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Huitsing: Huitsing: Ability of Native American Tribes

# The Ability of Native American Tribes to Waive Their Tribal Sovereign Immunity in Clear and Unequivocal Contracts to Arbitrate

*C&L Enterprises, Inc. v. Citizen Band Potawatomie Tribe of Oklahoma*<sup>1</sup>

## I. INTRODUCTION

Native American tribes enjoy immunity from suits on contracts made on or off a reservation.<sup>2</sup> A tribe is subject to suit only if it has clearly waived its immunity or Congress has expressly authorized the suit.<sup>3</sup> Tribal immunity was given to the tribes on the principle that tribes are sovereigns or quasi sovereigns enjoying immunity from judicial attack absent their consent.<sup>4</sup> The purpose of tribal sovereignty, according to the Supreme Court, is to promote tribal economic development and self-sufficiency.<sup>5</sup> Though the Court has expressed its dissatisfaction with the doctrine in light of increased tribal economic self-sufficiency through successful business ventures, the Court has upheld this doctrine and has deferred to Congress any question of abrogating tribal sovereign immunity.<sup>6</sup>

## II. FACTS AND HOLDING

Citizen Potawatomi Nation (Tribe), a federally recognized Indian tribe, entered into a contract with C&L Enterprises (C&L), for the installation of a roof on a tribally-owned building in Shawnee, Oklahoma.<sup>7</sup> The building was neither on the Tribe's reservation nor on land held in trust for the Tribe by the federal government.<sup>8</sup> As part of the construction contract, the Tribe submitted a standard-form contract it had drawn up to C&L containing an arbitration clause and a choice of law clause.<sup>9</sup>

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1. 532 U.S. 411 (2001).
  2. *Id.* at 415 (citing *Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998)).
  3. *Id.* at 1593 (citing *Kiowa*, 523 U.S. at 754). *See also id.* at 1594.
  4. *Kiowa*, 523 U.S. at 757 (1998).
  5. *Id.*
  6. *Id.* at 758.
  7. *C&L*, 532 U.S. at 414.
  8. *Id.*
  9. *Id.* at 415. The agreement stated, in pertinent part:

All claims or disputes . . . arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction [I]ndustry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise .

After execution of the contract, but before C&L began performance, the Tribe solicited new bids and retained a different company to install the roof.<sup>10</sup> C&L submitted an arbitration demand claiming that the Tribe had breached the contract.<sup>11</sup>

The Tribe declined to participate in the arbitration proceedings and instead asserted sovereign immunity.<sup>12</sup> The Tribe, however, notified the arbitrator of its substantive defenses to C&L's claim.<sup>13</sup> The arbitrator found for C&L and awarded \$25,400 in damages, plus attorney's fees and costs.<sup>14</sup>

C&L filed suit to enforce the arbitrator's award in the District Court of Oklahoma County.<sup>15</sup> The Tribe appeared for the sole purpose of moving to dismiss the action, reasoning that it had tribal immunity from the suit.<sup>16</sup> The issue to be resolved by the District Court of Oklahoma County was whether the Tribe's motion to dismiss should be granted or whether the arbitrator's award should be affirmed.<sup>17</sup> The district court denied the Tribe's motion and entered a judgment confirming the award.<sup>18</sup>

The Oklahoma Court of Civil Appeals affirmed the district court's decision.<sup>19</sup> It held that the Tribe lacked immunity because the contract was between an Indian tribe and a non-Indian and was executed outside of Indian territory.<sup>20</sup> After the Oklahoma Supreme Court denied review, the Tribe petitioned the United States Supreme Court for review.<sup>21</sup> The Court granted the Tribe's petition and vacated the judgment of the Court of Civil Appeals, remanding the case for reconsideration in light of the Court's recent decision in *Kiowa*.<sup>22</sup>

On remand, the Court of Civil Appeals held that in light of the *Kiowa* decision, the Tribe was immune from suit, despite the fact that the contract concerned an

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.... The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

*Id.* Further, the agreement stated, "[t]he contract shall be governed by the law of the place where the Project is located." *Id.*

10. *Id.* (The Tribe solicited new bids because of its decision to change the roofing material from that specified in its contract with C&L.)

