BUSINESS LAW TODAY

Doing Business in Indian Country: A Primer

By Ryan Dreveskracht

There are more than 566 tribal governments in the United States, varying in population from a few hundred members to more than 600,000, with a land base of more than 52.7 million acres. The past 15 years have seen tribes emerge as powerful economic, legal, and political forces. And as part of this renaissance, tribes are increasingly partnering with non-Indian businesses that bring proven expertise, brand identity, and new capital to their lands.

In this dynamic period, businesses working with tribes—and, most importantly, their attorneys—must have a firm grasp on the nuances of Indian and tribal law. This can be quite a daunting task. Distinct and peculiar issues of law proliferate: Do each of the 566 tribes have their own courts and their own laws? Do these laws apply to non-Indians? Do their courts have jurisdiction over non-Indians? Do the tribes pay taxes? The short answers: yes, yes, yes, and yes—qualified, of course, as follows.

Sovereign Immunity

A central axiom of Indian law centers on Indian tribes' status "as domestic dependent sovereigns." And like other sovereign governmental entities, tribes enjoy federal common-law sovereign immunity.

Tribal sovereign immunity protects tribal officials and employees acting in their official capacity and within the scope of their employment, as well as shielding tribes from suits for damages and requests for injunctive relief (whether in tribal, state, or federal court). Tribes have been held specifically immune from subpoena enforcement to compel production of tribal witnesses or documents. In addition, the doctrine of sovereign immunity usually extends to suits arising from a tribe's "off-reservation" or commercial activities, including the activities of an off-reservation tribal casino.

With regard to business endeavors, federal courts generally do not distinguish between "governmental" and "commercial" activities. Thus, tribal entitles retain immunity whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Numerous courts have thus held that tribal sovereign immunity extends to tribal casinos, businesses, schools, and corporations.

Tribal sovereign immunity is not absolute, however. While there is a "strong presumption" against a waiver of sovereign immunity, it may nonetheless be voluntarily waived or abrogated by an "unequivocal expression" of Congress. As to the latter, federal courts have held that tribes are subject to, for example, the National Labor Relations Act, the Federal Debt Collection Procedures Act of 1990, and the Bankruptcy Code. As to the former, while some tribes and tribal enterprises will not agree to a complete waiver of immunity that could impact governmental assets and other rights, many (perhaps most) tribes are amenable to clear, limited waivers of immunity—particularly where insurance coverage is available to mitigate any governmental loss.

One important caveat before we leave the subject: waivers of immunity must come from a tribe's governing body and not from "unapproved acts of tribal officials." Attorneys must evaluate a tribe's structural organization to determine precisely which tribal agents have authority to properly waive tribal sovereign immunity or otherwise bind the tribal entity by contract. If attorneys do not have a working knowledge of pertinent tribal law, they risk leaving their clients without an enforceable immunity waiver.

Arbitration

Exactly what contract language constitutes a clear tribal immunity waiver is somewhat unclear. The Supreme Court in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, ruled that the inclusion of an arbitration clause in a standard-form contract constitutes "clear" manifestation of intent to waive sovereign

immunity. 532 U.S. 411 (2001). The court held that although the contract did not clearly mention "immunity" or "waiver," the alternative dispute resolution language—on a standard-form contract—manifested the tribe's intent to waive immunity. The lesson that Indian lawyers learned from *C & L Enterprises* was (1) to not use standard-form contracts, and (2) to be explicit about a *reservation* of tribal immunity.

But this is not to say that the arbitration, in and of itself, is ill advised—even where a waiver of sovereign immunity is involved. While arbitration language likely operates to waive tribal immunity, vesting jurisdiction in a private arbitration panel eliminates the possibility that a tribe's sovereignty, immunity, or jurisdiction would be eroded by a supreme court that has suggested "a need to abrogate tribal immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998). Thus, where parties are unable to agree on state or tribal court as the forum for resolving disputes, they may compromise by agreeing to arbitration. At least one court has held that an arbitration agreement that does not draw a distinction between tribal and state court systems allows the tribal court to assert jurisdiction over enforcement of arbitration awards. *Val/Del, Inc. v. Pima County Super. Ct.*, 703 P.2d 502, 509 (Ariz. Ct. App. 1985). Moreover, federal courts have applied the tribal exhaustion doctrine to arbitration clauses, holding that, when faced with an arbitration demand, a tribal court should be "given the first opportunity to address [its] jurisdiction and explain the basis (or lack thereof) to the parties." *Lien v. Three Affiliated Tribes*, 93 F.3d 1412, 1421 (8th Cir. 1996). Accordingly, any arbitration clause must contemplate not only the venue for award enforcement, but also appropriate exhaustion of tribal court remedies.

