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The Inferred Explicit Standard - Waiver of Sovereign Immunity Via an Arbitration Clause

*Sokaogon Gaming Enter. Corp., et al. v. Tushie-Montgomery Assoc., Inc.*¹

I. INTRODUCTION

The judicially created doctrine of tribal sovereign immunity was recognized as part of the unique relationship between the United States and these domestic dependent sovereigns.² As tribes and tribal organizations enter into more commercial transactions in an effort to promote their self-determination and economic development, they have used sovereign immunity as a “trap for the unsuspecting”, leaving the business they enter into an agreement with, without a judicially enforceable remedy for breach of contract.³ To remedy this inequity, courts have chipped away at the doctrine of tribal sovereign immunity, finding waivers in commercial contexts where none existed before. In one area involving the inclusion of an arbitration clause in a contract, courts are split on what is required to find a waiver of sovereign immunity. This case represents a synthesis of competing views and an articulation of a workable standard for determining to what extent an arbitration clause represents a waiver of sovereign immunity.

II. FACTS AND HOLDING

Tushie-Montgomery Associates Incorporated (TMI) sought an interlocutory appeal after the U.S. District Court for the Eastern District of Wisconsin granted partial summary judgment to the Sokaogon Gaming Enterprise Corporation (tribe). The district court ruled that the tribe had not waived its sovereign immunity by including an arbitration clause in its contract with TMI for architectural services.⁴

The dispute arose after the leadership of the tribe changed. The new leaders repudiated the contract with TMI, claiming that the contract was illegal

1. 86 F.3d 656 (7th Cir. 1996).

2. See *infra* notes 13 and 14.

3. See *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

4. The Sokaogon Gaming Enterprise Corporation is a casino subsidiary of the Sokaogon Chippewa Community. *Sokaogon*, 86 F.3d at 657-58.

because it had not been approved by the Bureau of Indian Affairs.⁵ TMI invoked the contract's arbitration clause,⁶ arguing that the arbitration clause in the contract between TMI and the tribe constituted a waiver of the tribe's sovereign immunity. Such a waiver would allow TMI to enforce an arbitration award against the tribe.⁷ The tribe, however, refused to arbitrate and, instead, brought this suit seeking the district court's determination that the tribe had not waived its sovereign immunity and could not be forced to arbitrate the dispute.⁸

After ruling that the arbitration clause was not an explicit waiver of the tribe's sovereign immunity,⁹ the district court certified the ruling for an immediate appeal under 28 U.S.C. § 1292(b).¹⁰

The United States Court of Appeals for the Seventh Circuit ruled in favor of TMI by determining that the wording of the arbitration clause unambiguously waived the tribe's sovereign immunity.¹¹ The appellate court held that where the arbitration clause contains specified arbitral and judicial fora for enforcement of the rights under the contract, the wording of an arbitration clause does not have to contain reference to a waiver of sovereign immunity to constitute an explicit waiver.¹²

III. LEGAL BACKGROUND

Indian tribes have been characterized by the Supreme Court as "domestic dependent nations."¹³ As such, they enjoy a common law right to sovereign

5. *Id.* at 658. Contracts with Indian tribes relating to a tribe's land or property must have prior approval of the Bureau of Indian Affairs. 25 U.S.C. § 81. In the instant case, although the tribe contends that the contract was illegal, it does not argue that the illegality infects the arbitration clause. *Sokaogon*, 86 F.3d at 659.

6. *Id.* at 658. The arbitration went forward without the tribe's participation and TMI was awarded more than \$500,000. TMI sought enforcement of the arbitration award in state court, however, the action was stayed pending the outcome of this suit. *Id.*

7. *Id.* TMI asserted that the bringing of the present suit rather than defending against TMI's state court suit constituted a waiver of sovereign immunity. *Id.* at 661. TMI also asserted in a footnote in its appellate brief that the tribe had waived its sovereign immunity because the Sokaogon tribal charter explicitly allowed the tribe to be sued. *Id.* at 658. The circuit court ruled that TMI had waived this ground by presenting it in the form of a short sentence asserting only a conclusion. *Id.*

8. *Id.* In addition, the tribe sought the court's determination that the contract was void and that TMI should return the \$150,000 the tribe had paid TMI under the contract. *Id.*

9. *Id.* at 658. The district court also ruled that the tribe had not waived its sovereign immunity by bringing the present suit. *Id.*

10. *Id.* The circuit court determined that the issue was within its jurisdiction because the issue of sovereign immunity was "a controlling question of law to which there was substantial ground for difference of opinion." *Id.* Removing the issue of sovereign immunity from the case would allow the case below to be decided on the basis of the arbitration award. *Id.* at 659.

