Let's Make A Deal: Contracts In Indian Country

by Anthony S. Broadman

Transactional lawyers try to take the gambling out of contracts. But what elements of contract law are different when you are a sovereign nation, or a business contracting with a sovereign nation? Lawyers to a deal among businesses and tribal governmental gaming operations must focus on the issues below – at a minimum.

No matter where in the life of a contract – either at the drafting or, more unfortunately, the litigation stage – the following issues can do or undo a deal. These concerns will be familiar to anyone doing business in Indian Country. But given the current economic climate, and the pressure and scrutiny down-times will likely bring to even the most carefully drafted contracts, now is a good time to refamiliarize oneself with the basics. Contracts (and the lawyers who draft them) that carefully address the issues below, put deal parties on much safer ground. After all, when it comes to contracts, there's no room for chance.

Sovereignty

As tribal governments know, sovereignty is the whole point – financially, culturally, politically, legally. It's why tribes can operate gaming businesses, maintain "distinct, independent political communities," and "make their own laws and be ruled by them," as the U.S. Supreme Court has put it.

Like all governments, those of tribes comprise diverse and sometimes elaborate structures, often with familiar elements like executive, legislative and judicial branches. But just as often, unfamiliar legal structures, political contours and cultural sensitivities require expertise seldom found outside the Indian law bar.

Immunity

For purposes of recognizing issues in the bargaining context, perhaps the most important facet of any deal is understanding that a tribal government's immunity from suit can often prevent the enforcement of an otherwise valid contract.

Tribes can only be sued if Congress has "unequivocally" authorized the suit or the tribe has "clearly" waived its immunity. Tribal immunity generally extends to tribal officials in their official capacity, tribal businesses, and Section 17 and tribally chartered corporations. Tribes and their officials, however, may be subjected to suit under various court-made exceptions, such as when a tribal official acts beyond his or her authority.

Geographically, tribes retain immunity from suit when conducting business both on- and off-reservation. Therefore, even a tribally owned business operating beyond the exterior boundaries of a reservation may stand immune from any litigation relating to a contract.

In deal drafting, a wise attorney (and client) will operate under the assumption that a tribe can only be sued under the contract if the parties expressly negotiate a sovereign immunity waiver into the four corners of the contract. That said, the U.S. Supreme Court held in *C&L Enterprises v. Citizen Band Potawatomi Tribe of Oklahoma*, 532 U.S. 411 (2001), that an agreement to arbitrate constituted a clear waiver of immunity. While the court held that a tribe's waiver must be "clear," it stated for the first time that a waiver need not include the actual terms, "waiver of sovereign immunity" and that an arbitration clause was sufficient to evince a clear waiver.

Limited waivers are commonly used by tribal governments to get deals done. However, many attorneys working on tribal deals fail to provide for contractual doomsday. It likely takes only one such mistake, when an attorney finds his client without a remedy for breach, to teach that attorney to fully explore sovereignty in every applicable agreement. Tribes may agree to clear and unequivocal limited waivers of immunity, or otherwise make parties secure, in agreements with non-Indian parties in order to get deals done.

In negotiating with tribal governments, it must be recognized that sovereign immunity represents more than immunity from suit; to many tribal councils responsible for the welfare of their people, sovereignty and thus immunity is sacred, and not merely a negotiable provision of a contract.

Tribal Corporations

Indian tribes have been organized, and have organized themselves differently. Many tribes are organized pursuant to a treaty with the United States. Others are organized pursuant to an executive order. Still others are organized pursuant to the Indian Reorganization Act of 1934 (IRA), which contemplates two main tribal structures. A tribe organized under Section 16 of the IRA adopted a constitution and bylaws that set forth the tribe's governmental framework. The constitution typically outlines governmental processes and authority.

Under Section 17 of IRA, the Secretary of Interior issues the tribe a federal charter under which the tribe creates a separate legal entity, essentially dividing its governmental and business activities. The Section 17 corporation has familiar corporate elements: articles of incorporation and bylaws that identify its purpose, much like a state-chartered corporation.

In addition, a tribal corporation may have been organized

under tribal or state law. If the entity was formed under tribal law, the tribe will have done so pursuant to its corporate code. Under federal Indian jurisprudence, the corporation likely enjoys immunity from suit, as discussed below. If the entity was created under state law, however, the tribal corporation exists as a state entity and state law governs the corporation and its activity. However, it does not necessarily follow that a state-chartered tribal corporation may be sued in state court, as a state-incorporated tribal corporation may still enjoy sovereign immunity protection depending on the test employed by the applicable court.

When the status of a tribal party (either your entity or another contracting party) is unclear, turn to its own governing documents and the associated tribe's law. Read the treaty, executive order, constitution and bylaws, federal charter, operating agreement, etc.

Actual Authority

Like their state and federal counterparts, tribal governments may be bound only through valid exercises of actual authority. If governments could be bound by anything less than an agent acting with actual authority, they would likely find themselves quickly penniless, particularly tribal governments, which typically lack a tax base.

