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ARBITRATION IN INDIAN COUNTRY: Taking the Long View

To advance the interests of tribal governments and their business partners, while managing the risk of attacks on tribal sovereignty, the author suggests arbitration as a means to address commercial disputes arising in Indian Country.

Economic development has proven markedly positive for many tribes. As Indian economies have grown, so too has tribes' capacity to assert sovereignty and exercise self-determination. For example, tribal governments are now administrating federal services, improving or creating tribal justice systems, lobbying other governments to further their socio-economic agendas, and refining policies governing tribal employment of an increasing number of non-Indian citizens. Attracted by the byproducts of these tribal governmental efforts, non-tribal business partners and investors have flocked to the reservation in search of economic opportunity like never before, with many forming symbiotic business relationships with tribal governments and enterprises.

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But tribal economic development has been shadowed closely by a steady erosion of tribal sovereignty—the centerpiece of any tribal/non-tribal joint venture—which has in turn slowed private investment in Indian Country. This is particularly true in the business litigation context. Although there have been some tribal gains, courts have found waivers of tribal sovereign immunity where there were none,[1] inappropriately imposed federal regulations on tribal businesses,[2] and subjected tribal businesses to state taxes.[3]

This dichotomy forces us to ask: If tribes advancing business interests are simultaneously exposing their sovereignty to attack, how should tribes manage such exposure? And how must non-Indian business partners protect their own interests while at the same time respecting and leveraging tribal sovereignty? Slowing economic development is not an option; neither is knowingly risking long-term harm to the governmental integrity tribal leaders have sworn to protect, or to the economic integrity corporate fiduciaries must uphold. Arbitration is not the only tool, but it is a much-overlooked answer. Through careful contracting and governance, tribes and their business partners can employ arbitration to protect against litigation, while still encouraging private investment and economic growth in Indian Country.

Doing the Deal

For tribes, the importance of laying a strong foundation for business structures cannot be overemphasized. Tribal businesses must protect tribal assets and reduce risks to tribal enterprises, while simultaneously facilitating economic relationships—which, of course, require business risk. Business disputes that may be pedestrian in other contexts are direct threats to tribal sovereignty when a tribe's political integrity is attacked as part of the dispute process. For instance, non-tribal businesses might denounce a business practice, or disgruntled employees might file suit under non-tribal labor or employment laws. When these issues are presented to state and federal courts, tribal parties are rolling the dice. Today's simple jurisdictional dispute may become tomorrow's harmful judge-made authority for an attack on tribal sovereignty.[4] In dealings, or anticipation of dealings, with non-tribal entities, business structuring often entails striking a compromise with regard to some aspects of sovereignty in order to avoid litigating in an uncertain legal and political climate. Typically up for negotiation, for instance, are the size, scope, and application of any waiver of tribal sovereign immunity; the forum permitted to adjudicate a dispute; and the substantive law governing the agreement.

Many, if not most, sophisticated non-Indian businesses already prefer arbitration to formal litigation proceedings, as arbitration is sometimes cheaper and less risky than litigation. Tribes should welcome these arbitration agreements for the same reasons—and some in addition. When forming a tribal business, tribes should keep in mind that arbitration provides an alternate, viable means for all parties to reconcile their differences. In the unfortunate case that a dispute does arise, arbitrators selected by the disputing parties are much more likely than the average state or federal judge to be (or become) intimately familiar with the issues and complex bodies of law involved and, therefore, are more likely to render a fair decision.

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Not being bound to formal dispute resolution mechanisms also allows for ingenuity in the formation of tribal enterprises. For attorneys working with tribes, arbitration means a better product "in the shortest time, with the least possible expense, and with minimal stress...."[5] In other words, arbitration can allow lawyers to become problem solvers, harmonizers, and peacemakers: the healers—not the promoters—of conflict.[6]

Still, arbitration provisions in foundational documents should be well thought out. Since many non-Indian businesses have been using arbitration clauses since the early 1980s, these businesses are much more experienced with these clauses and have shown themselves capable of using arbitration to cause harm.[7] Thus, tribes should carefully consider any arbitration agreements with non-Indian businesses to avoid unnecessary future setbacks. For non-tribal businesses, setting out the rules of the game ahead of time is advantageous because it creates less risk that a tribe will assert sovereign immunity or

bring suit in an unfavorable forum—which lowers the overall estimated cost of investment.[8] Both tribes and non-Indian parties should make sure that they are not giving up more than they should in exchange for: (1) an unequivocal expression of any sovereign immunity waiver, (2) a specified forum to resolve disputes, and (3) submission to judgment in that or another specified forum.[9]