11. *Id.* at 415.

12. *Id.*

13. *Id.*

14. *Id.* (\$25,400 was close to thirty percent of the contract price.)

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* In *Kiowa*, the Court held that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa*, 523 U.S. at 760. The Court also held that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754.

off-reservation building.<sup>23</sup> The court determined that the Tribe did not clearly and explicitly waive its immunity.<sup>24</sup>

The Oklahoma Supreme Court denied C&L's petition for review.<sup>25</sup> The Supreme Court once again granted certiorari in light of the Civil Appeals Court decision and other intervening case law from various state and federal courts, holding that arbitration clauses similar to the one in this case expressly waived tribal immunity.<sup>26</sup> Again, the question for the Supreme Court was whether the Tribe had waived its immunity in its contract with C&L.<sup>27</sup>

The Court held that when a Tribe signs a contract with a clear arbitration provision and choice-of-laws clause, resulting in an agreement to arbitrate under state law, the Tribe has waived its sovereign immunity.<sup>28</sup> The court held that in this case, where the Tribe had issued in its contract a clear arbitration agreement and a plain choice-of-laws clause, it was subject to the arbitration agreement.<sup>29</sup>

### III. LEGAL BACKGROUND

#### A. *The Purpose and Definition of Tribal Sovereignty*

The United States Supreme Court expressly declared sovereign immunity a tribal right in 1940.<sup>30</sup> This doctrine has been pieced together from many divergent legal sources, including federal immunity law, state immunity law, and foreign governmental immunity law.<sup>31</sup> Advocates of tribal sovereign immunity promote the immunity as a benefit to the tribes' weak economic base by preventing suits against

23. *C & L Enterprises*, 532 U.S. at 412.

24. *Id.* Here, the Court indicated that the language of the contract "seem[ed] to indicate a willingness on [the] Tribe's part to expose itself to suit on the contract," but that "the leap from that willingness to a waiver of immunity is one based on implication, not an unequivocal expression." *Id.*

25. *Id.* at 417.

26. *Id.* See *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assoc., Inc.*, 86 F.3d 656, 661 (7th Cir. 1996); *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983); *Val/Del, Inc. v. Superior Court*, 703 P.2d 502 (Ariz. App. 1985).

27. *C&L Enterprises*, 532 U.S. at 418.

28. *Id.* at 419.

29. *Id.*

30. *U.S. v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940). The Court stated that "[t]he public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continu[ed] this immunity even after the dissolution of . . . tribal government[s]." *Id.* The Court further held that without "congressional authorization," the "Indian Nations are exempt from suit." *Id.* See Bruce A. Wagman, *Advancing Tribal Sovereign Immunity as a Pathway to Power*, 27 U. of S. F. L. Rev. 419, 446 (1993); Eric Governo, *Tribal Sovereign Immunity: History, Competing Policies, and Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 34 New Eng. L. Rev. 175, 178 (1999).

31. Wagman, *supra* n. 30, at 422. Additionally, it can be traced to the English concept of the divine right of royalty, the idea that the monarch could do no wrong and therefore against the monarch, no suit could be legitimate. Theresa R. Wilson, *Nations Within a Nation: The Evolution of Tribal Immunity*, 24 Am. Indian L. Rev. 101 (1999).

the tribes<sup>32</sup> and by providing political and psychological recognition for the individual rights and dignity of the Indian nations as self-sufficient units.<sup>33</sup> Critics of tribal sovereign immunity contend that it leads to outside entities being deterred from transacting with tribes whose tribal immunity may insulate them from any recourse the company may wish to pursue should the enterprise sour.<sup>34</sup> This opposition to tribal immunity appears in recent Supreme Court reasoning that in today's society where tribes are active in many business enterprises, tribal immunity extends beyond what is needed to safeguard tribal governance and can harm those dealing with the tribes in business matters.<sup>35</sup>