Practically, this requires attorneys to understand what, under tribal law, constitutes actual authority. For many tribes, the tribe's governing council must either authorize an individual officer to take specific actions or take the action itself. When in doubt, get a resolution from the tribe's highest authority, pursuant to tribal law.

Authority is most crucial in the immunity-waiver context. Tribal law, whether in resolution, statute or ordinance form, dictates how a proper waiver may be made. As with failures to secure valid waivers of immunity, contracting with an agent of a tribal government contract party presents substantial risk for the unwary, because a deal based on anything other than actual authority may unravel under political or economic pressure.

Tribal Adjudicatory Jurisdiction

Indian tribes have near plenary regulatory jurisdiction over tribal members within Indian Country; even non-members are subject to tribal regulatory authority on Indian land. Although almost nothing in Indian law is more complex that sorting through the labyrinth of federal, state, and tribal jurisdictional authority, as an elementary matter, there can be enormous implications if a contract falls apart.

"Contemplating the particularities of Indian law and jurisdiction in the contract drafting phase will prevent tribes and businesses from being forced to hire lawyers in the performance phase."

In general, under the modern Supreme Court's most important tribal jurisdictional decision, tribes can only assert jurisdiction over non-Indians in Indian Country if the non-member has entered into a consensual relationship with the tribe or its members, or partaken in conduct that threatens or has some direct effect on the political integrity, economic security, or health and welfare of the tribe.

For purposes of gaming vendor deals, non-tribal businesses transacting in Indian Country and therefore party to a contractual, commercial relationship with an Indian tribe, should recognize that to the extent its activity is located on tribal land, it likely will be subject to the civil adjudicatory authority of the tribe unless the contract dictates otherwise.

Again, agreements clearly recognizing where and how disputes will be resolved are indispensable.

Tribal Regulatory Jurisdiction

As gaming vendors are acutely aware, many tribes are the primary regulators of gaming in their jurisdictions. U.S. Supreme Court Justice John Roberts, writing in a recent case, acknowledged that tribal governments retain the power to regulate non-member conduct "that implicates tribal governance and internal relations." The case specifically affirms tribes' taxing and permitting authority over non-members who satisfy either the "consensual relationship" or "direct effect" test mentioned above.

Accordingly, at the outset of any deal be aware that non-member businesses operating in Indian Country may be subject to different taxes, employment laws, land use rules and other tribal regulations.

Tribal Court Exhaustion

Returning to the topic of tribal adjudicatory power, where a tribal court has jurisdiction over a non-Indian party to a civil proceeding, the party is required to exhaust all remedies in the tribal court prior to challenging tribal jurisdiction in federal district court. Tribal courts should make the first determination regarding the scope of their jurisdiction.

As a result, even where non-tribal court jurisdiction exists over a case involving tribal court jurisdiction, a federal (and arguably state) court should stay its hand until after the tribal court has determined its own jurisdiction.

Notwithstanding apparently clear rules, several exceptions to the exhaustion requirement exist. However, a party to litigation attempting to force its case into federal court, or keep a matter in tribal hands, would do well to explore the fact-based inquiries courts have used to determine when exhaustion is and is not necessary.

Section 81/415 Approval

Any contract encumbering Indian lands for a period of seven or more years requires approval from the Secretary of the Interior or his determination that approval is not required. Since 2000, revisions to "Section 81" have prevented the Secretary from approving any such contract or agreement if the document does not set forth the parties' remedies in the event of a breach, disclose that the tribe can assert sovereign immunity as a defense in any action brought against it, or include an express waiver of tribal immunity. Under "Section 415," leases of restricted lands also require secretarial approval.

Any contract encumbering tribal land should be run through the Section 81 and 415 calculus. If a contract needs to be approved by Interior and is not, that failure could render the agreement null and void.

NIGC Approval of Management Contracts

Contracts with Indian tribes to manage gaming operations are fine – if approved by the National Indian Gaming Commission (NIGC) Chairman. 25 U.S.C. § 2710(d)(9). Without approval, management contracts are null and void.

Among other things, the Indian Gaming Regulatory Act of 1988 permits tribes to enter into management contracts for the operation and management of gaming facilities, subject to the approval by the Chairman of the NIGC. 25 U.S.C. § 2711. But the Chairman cannot approve a contract unless it provides an "agreed ceiling for the repayment of development and construction costs" (§ 2711(b)(4); 25 C.F.R. § 531.1(g)), and a "representation that the contract as submitted. . . is the entirety of the agreement among the parties." 25 C.F.R. § 533.3(a)(2).

Several other requirements must be met, including NEPA compliance and certain fee justifications. As an indication of how complex the review process can be, since 1993 the NIGC has approved just over 50 management contracts.

Tribal and non-tribal businesses should understand the issues above when referred to by lawyers. If lawyers have not fully addressed these elements of the contract, a wise client will make sure they do. Contemplating the particularities of Indian law and jurisdiction in the contract drafting phase will prevent tribes and businesses from being forced to hire lawyers in the performance phase. ♣

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