Selecting the Forum

Selecting a forum for dispute resolution is a sensitive issue for tribes. Because federal courts have consistently ruled that tribes are not "persons" for the purpose of diversity jurisdiction,[10] disputes with tribes will only reach federal courts if they involve a question of federal law, which is rare.[11] But state and local governments' courts are often hostile toward tribal governments.[12] Thus, another dilemma arises: Tribes must either forgo the formal enforcement of their rights or trust enforcement of their rights to a biased forum. For this reason, tribes often insist that their own courts serve as the forum for dispute resolution. Indeed, Supreme Court Justice Sandra Day O'Connor has maintained that "[t]ribal courts should continue to [develop] further methods of dispute resolution [in order to] provide a model from which federal and state courts can benefit as they seek to encompass alternatives to the Anglo-American adverbial model."[13] Many non-Indian businesses, however, are reluctant to enter a tribal court due to fear of bias or plain unfamiliarity with the forum. Although these fears have time and time again been exposed as irrational,[14] they nonetheless exist. Leveling the playing field requires that neutral law be applied in a neutral fashion. Arbitration presents a viable solution to the problem of bias in federal and state legal forums by providing tribes, as well as non-tribal investors, an opt-out forum that is cognizant to the apprehensions of all.

For tribes, arbitration should be viewed as a means of empowerment, rather than a waiver of sovereignty.

For tribes, the high likelihood of losing in traditional forums carries with it the additional real-world concern that losing will have a broader effect on tribal sovereignty: setting a precedent binding for all of Indian Country. This puts tribes at a disadvantage in the litigation or settlement phases of a dispute. By agreeing to private arbitration, however, tribes do not cede litigation or settlement leverage to non-tribal opponents who know tribes are increasingly fearful of litigating and losing again in state or federal court and thereby creating bad law for all tribes.

Enforcing Judgments and the FAA

When parties make a decision to arbitrate, the rules of the Federal Arbitration Act (FAA) may apply.[15] At the FAA's core is the freedom to contract with respect to arbitration agreements in order to prevent state courts from weakening their private sector competitors by refusing to enforce arbitration agreements.[16] For private sector businesses, especially those competing with states (i.e., tribes), this is cause for tentative celebration. The Supreme Court has held that the FAA preempts any attempts by states to declare some matters unfit for arbitration.[17] The FAA acts much like the Uniform Commercial Code in that parties are allowed to contract out of the FAA and to choose their own post-arbitration dispute forum if they deem it necessary. If they do not take this route, state or tribal courts may be called upon to review post-arbitration challenges. Although the FAA does not create federal question jurisdiction for the purpose of bringing a lawsuit in federal court,[18] under the common law default rules, parties may bring a suit to challenge an arbitration award in any forum where jurisdiction would be proper under the Federal Rules of Civil Procedure.[19] Federal courts have held that this means that tribal courts have jurisdiction over enforcement of arbitration awards if a party files suit there first.[20] Tribal court jurisdiction is automatic if the non-Indian business entered into "a consensual relationship with the Tribe through a contract."[21] This burden can be met with a contract and meetings with tribal officials on the reservation.[22]

Statements in federal cases upholding tribal court arbitration jurisdiction in these situations—statements such as, "s[eeing] no reason to exclude tribal courts" from enforcement jurisdiction[23]—contrast sharply with statements in other federal cases, including *Oliphant v. United States*[24] and *Nevada v. Hicks*,[25] where the Supreme Court took a patronizing view of tribal courts' ability to fairly exercise jurisdiction over nonmembers.[26] Arbitration, it seems, is the one area that federal courts are willing to let tribal courts handle cases, uninhibited by federal or state interference.[27]

Moreover, because tribal judges tend to view

arbitration as similar to a traditional dispute resolution process, tribal courts are more inclined than state and federal courts to enforce arbitration awards and settlements as a matter of public policy.[28] In this way, tribal courts may actually be a more attractive venue. This is especially the case for non-Indians, as federal courts have consistently held that judgment creditors are unable to enforce their judgments against on-reservation assets, a non-issue in tribal court.[29] In addition, tribal courts allow business to resolve their disputes away from juries, which often carry an anti-business bias.[30]

Taking the Long View

For tribes, arbitration should be viewed as a means of empowerment, rather than a waiver of sovereignty. The FAA gives the terms of an arbitration agreement the force of federal law—in tribal court. Indeed, arbitration is one area of law where federal courts have allowed tribal sovereignty to flourish. Moreover, arbitration also provides a forum for adjudication in which the decision maker is selected because he or she appreciates and understands the entirety of the cultures and concerns at issue.

Tribes and non-Indian investors alike should take advantage of the opportunities presented by arbitration in the event of a business dispute.[31] Tribal economic development is full of mutually beneficial opportunities. Tribes have a perfect occasion to persuade strangers to become partners. Because an arbitration agreement helps create relationships instead of adversaries, arbitration fulfills this goal, presenting a forum that promises positive commercial interaction and potentially less contentious dispute resolution, for generations to come. ■

ENDNOTES

[1] See e.g., *C & L Enter. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001).