Tribal sovereignty includes the common-law immunity from suit traditionally enjoyed by sovereign powers.<sup>36</sup> In order to waive this immunity, the language used to waive it must be unequivocal and express.<sup>37</sup> This requirement of unambiguous waiver is an important corollary to sovereign immunity protections.<sup>38</sup>

### *B. The Frontier and Future of Tribal Sovereignty*

The United States Supreme Court traced the history of tribal sovereign immunity in *Kiowa*.<sup>39</sup> The Court noted in *Kiowa* that the tribal sovereign immunity concept began as a passing reference by the Court in *Turner v. United States*.<sup>40</sup> The Court explained the foundation for tribal immunity, having been laid by reference in *Turner*, resulted in later explicit holdings of tribal immunity from suit.<sup>41</sup> In *United States v. United States Fidelity & Guaranty Co.*, the Court explicitly held that tribes had immunity from suit absent tribal consent to be sued.<sup>42</sup> Later cases have reiterated this doctrine.<sup>43</sup> Though the Court has recently had the opportunity to reject

32. Wagman, *supra* n. 30, at 423 (citing *U.S. Fidelity*, 309 U.S. at 512). See also Governo, *supra* n. 30, at 203, who comments "[a]n expansive immunity doctrine finds additional support in the 'infant government' rationale, the tribes' financial frailty, limited resources, and limited taxing power justify sovereign immunity."

33. Wagman, *supra* n. 30, at 423; See Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 Am. U. L. Rev. 1172, 1265-66 (2001) ("tribal sovereignty provides a protective shell around the evolution of tribal life . . . [w]ithout it, American Indians, as a people with separate cultures and identities cease to exist"). See also Governo, *supra* n. 30, at 204-05.

34. Wagman, *supra* n. 30, at 423 (citing *U.S. v. Wheeler*, 435 U.S. 313, 322-23 (1978)). Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal. L. Rev. 1137, 1155 n. 111 (1990).

35. *Kiowa*, 523 U.S. at 758.

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

37. *Id.*

38. Wagman, *supra* n. 30, at 447.

39. 523 U.S. 751, 757 (1998).

40. *Kiowa*, 523 U.S. at 756-57 (referring to *Turner v. U.S.*, 248 U.S. 354 (1919) as a basis for later holdings concerning tribal sovereign immunity).

41. *Kiowa*, 523 U.S. at 757.

42. 309 U.S. 506, 512 (1940).

43. *Kiowa*, 523 U.S. at 757 (citing *Puyallup Tribe, Inc. v. Dept of Game of Wash.*, 433 U.S. 165, 167 (1977); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890-91 (1986); *Blatchford v. Native Village of Noatak*,

the doctrine of tribal immunity, it has declined to do so, indicating Congress would be better equipped for this task.<sup>44</sup>

Despite the Court's indication of its doubts about the continuing necessity for tribal sovereign immunity,<sup>45</sup> the Court nonetheless has upheld the concept.<sup>46</sup> In *Kiowa*, the Court reaffirmed its earlier decisions in support of tribal sovereign immunity, holding tribes enjoy immunity from suits on contracts for both governmental and commercial activities on and off of the tribal reservation.<sup>47</sup> Consistent with the Court's earlier decisions regarding tribal sovereign immunity, the *Kiowa* Court determined a tribe is subject to suit only where Congress has authorized the suit or where the tribe has waived its immunity.<sup>48</sup>