11. *Id.* at 659. The arbitration clause states that "claims, disputes or other matters" will be decided in accordance with the rules of the American Arbitration Association and that the agreement to arbitrate is enforceable with any court having jurisdiction. *Id.*

12. *Id.* at 659-60.

13. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

immunity.¹⁴ Congress, however, may use its plenary power over the tribe to waive the tribe's sovereign immunity.¹⁵ In addition, the tribe itself may waive its sovereign immunity from suit.¹⁶ Any waiver must be unequivocally expressed and may not be implied.¹⁷

This standard for evaluating a waiver supports a strong presumption in favor of upholding tribal sovereignty in the context of inter-tribal matters.¹⁸ In recent years, however, tribal organizations have reached beyond the borders of the reservation.¹⁹ In a commercial context, the policy reasons underlying tribal sovereign immunity are less compelling,²⁰ without an express waiver of sovereign immunity, an unwitting business person could be without redress for a tribe's contractual breach.

While Congress has allowed suits against foreign sovereigns²¹ and against the federal government²² in commercial contexts, it has not addressed Indian sovereign immunity in similar situations. Even though a tribe's sovereign immunity is derivative of the United States' Government and is applied in the same way in the courts, it is fundamentally different at its inception.²³ Where the parameters of state and federal government immunity are defined by statutes, tribal sovereign immunity is governed by Congress and interpreted by the judiciary. Because Congress has not passed comprehensive legislation defining the parameters of tribal sovereign

14. This right was first clearly articulated in *United States v. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), however, earlier decisions had recognized the sovereignty of Indian tribes. *Turner v. United States*, 248 U.S. 354, 358 (1919). The Supreme Court has held that as dependent sovereignties, Indian tribes are immune from suits or cross suits. *Fidelity*, 309 U.S. at 512, 513.

15. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

16. *See Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 173 (1977). Although the Supreme Court has not frontally addressed this issue, recent dictum indicates that tribes possess the authority to waive their own sovereign immunity. *Id.* In addition, the circuits with the largest Indian populations have recognized this right. Amelia A. Fogelman, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Business*, 79 VA. L. REV. 1345, 1364 (1993).

17. *Santa Clara Pueblo*, 436 U.S. at 58.

18. In refusing to imply remedies in addition to habeas corpus into the Indian Civil Rights Act of 1968, the Supreme Court noted Congress's interest in promoting Indian self-government and self-determination. *Id.* at 62.

19. The Indian Reorganization Act of 1934, 25 U.S.C. §§ 476, 477, allowed Indian tribes to organize as sovereign entities under § 16 of the Act, thereby retaining their sovereign immunity. Under § 17 of the Act, tribes could form corporate business entities and could optionally waive their sovereign immunity in their charters to facilitate economic interaction with businesses outside the reservation. *See generally* Kenton Keller Pettit, *The Waiver of Tribal Sovereign Immunity in the Contractual Context: Conflict Between the Ninth Circuit and the Alaska Supreme Court?*, 10 ALASKA L. REV. 363, 372-81 (1993).

20. The federal government's policies supporting tribal self-sufficiency and economic development may actually be countered by the sovereign immunity doctrine because the doctrine could have a chilling effect on economic development in that non-Indian business may be hesitant to deal with organizations that are immune from suit. *See* Brian C. Lake, *The Unlimited Sovereign Immunity of Indian Tribal Business Operating Outside the Reservation: An Idea Whose Time Has Gone*, 1996 COLUM. BUS. L. REV. 87, 104 (1996).

21. 28 U.S.C. §§ 1602-11 (1996).

22. 28 U.S.C. § 1491 (1996).

23. *See Cherokee Nation v. Georgia*, 30 U.S. at 17.

immunity, the judiciary has had great leeway in determining what those boundaries are. Nowhere is this more evident than in the interpretation of an arbitration clause in a commercial contract.