Tribal Corporations

Many tribal entities that choose to incorporate do so through Section 17 of the Indian Reorganization Act of 1934 (IRA). Through a Section 17 incorporation, the tribe creates a separate legal entity to divide its governmental and business activities. The Section 17 corporation has a federal charter and articles of incorporation, as well as bylaws that identify its purpose, much like a state-chartered corporation. The main differences between these entities and state chartered corporations are that (1) the IRA places certain limitations on incorporated tribes, and the secretary of the interior issues the federal charter; (2) some corporate transactions, such as the sale or lease of tribal land or assignment of tribal income, require the approval of the secretary; and (3) the tribe retains sovereign immunity.

An Indian corporation may also be organized under tribal or state law. If the entity was formed under tribal law, formation likely occurred pursuant to its own corporate code—just as state entities incorporate via a state's corporate code. Under federal common law, tribal corporations enjoy sovereign immunity from suit. However, it is unclear whether a tribal corporation's sovereign immunity is waived through state incorporation. While courts are trending towards a rule that state incorporation waives sovereign immunity, there is no consensus at this point.

Taxes

Generally, both federal and state taxes apply to tribes, tribal enterprises, and tribal members outside of a tribe's reservation. Within Indian country, on the other hand, the initial and frequently dispositive question in Indian tax cases is who bears the legal incidence of the tax. When the legal incidence falls on tribes, tribal members, or tribally owned corporations, states are categorically barred from implementing the tax.

When the legal incidence falls on non-Indians, however, a more nuanced analysis applies. Because Congress does not often explicitly preempt state law, the Supreme Court and the lower federal courts engage in a balancing act to determine whether tribal self-governance rights, bolstered by federal laws, preempt state taxation of non-Indians in Indian country. This balancing act weighs a state's interest in the non-Indian conduct to be taxed against combined federal and tribal interests in controlling affairs that arise on-reservation. And, as with all balancing tests, the result is a crapshoot.

Tribal Courts

Most tribes have their own court systems, which include extensive court rules and procedures. While tribal courts are similar in structure to other courts in the United States, tribal courts are also unique. For example, the qualifications of tribal court judges vary widely depending on the court. Some tribes require tribal judges to be members of the tribe and to possess law degrees, while others do not. Generally though, as a matter of federal law—particularly when it comes to the application of exhaustion principles—tribal courts are "competent law-applying bodies."

As with other courts, tribal court judges usually adhere to a tribe's judicial precedent. In some instances, tribal judges place great weight on the decisions from other tribal courts. Unfortunately, conducting research on prior tribal court decisions may be difficult. There is no official tribal court reporter that compiles all published decisions from the various tribal courts. While groups like the Tribal Court Clearinghouse and the National Tribal Justice Resource Center now publish decisions from participating tribal courts on their websites, many tribal courts have yet to maintain their opinions in any searchable format.

Where tribal law is silent on an issue, federal and state court opinions often serve as persuasive authority to a tribal court, particularly in commercial litigation matters. State courts either extend full faith and credit to tribal court orders or enforce judgments under a comity analysis. Similarly, federal courts generally grant comity to tribal court rulings.

Tribal Court Civil Jurisdiction

The metes and bounds of tribal court jurisdiction generally depend on three factors (1) tribal law, (2) the status of the defendant, and (3) the land upon which the subject matter of the suit arises.

First, just as the type of cases that state chancery courts and federal bankruptcy courts can hear are limited by state and fed-

eral law, respectively, the type of cases that tribal courts may hear is largely a matter of tribal law. While most tribal courts are courts of general jurisdiction, some Tribes have resolved to limit the types of cases that may be brought. Civil suits in the Muckleshoot Tribal Court, for instance, are statutorily limited to suits against the tribe—the tribal court does not possess jurisdiction to hear run-of-the-mill citizen v. citizen tort suits, for example. The Tulalip Tribal Court, on the other hand, is a court of general jurisdiction.

Assuming that the tribal court is a court of general jurisdiction, tribal courts possess both subject matter and personal jurisdiction over a civil suit by any party—Indian or non-Indian—against an Indian defendant for a claim arising on the reservation.

