts arguably violates these constitutional prohibitions by inserting state legislatures into matters of U.S. foreign relations. Finally, if the amendment is applied to prohibit application of any foreign law, it arguably would violate limitations imposed by the federal due process clause on choice-of-law decisions of state courts – although the existence and contents of such limits is a highly disputed topic.

One might be tempted to dismiss the "Save our State Amendment" as a local eccentricity without practical consequence. Unfortunately, that conclusion is premature. Similar legislative proposals are presently being considered in the Arizona State House and Senate Judicial and Rules Committees. The Arizona bill provides that "[a]ny decision or ratification of a private agreement that is determined, on the merits, by a judge in this state who relies on any body of religious sectarian law or foreign law is null and void, is appealable error and is grounds for impeachment and removal from office." The full text of the Arizona House bill is here. Although predictions are always risky, one suspects that similar legislative proposals will surface in other states and, eventually, the U.S. Congress.

More broadly, and of even greater practical concern, the Oklahoma amendment is not unrelated to the so-called "Arbitration Fairness Act," currently pending in the U.S. Congress. Versions of that legislation would invalidate broad categories of agreements to arbitrate consumer, employment, franchisee, and "civil rights" disputes. These legislative proposals are all designed to enhance the litigation options of local constituencies by guaranteeing a more favorable local forum applying local protections – including where parties (in an international commercial agreement) have agreed to resolve their disputes by arbitration. That result is very difficult to square with U.S.

commitments under the New York Convention (and the Inter-American Convention). The Convention permits derogation from Article II's obligation to recognize international arbitration agreements only in limited instances of disputes that are not capable of settlement by arbitration. Article II's exception cannot easily be expanded to accommodate the proposed Act's sweeping invalidation, in all circumstances, of broad categories of international arbitration agreements.

The Arbitration Fairness Act parallels the Oklahoma amendment in an even more troubling fashion in its treatment of the separability presumption and the doctrine of competence-competence. Both principles are universally-recognized, in national and international arbitration instruments, judicial decisions, arbitral awards and commentary from all of the world's leading legal systems. Indeed, U.S. courts played a central role in developing both doctrines (for example, in the Supreme Court's classic decision in *Prima Paint*).

Despite that, versions of the proposed Arbitration Fairness Act would abrogate both the separability presumption and the competence-competence doctrine in the context of international arbitration agreements (including in agreements outside the context of consumer, employment and franchise disputes). If adopted, this approach would violate the parties' express and implied agreements in most international contexts — including where institutional rules, agreed to by the parties, adopt both doctrines; where foreign law, applicable to the agreement to arbitrate, adopted one or both principles; and where parties impliedly intend for these international principles to apply, which is true in virtually all international commercial contexts. By denying effect to the parties' agreements on these issues, the Arbitration Fairness Act would also violate U.S. commitments under the New York (and Inter-American) Convention – preferring parochial domestic law and constituencies to the United States' international engagements under Article II of the New York Convention and parallel provisions of the Inter-American Convention, in a manner uncomfortably reminiscent of the Oklahoma amendment.

It remains to be seen whether the legislative instincts that inspired the "Save our State Amendment" will spread in their most virulent form to Washington, DC. The likelihood appears slim. Nonetheless, if the Arbitration Fairness Act is ultimately passed in its current form it would violate U.S. treaty commitments – under the New York Convention – and depart from universally-accepted principles of international arbitration law. The possibility of this occurring remains uncertain and the risk of jingoistic federal legislation appears even more remote. But that conclusion is by no means certain. To put the question in practical terms, what odds would one have given twelve months ago for adoption of something like the "Save our State Amendment" in Oklahoma or anywhere else?

(1) 2010 Okla. Sess. Law Serv. Hs. Jt. Res. 1056 (West).
(2) The Oklahoma Attorney General has since supplemented the initially proposed Preliminary Ballot Title (the question that will be posed to the voters as a referendum) to explain to the voters what international law and Sharia law comprise: "This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using Sharia law. .International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons. The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties. Sharia Law is Islamic law. It is based on two principal sources, the

Koran and the teaching of Mohammed." Letter from the Office of the Attorney General for Oklahoma State to the Oklahoma Secretary of State, the Speaker of the Oklahoma House of Representatives, and the Senate President Pro Tempore of Oklahoma, dated 4 June 2010, Re: Preliminary Ballot Title for State Question No. 755, Legislative Referendum No. 355.

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