### C. *The Waiver of Tribal Sovereignty?*

Since sovereign immunity is best understood as a government's power to define the forum, procedure, and limits placed on suits against itself, the power of sovereign immunity litigation and legislation mainly concerns the scope of waivers of that immunity.<sup>49</sup> The question of whether a tribe can waive its immunity through an arbitration contract became an issue in several federal and state cases beginning in the 1980's, and resulted in conflicting holdings.<sup>50</sup> The Seventh Circuit Court of Appeals,<sup>51</sup> Alaska Supreme Court,<sup>52</sup> and Arizona Court of Appeals<sup>53</sup> held clauses requiring arbitration of contractual disputes expressly waived tribal immunity.<sup>54</sup> The Ninth Circuit disagreed, holding an arbitration agreement does not imply a waiver of sovereign immunity.<sup>55</sup> The Eighth Circuit took a moderate position between the two, holding an arbitration clause in a contract waives tribal sovereign immunity as

501 U.S. 775, 782 (1991); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997)).

44. *Okla. Tax Commn. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991); *Kiowa*, 523 U.S. at 757-60 (holding "we defer to the role Congress may wish to exercise in this important judgment").

45. See *Kiowa*, 523 U.S. at 758 (detailing immunity is no longer as necessary as it once was to protect tribes against states' encroachments or to safeguard tribal self-governance when tribal enterprises now include sophisticated commercial activities such as operating ski resorts, gambling operations, and sales of cigarettes to non-Indians); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (same).

46. *Kiowa*, 523 U.S. at 758-60.

47. *Id.* at 760.

48. *Id.* at 754.

49. Thomas P. Schlosser, *Sovereign Immunity: Should the Sovereign Control the Purse?*, 24 Am. Ind. L. Rev. 309, 317 (2000).

50. See e.g. *Sokaogon*, 86 F.3d 656; *Native Village of Eyak*, 658 P.2d 756; *Val/Del*, 703 P.2d 502; *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989)).

51. *Sokaogon*, 86 F.3d at 661.

52. *Native Village of Eyak*, 658 P.2d at 760-61.

53. *Val/Del*, 703 P.2d at 509.

54. *C&L*, 532 U.S. at 417.

55. *Pan American Co.*, 884 F.2d at 420 (disagreeing with opinions holding arbitration agreements constitute waiver of tribal immunity on the basis of *Santa Clara Pueblo's* admonition against implied waivers).

to contractual claims under the contract, but does not waive immunity from any tort claims arising out of the same agreement.<sup>56</sup>

In order to resolve this conflict in the state and federal courts, the Supreme Court decided to rule on the issue of whether an arbitration agreement constitutes waiver of tribal sovereign immunity.<sup>57</sup>

#### IV. INSTANT DECISION

In *C&L*, the Supreme Court faced the issue of whether the Tribe had waived its immunity from suit in state court when it expressly agreed to arbitrate disputes with C&L.<sup>58</sup> The Court unanimously held the Tribe waived its sovereign immunity when it signed the arbitration agreement with C&L.<sup>59</sup>

##### A. *C&L, Kiowa, and Tribal Immunity*

In the instant case, the Court relied on the holding in *Kiowa*, decided while *C&L* was pending, and factually distinguished the present case from *Kiowa*.<sup>60</sup> The Court upheld *Kiowa's* holding that tribal immunity extends to suits on off-reservation commercial contracts.<sup>61</sup> In *Kiowa*, the Court found the Kiowa Tribe was immune from suit because it had not waived its immunity and Congress had not abrogated this immunity through statute.<sup>62</sup> The Court reasoned the present case arose out of the breach of a commercial, off-reservation contract by a federally recognized Indian Tribe.<sup>63</sup> In *Kiowa*, however, the Kiowa Tribe defaulted on a promissory note which recited, "[n]othing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma."<sup>64</sup> Unlike *Kiowa*, the Potawatomie Tribe in the present case had signed an explicit arbitration agreement and choice of laws clause in its construction contract with C&L.<sup>65</sup>

##### B. *Clear and Unequivocal Waiver of Tribal Immunity*

The Court upheld earlier holdings that requirements for waiver of tribal immunity must be unequivocal and clear.<sup>66</sup> The Court reasoned the arbitration

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56. *Rosebud Sioux Tribe v. Val-U Constr. Co. of South Dakota, Inc.*, 50 F.3d 560, 562 (8th Cir. 1994).