As to non-Indian defendants, however, it becomes a bit more complicated. Generally, tribal courts possess jurisdiction over all non-Indian activities on "Indian trust land" (called that because, due to antiquated federal policies, sovereign Indian land is actually held in trust for the tribe by the federal government). Thus, the first step is to determine the status of reservation land. Believe it or not, not all reservation land is trust land. Many reservations are checkerboarded, with parcels of non-Indian fee lands sprinkled throughout (also due to antiquated federal policies). The Puyallup Indian Reservation offers one extreme example: the reservation consists of 99 percent non-Indian-owned fee land, and includes the much of the City of Tacoma and one of the largest container ports in North America. The Port Gamble S'Klallam Reservation, on the other hand, is 100 percent Indian trust land.

Thus, while the Port Gamble S'Klallam Tribe possesses jurisdiction over all activities arising on its reservation, the Puyallup Indian Tribe must conduct a second level of analysis to determine whether it possess jurisdiction over an activity arising on non-Indian owned fee land within its reservation (at Port of Tacoma, for example). Here, the tribe must look to the "landmark" decision of *Montana v. United States*, where the Supreme Court held that a tribal court cannot assert jurisdiction in this circumstance unless one of two exceptions applies: (1) the non-Indian has entered into "consensual relations" with the tribe or its members, or (2) the subject matter threatens the "political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. 544, 565-66 (1981).

The Supreme Court has made clear that a private contract qualifies as a consensual relationship under the *Montana* rule, thus affirming that tribal courts have jurisdiction over non-Indian parties to tribal contracts. This is the case whether the contract involves on- or off-reservation conduct. Moreover, federal courts have also held that a party who files a civil complaint in tribal court has entered into a "consensual relationship" with the tribe.

Tribal Court Exhaustion

The question of whether a tribal court has jurisdiction over a nontribal party is one of federal law, giving rise to federal questions of subject matter jurisdiction. Thus, non-Indian parties can challenge the tribal court's jurisdiction in federal court. Before this occurs, however, the opposing party must comply with the tribal court exhaustion rule. This rule is akin to the well-known rule of administrative law as announced in *Smoke v. City of Seattle*: "if an administrative proceeding can alleviate the issue, a litigant must first pursue that remedy before the courts will intervene." 937 P.2d 186, 190 (1997). Applied to tribal courts, this means that the party opposing jurisdiction is generally required to make its case to the tribal court prior to challenging tribal jurisdiction in a federal district court. If tribal options are not exhausted prior to bringing a jurisdictional challenge in federal court, the court will be forced to dismiss or stay the case until tribal remedies are exhausted.

After the tribal court has ruled on the merits of the case and all appellate options have been exhausted, the appellant can file suit in federal court, where the question of tribal court jurisdiction is reviewed by a de novo standard. The federal court may look to the tribal court's jurisdictional determination for guidance; however, that determination is not binding. If the federal court affirms the tribal court ruling, the nontribal party may not re-litigate issues already determined on the merits by the tribal court.

Conclusion

Economic growth and development in Indian country has spurred many businesses to engage in business dealings with tribes and tribal entities. Confusion often arises during these transactions because of the unique sovereign and jurisdictional characteristics attendant to business transactions in Indian country. Accordingly, counsel assisting in these transactions, or any subsequent litigation, should conduct certain due diligence with respect to the pertinent federal law, tribal organizational documents, and tribal laws that may collectively dictate and control the business relationship.

To maximize a client's chances of a successful partnership with tribes and tribal entities, counsel should ensure that the transactional documents contain clear and unambiguous contractual provisions that address all rights, obligations, and remedies of the parties. Therefore, even if the deal fails, careful negotiation and drafting, and in turn thoughtful procedural and jurisdictional litigation practice, will allow the parties to more expeditiously litigate the merits of any dispute, without jurisdictional confusion. As business between tribes and nontribal parties continues to grow, it becomes more and more important that both sides of the transaction fully understand and respect the relationship and fully grasp the law that governs it.

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ADDITIONAL RESOURCES

For other materials related to this topic, please refer to the following.

Business Law Section Program Library

Tribal Sovereign Immunity and Consumer Protection: Who Can Regulate a Tribe that Provides Financial Services to Consumers? (PDF) (Audio)

Presented by: Consumer Financial Services

Location: 2014 Committee Meeting

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By Richard P. Eckman, Richard J. Zack, Christina O. Hud, Jonathan N. Ledsky, and Scott J. Helfand

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