

Amendment could be bad for business

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By **Dan Loeffler**

Last week, Oklahoma voters passed State Question 755, which would amend the Oklahoma Constitution to forbid Oklahoma courts from “looking to” or “considering” the laws of other nations or cultures, including Sharia law. This week, a federal court in Oklahoma City issued a temporary restraining order prohibiting the amendment from taking effect for two weeks, when the court will hear arguments on whether a more permanent injunction should be issued. The lawsuit and public debate about the amendment have so far focused on politically controversial aspects about the First Amendment, Islam and Islamic culture, and Sharia law.



What has largely been lost in that debate is that the amendment also purports to ban our courts’ consideration of “the legal precepts of other nations or cultures” and “international law,” as well as the laws of other states, if the laws of other states include Sharia law. These provisions could have significant, adverse consequences, particularly for businesses. To see why, consider a few examples of legal matters that occur routinely in our state in a business context.

Documents affecting any aircraft registered in the United States are filed with the Federal Aviation Administration’s office in Oklahoma City. As a result, a significant number of aircraft transactions occur in Oklahoma. Many legal rights created by these transactions are governed by the Cape Town Convention, a treaty among nations including the United States. Businesses also regularly depend on numerous other treaties in protecting their rights, such as those that protect intellectual property rights across national borders and treaties dealing with international tax matters. Yet if the Oklahoma amendment were to become effective, Oklahoma courts could no longer look to or consider the Cape Town Convention or other treaties because they are “international law.” That could create havoc for a number of businesses and transactions. As is often the case, the law of unintended consequences creates more problems than it solves.

Next, consider an Oklahoma business that enters into a contract with a foreign company. The parties negotiate the fine points of the deal and agree that the laws of the foreign country will govern the contract. If a party attempts to enforce the contract in Oklahoma courts, our courts (like the courts of other states) would typically honor the agreement of the parties. But that would require an Oklahoma court to apply “the legal precepts of another nation.” Thus, if the Oklahoma amendment takes effect, the contract provisions become questionable and uncertain. Oklahoma companies that routinely transact business with companies in Canada, Mexico, Europe, Asia, or other non-U.S. locations may be required to provide additional special assurances or incur additional costs to close the deal. In a worst-case scenario, the deal may not be made at all.

These are merely examples of the serious legal and business concerns and the related unintended consequences raised by the Oklahoma amendment. Many others will arise if the law is allowed to take effect. For instance, a party may now find it difficult to enforce a foreign judgment in Oklahoma courts that is obtained abroad, insofar as that would require a court to consider foreign law. Jurisdictions that require reciprocity may likewise refuse to recognize Oklahoma law or judgments.

The possible impact of this amendment goes beyond the specific examples noted above and could affect all Oklahoma businesses that operate internationally. International treaties and other features of international law form the very foundation for international business transactions. Companies throughout the world have become familiar with, and routinely rely on, the principles embodied in international law and our country’s recognition of the laws of other nations.

With the amendment in place, foreign companies considering doing business with Oklahoma companies will be faced with a choice: Should they do business in the one state in the United States that has evidenced hostility to international law and thereby face uncertainty in identifying the governing legal principles? When presented with that choice, the alternative – doing business in jurisdictions that play by the same rules as the rest of the international business community – will be more attractive.

While the amendment recognizes that our courts must uphold the U.S. Constitution, it likely violates that very Constitution for reasons not yet raised in the pending lawsuit or perhaps even considered by many Oklahomans who voted for SQ 755. To the extent the amendment purports to prohibit consideration of treaties to which the United States is a signatory, it runs squarely into Article VI of the U.S. Constitution, which makes all such treaties “the supreme law of the land,” and requires that “judges in every state shall be bound thereby” – regardless of any state’s laws to the contrary. So, putting aside the First Amendment issues raised in the current federal lawsuit, the amendment has other serious legal problems, and there are good reasons to believe that it may be deemed invalid.

But if it does become law, it may have far-reaching effects on Oklahoma businesses and the Oklahoma economy, effects that were probably not intended by the authors of the amendment or Oklahoma voters.

Daniel A. Loeffler is a trial lawyer with McAfee & Taft.

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LINKS

Dan Loeffler's Bio

Oklahoma City Tenth Floor • Two Leadership Square 211 N. Robinson • Oklahoma City, OK 73102-7103
(405) 235-9621 office • (405) 235-0439 fax
Tulsa 1717 S. Boulder Suite 900 • Tulsa, OK 74119 (918) 587-0000 office • (918) 599-9317 fax