

AMERICAN ARBITRATION ASSOCIATION

Commercial Panel

No. 76 517 Y 00191 11 S1M

In the Matter of the Arbitration of

Grand Canyon Skywalk Development, LLC

and

'Sa' Nyu Wa, Inc.

ORDER RE RESPONDENT'S *MOTION TO DISMISS* *GCSD'S ARBITRATION COMPLAINT*

On November 4, 2011, respondent Sa Nyu Wa, Inc., a Hualapai Indian Tribally chartered corporation, formally objected to the tribunal's jurisdiction (based on the Hualapai Nation's claim of and refusal to waive sovereign immunity). On November 18, 2011, claimant responded. After reviewing and considering the parties' submissions, the tribunal denies the objection and confirms jurisdiction.

Respondent 'Sa' Nyu Wa, Inc. (SNW) contends that the tribunal must dismiss claimant Grand Canyon Skywalk Development, LLC's (GCSD) demand for arbitration on grounds of sovereign immunity. SNW argues that GCSD must first comply with Section 15.4 of the 2003 *Development and Management Agreement*, which, SNW urges, requires first an order from an Arizona federal court compelling SNW to arbitrate. And, SNW argues, the Hualapai Tribal Court's August 2d order to this same effect precludes GCSD from re-litigating the issue here.

GCSD points out in response that an agreement to arbitrate constitutes the required waiver of sovereign immunity. Second, the Court of the Hualapai Nation determined that it lacked subject matter jurisdiction. Following motion practice, the Tribal Court found that it was "deprived of jurisdiction." *Order* (8.2.11), at 2. Thus,

GCSD argues, its judgment was void and, in any event, not on the merits.

The controlling 2003 *Development and Management Agreement* provides in section 15.4 in part as follows:

15.4 Arbitration, Governing Law, Jurisdiction

(a) Mandatory Arbitration. Any controversy, claim or dispute arising out of or related to this Agreement shall be resolved through binding arbitration . . . Either party may request and thus initiate arbitration of the dispute by written notice (“Arbitration Notice”) to the other party The arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect, as limited by Section 15.4(d). Judgment upon the award (as limited by Section 15.4(d)) rendered by the arbitrator may be enforced through appropriate judicial proceedings in any federal court having jurisdiction[.]

Agreement, at 42-43. Section 15.4(d) of the *Agreement* provides for SNW’s waiver of sovereign immunity from suit but limited to three actions or remedies, including “[a]n action in a federal court of competent jurisdiction in Arizona to either (i) compel arbitration or (ii) enforce a determination by an arbitrator requiring SNW to specifically perform any obligation” under the Agreement.

Federal and state courts, including the U.S. Supreme Court, read nearly identical arbitration provisions as a waiver of sovereign immunity. *See Response*, at 6-9 (citing and discussing authorities, including *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001)). After all, the agreement to arbitrate would otherwise make little sense.

Second, Section 15.4(d) does not require an order from the federal court to arbitrate. Instead, the parties agreed that one or the other party may first file an action in federal court and seek an order compelling arbitration, but, under section 15.4(a), either party may likewise first request arbitration by filing a demand with the American Arbitration Association. Here, claimant chose the latter course. In some circumstances, parties may wish to first file in federal court because certain

tactical advantages follow, but neither the *Agreement* nor the law requires that course.

Finally, on August 2d, the Court of the Hualapai Nation granted SNW's motion to dismiss and found that the Court lacked jurisdiction. In these circumstances, long-settled preclusion law requires a final judgment from a court with subject matter jurisdiction. The tribal court lacked jurisdiction. Thus, its order carries no preclusive effect.

The tribunal denies SNW's *Motion to Dismiss GCSD's Arbitration Complaint*.

Dated: November 21, 2011
Phoenix, Arizona

/s/ *Shawn K. Aiken*
Shawn K. Aiken, Arbitrator