One example is *Pan American Co. v. Sycuan Band of Mission Indians*.²⁴ In this case, the United States Court of Appeals for the Ninth Circuit held that an arbitration clause in a contract between the tribe and a bingo operator was not an express waiver of the tribe's sovereign immunity.²⁵ Relying on the presumption against waivers found in *Santa Clara Pueblo v. Martinez*, the court opined that "[t]he Bingo Agreement's arbitration clause simply does not contain that unequivocal expression of tribal consent to suit necessary to effect a waiver of the Band's sovereign immunity."²⁶

The exact opposite result came from the United States Court of Appeals for the Eighth Circuit. In *Rosebud Sioux Tribe v. Val-U Construction Co. of South Dakota, Inc.*,²⁷ the Eighth Circuit found a waiver in a similarly worded arbitration clause in a construction contract to build housing on the Rosebud Sioux Indian Reservation.²⁸ The court based its finding on the rules referenced in the arbitration clause and on its incorporation of a forum selection clause by reference.²⁹ The court determined that "by definition such disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense."³⁰ Recognizing that there was a strong policy in support of tribal sovereignty and against implied waivers of immunity, the Eighth Circuit pointed out that the Supreme Court has never required the use of "magic words" in finding an explicit waiver.³¹

Because the Supreme Court has not decided which interpretation is correct, it is this framework that provides a backdrop for the decision in *Sokaogon*.

IV. THE INSTANT DECISION

In *Sokaogon*, the court based its decision on the wording of the arbitration clause.³² The Seventh Circuit held that the wording was not ambiguous; the

24. 884 F.2d 416 (1989).

25. *Id.* at 419.

26. *Id.* at 419-20. The arbitration clause provided: "In the event a dispute arises between its parties...either party may seek arbitration of said dispute and both parties do hereby subject themselves to the jurisdiction of the American Arbitration Association and do agree to be bound by and comply with its rules and regulations as promulgated from time to time." *Id.*

27. 50 F.3d 560 (1995).

28. *Id.* at 562. The arbitration clause reads: "All questions of dispute under this agreement shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association." *Id.*

29. *Id.* The Construction Industry Arbitration Rules specify that "parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." *Id.*

30. *Id.*

31. *Id.* at 563.

32. See *supra* note 9.

arbitration clause provided that the tribe would submit disputes under the contract to arbitration and that the tribe would have its submission and any arbitration award enforced in a court of law.³³ According to the court, because the arbitration clause included an agreement to be sued, the tribe waived any immunity it had from being sued.³⁴

The court noted that cases involving the waiver of tribal sovereign immunity had developed along two lines. The first line of cases involved disputes where Congress had limited tribal rights.³⁵ The second line arose in a commercial context and involved the tribe's waiver of rights.³⁶ The court reasoned that in the latter category, any requirement of an explicit waiver of sovereign immunity was based on the "paternalistic purpose of protecting the tribe against being tricked."³⁷ In *Sakaogon*, there was no evidence that this purpose was being served and the court expressed doubt as to "whether there really is a requirement that a tribe's waiver of its sovereign immunity be explicit."³⁸

The circuit court stated that the waiver in this case was implicit only if the words "sovereign immunity" were required to effectuate the waiver.³⁹ The court indicated that no case has ever held that there was such a requirement to find a waiver of sovereign immunity.⁴⁰ When the United States waives sovereign immunity by statute, it creates a right to sue and often does not explicitly mention sovereign immunity.⁴¹ According to the court, this is analogous to the right to sue created by the arbitration clause.⁴²

In distinguishing the instant case from *Rosebud Sioux Tribe*, the Seventh Circuit noted that in *Rosebud Sioux Tribe* the court had to incorporate references to the American Arbitration Association (AAA) rules to find a waiver.⁴³ In the instant case, the court did not have to incorporate such a reference because the contract specified that disputes would be arbitrated according to the AAA rules and that any arbitration award could be enforced in a court having jurisdiction.⁴⁴ The Seventh Circuit concluded that because the contract in this case contained explicit reference to the AAA and judicial enforcement of any arbitration award, the contract did not have to specifically mention a waiver of sovereign immunity to create such a waiver.⁴⁵

33. *Sokaogon*, 86 F.3d at 659.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 659-60. The court stated that this was especially true because the more difficult it is for a tribe to waive its sovereign immunity, the harder it is to make business deals. *Id.* at 560.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* See *supra* note 27.