[2] See e.g., *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991) (ERISA); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) (OSHA); *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009) (Fair Labor Standards Act); *Dawavendewa v. Salt River Project Agric. Imp. & Power Dist.*, 154 F.3d 1117 (9th Cir. 1998) (Title VII).

[3] See e.g. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

[4] See e.g. *Nevada v. Hicks*, 533 U.S. 353 (2001).

[5] Warren E. Burger, "Isn't There a Better Way?" 68 *A.B.A. J.* 274, 275 (1982).

[6] Warren E. Burger, "The Decline of Professionalism," 61 *Tenn. L. Rev.* 1, 5 (1993).

[7] Steve Russell, "Sovereign Decisions: A Plan for Defeating Federal Review of Tribal Law Applications," 20(2) *Wicazo Sa Rev.*, 65, 67-68 (2005).

[8] See e.g., *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998).

[9] See generally, Jeremy Clinefelter, Note, "Just Say the 'Magic Words': Advocating an Arbitration Clause Should Be Held to an Express Waiver Standard for the Doctrine of Indian Sovereign Immunity–*C&L Enterprises v. Citizen Band Potawatomi Indian Tribe*, 25(2) *Am. Indian L. Rev.* 315 (2000/2001).

[10] *Oglala Sioux Tribe v. C & W Enter., Inc.*, 487 F.3d 1129, n. 2 (8th Cir. 2007).

[11] *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985).

[12] See generally, Kathryn R.L. Rand, "Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence Over Indian Gaming," 90 *Marq. L. Rev.* 971 (2007).

[13] Sandra Day O'Conner, "Lessons from the Third Sovereign: Indian Tribal Courts," 33 *Tulsa L.J.* 1, 4-6 (1997); see also, Christopher McMillin, Note, "Failure to Object: Tribal Waiver of Immunity by Participation in Arbitration," 2009 *J. Disp. Resol.* 517, 528-29 ("Tribal Courts provide an environment that seems a perfect forum for alternative dispute resolution proceedings.").

[14] There is exhaustive evidence that tribal courts are fair to nonmembers, particularly non-member businesses. See e.g., Bethany R. Berger, "Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems," 37 *Ariz. St. L.J.* 1047, 1050 (2005); Ryan Dreveskracht, "Tribal Court Jurisdiction Stripping: Another Trip into the Rabbit's Hole," 67 *Nat'l Law. Guild Rev.* (forthcoming Oct. 2010).

[15] *Long v. Silver*, 248 F.3d 309, 315 (4th Cir. 2001).

[16] *Volt Information Sci., Inc. v. Board of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989).

[17] *Perry v. Thomas*, 482 U.S. 483 (1987).

[18] *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 945 (9th Cir. 2004).

[19] *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000).

[20] See e.g. *Val/Del, Inc. v. Superior Ct. in & for Pima County*, 703 P.2d 502, 509 (Ariz. Ct. App. 1985); *First Specialty Ins. Corp. v. Confederated Tribes of the Grand Ronde Comm. of Ore.*, No. 07-05-KI, 2007 WL 3283699 (D. Or. Nov. 2, 2007).

[21] *First Specialty Ins. Corp.*, *supra*, n. 20, at *4 (applying *Montana v. United States*, 450 U.S. 544 (1981)).

[22] *Id.*

[23] *Id.* at *3.

[24] 435 U.S. 191 (1978).

[25] See n. 4, *supra*.

[26] See generally, Jessie Sixkiller, "Procedural Fairness: Ensuring Tribal Civil Jurisdiction After Plains Commerce Bank," 26(3) *Ariz. J. Int'l & Comp. L.* 779 (2009).

[27] See Matthew L.M. Fletcher, "Toward a Theory of Intertribal and Intratribal Common Law," 43(3) *Hous. L. Rev.* 701, 723 (2006) (noting that tribal enforcement of arbitration is a "perfect example" of fairness).

[28] Pat Sekaquaptewa, "Tribal Courts and Alternative Dispute Resolution," 18(2) *Bus. L. Today* 23, 24-25 (Nov./Dec. 2008).

[29] See Edward Rubacha, "Construction Contracts with Indian Tribes or on Tribal Lands," 26 *Constr. Law.* 12, 15-16 (Winter 2006) (discussing the cases shaping the enforcement of contracts with Indian tribes).

[30] Deborah R. Hensler, "Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Reshaping Our Legal System," 108 *Penn. St. L. Rev.* 165, 184 (2003).

[31] Some have even suggested state-tribal compacts that would require arbitration between tribes and non-Indian parties before a foray into state or federal courts. See e.g. David D. Haddock & Robert J. Miller, "Can a Sovereign Protect Investors from Itself? Tribal Institutions to Spur Reservation Investment," 8(2) *J. Small & Emerging Bus. L.* 173, 223 (2004).