44. *Id.*

45. *Id.*

V. COMMENT

The Seventh Circuit's holding in *Sokaogon* further limits an Indian tribe's use of the sovereign immunity doctrine to avoid contractual obligations. In doing so, the holding effectively synthesizes preceding case law by defining when a court can find a waiver of sovereign immunity in an arbitration clause. Because it is a synthesis of prior case law, the holding could serve to provide a "bright-line" rule that provides guidelines for drafting arbitration agreements in contracts with Indian tribes.

In recent years, commentators and the Supreme Court have expressed doubt about the efficacy of tribal sovereign immunity in a commercial context.⁴⁶ Because Congress has plenary power over Indian tribes, however, any wholesale waiver of sovereign immunity must come from Congress.⁴⁷ Courts have been left with the task of defining the powers of sovereigns that have a status of independent dependence. With mixed results, the courts have tried to balance Congressional imperatives⁴⁸ against the equity of the situation at hand when a tribe enters into a commercial transaction.⁴⁹

The *Sokaogon* case represents such a balancing. In *Sokaogon*, the Seventh Circuit puts forth a workable solution in the context of an arbitration clause effectuating a waiver of sovereign immunity. By focusing on the language of the arbitration clause and not the underlying policy behind tribal sovereign immunity, the holding creates a tangible standard for determining when an arbitration clause serves as a waiver of sovereign immunity.⁵⁰ The standard is quite simply that when the arbitration clause specifies where disputes will be arbitrated and which court can enforce the arbitrator's decision, a waiver of sovereign immunity may be inferred.

46. In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma*, the Supreme court said that "tribal business activities...are now so detached from traditional tribal interests that the tribal sovereignty doctrine no longer makes sense in this context." 498 U.S. 505, 510 (1991). See also *Amelia A. Fogleman, Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 Va. L. Rev. 1345 (1993). See *supra* text accompanying note 20.

47. The Supreme Court has said that "the sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers." *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

48. The Supreme Court has recognized Congress's desire to promote Indian self-government, self-sufficiency, and economic development. *Citizen Band Potawatomi Tribe*, 498 U.S. 505, 510 (1991).

49. In a concurring opinion in *Greene v. Mt. Adams Furniture*, Circuit Judge Alarcon Rymer notes: "Because that common law sovereign immunity has evolved to be inapplicable to commercial activity by a sovereign and because such an exception is based on the important principle that it is disfavored for a commercial actor to escape the legal consequences of its actions, whether tribal sovereign immunity now extends to commercial activities is an important, complex and unresolved question." *Mt. Adams Furniture*, 980 F.2d 590, 600 (9th Cir. 1992).

50. In contrast to this proposition, even though the court in *Pan American* noted that a "submission to arbitration is a submission to judicial jurisdiction" and that the terms of the clause govern the extent of any waiver, the court refused to find a waiver because the tribe's "sovereignty . . . is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation." *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

While allowing an inference to determine the extent that a waiver must be explicit seems counter-intuitive, the concepts are not inconsistent if the inference is unequivocal. When applying this inferred-explicit standard to the arbitration clause, the court in *Sokaogon* found an unequivocal waiver of sovereign immunity.⁵¹

The Seventh Circuit's balancing of policy and equity was apparent when it addressed the requirement for a truly explicit waiver of sovereign immunity. The court said that such a requirement would only serve the archaic and paternalistic purpose of protecting the tribe's assets while impeding economic development.⁵² The Seventh Circuit also indicated that the prescribed purpose of the requirement to protect an "unsophisticated" negotiator from giving up the tribe's immunity was implausible and condescending.⁵³ In short, the court felt that the policy reasons behind the requirement for an explicit waiver of Indian sovereign immunity were not compelling in the context of modern-day commercial transactions.

Although the Seventh Circuit did not discuss them, there are other policy considerations that favor the court's holding. First, there is a need to protect businesses that enter into commercial contracts with Indian tribes, organizations, and businesses. Because Indian tribes are entering into more and more commercial transactions outside the boundaries of the reservation, commentators have noted that sovereign immunity gives tribes an unfair commercial advantage over the unwise or unwary businesses involved in these transactions.⁵⁴

Ironically, the court's decision in *Sokaogon* supports the same policy that lays behind the decision in *Pan American Co. v. Sycuan Island of Mission Indians*, even though the courts decided differently under similar circumstances. In *Pan American*, the court felt that the best way to further the policy goal of Indian "self-government, self-sufficiency and economic development" was to refuse to infer a waiver of sovereign immunity.⁵⁵ The court decided that protecting the tribe's assets was the best way to further that goal, despite the inequity the decision created.⁵⁶ In *Sokaogon*, the court decided that the best way to further Indian "self government, self-sufficiency, and economic development" was to infer a waiver. This long-term view furthers these policy goals by putting forth a standard allowing Indian tribes to waive sovereign immunity, thereby, making it easier to contract with businesses.

A second policy consideration involves the enforceability of arbitration awards. To have meaning, an arbitration clause must be enforceable.⁵⁷ Arguably, there could be a chilling effect on the use of arbitration clauses by Indian tribes in commercial contracts if a waiver of sovereign immunity can be inferred from an arbitration

51. *Sokaogon*, 86 F.3d 656, 660 (7th Cir. 1996).

52. *Id.* at 659-60.

53. *Id.* at 660.

54. See generally Brian C. Lake, *The Unlimited Sovereign Immunity of Indian Tribal Business Operating Outside the Reservation: An Idea Whose Time Has Gone*, 1996 Colum. Bus. L. Rev. 87. See *supra* note 20 and accompanying text.

55. See *supra* note 48.

56. See *supra* note 50.

57. See *Rosebud Sioux Tribe v. Val-U Construction Co. of South Dakota, Inc.*, 50 F.3d 560, 562 (8th Cir. 1995).

clause. Such an inference may make tribal negotiators hesitant to include an arbitration clause in a contract. On the other hand, businesses may be hesitant to enter into commercial transactions with the tribe if an arbitration clause is not included because then only a judicial forum could be used to resolve a dispute arising under the contract.

It is this tension that strengthens the significance of the *Sokaogon* holding. Because the holding focuses on the wording of the arbitration clause, both parties negotiating a contract in the Seventh Circuit could determine the extent of the waiver represented by an arbitration clause during the drafting of the contract. Including specific information about where and how arbitration takes place and the enforceability of that arbitration could constitute a general waiver of sovereign immunity absent any wording limiting such a waiver.⁵⁸ As a practical matter, the *Sokaogon* holding allows both Indians and businesses to negotiate with some certainty an arbitration clause that is meaningful in that it provides a judicially enforceable alternative forum for resolving disputes under the contract.

V. CONCLUSION

Absent Congressional action to define the parameters of tribal sovereign immunity, courts will have to continue to struggle with the scope of that immunity. Adoption of the *Sokaogon* holding outside of the Seventh Circuit would unite divergent trains of thought on the waiver of sovereign immunity via an arbitration clause and would create certainty that would foster Indian economic development. In the context of an arbitration clause acting as a waiver of sovereign immunity, a court may infer a waiver if the arbitration clause explicitly predetermines the arbitral and judicial fora. If adopted outside the Seventh Circuit, this rule would serve to protect businesses entering into commercial transactions with Indian tribes, thereby encouraging economic development on reservations. In addition, the rule would give meaning to arbitration clauses by making them judicially enforceable. As a result, judgments to enforce an arbitrator's awards would be less likely.

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58. In *GNS, Inc. v. Winnebago Tribe of Nebraska*, the arbitration clause specified that both parties shall be bound by the arbitrator's decision but the judgment on the decision may be entered in the *Winnebago Tribal Court*. [emphasis added] *Winnebago Tribe*, 866 F.Supp. 1185, 1187 (N.D. Iowa 1994). The district court found that the clause giving the tribal court authority to enforce an arbitrator's decision and that the clause in the contract reserving the tribe's sovereign immunity precluded the arbitration clause from being an unequivocal waiver of the tribe's sovereign immunity. *Id.* at 1189.