57. *C&L*, 532 U.S. at 417.

58. *Id.* at 413.

59. *Id.* at 423.

60. *Id.* at 417 (citing *Kiowa*, 523 U.S. at 751).

61. *Id.*

62. *Id.* (citing *Kiowa*, 523 U.S. at 760).

63. *Id.*

64. *Kiowa*, 523 U.S. at 753-54.

65. *C&L*, 532 U.S. at 417.

66. *Santa Clara Pueblo*, 436 U.S. at 58; *Okl. Tax Commn.*, 498 U.S. at 509.

agreement between C&L and the Tribe met the clear and unequivocal requirement.<sup>67</sup> The Court noted that the choice of laws clause made it clear Oklahoma was the state court with jurisdiction to enforce the award, and by selecting Oklahoma law the parties consented to confirmation of the arbitration award in court in accordance with the Oklahoma Uniform Arbitration Act.<sup>68</sup>

The Court reasoned by this express contract, the Tribe had agreed to adhere to dispute resolution procedures.<sup>69</sup> The Court supported its reasoning by the fact that the Tribe drafted the contract containing the arbitration agreement.<sup>70</sup> The Court also noted other lower courts' decisions of clear waiver in essentially indistinguishable arbitration agreements.<sup>71</sup> The Court also indicated that the law governing waivers of immunity by foreign sovereigns is instructive to the present issue concerning arbitration agreements by foreign sovereigns constitute waiver of their foreign sovereign immunity.<sup>72</sup>

### *C. The Tribe's Arguments Against Waiver of Tribal Immunity*

In its analysis, the Court also confronted the Tribe's arguments against waiver of its immunity.<sup>73</sup> First, the Tribe argued that it had not expressly waived its sovereign immunity in any forum, but merely waived its rights to a court trial for any contractual disputes.<sup>74</sup> The Tribe argued that the arbitration clause merely submitted the contractual disputes to arbitration, but by no means waived sovereign immunity from judicial enforcement.<sup>75</sup> The Court dismissed this argument, noting that dispute resolution has a real world objective with practical consequences and it specifically authorizes judicial enforcement of any resolution arrived at through arbitration.<sup>76</sup> To

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67. *C&L*, 532 U.S. 417 (This clause met the test of "clear and unequivocal" because it required resolution of all contract-related disputes by binding arbitration, allowed that arbitral awards could be reduced to judgment in accordance with the applicable law in any court having jurisdiction thereof, and specified that the American Arbitration Association Rules for the construction industry would be used in any arbitral proceedings.)

68. *Id.* at 417. The Court concluded the choice of Oklahoma was evident from the wording of the contract "in accordance with applicable law in any court having jurisdiction thereof" and by the phrase "the law of the place where the Project is located." *Id.* at 419-20. The Court stated the words of the contract "judgment may be entered upon [the arbitration award] in accordance with applicable law" meant the parties had effectively consented to confirmation of the award in Oklahoma courts in accordance with the Oklahoma Arbitration Act. *Id.*

The Court's reasoning was expressly adopted in a recent California Appeals Court decision with an identical contract in *Smith v. Hopland Band of Pomo Indians*, 2002 WL 22337 \*1, \*3 (Cal. App. 2002).

69. *Id.*

70. *Id.*

71. *Id.* Here the Court cited *Sokaogon*, 86 F.3d at 656-61 (indicating that waiver in a contract such as this is unambiguous and does not require the explicit use of the words "sovereign immunity" to constitute waiver).

72. *Id.* at 421 n. 3 (quoting *Restatement (Third) of the Foreign Relations Law of the United States* § 456(2)(b)(ii) (ALI 1987)).

73. *Id.* at 420-22.

74. *Id.* at 420.

75. *Id.*

76. *Id.*



support its holding, the Court referred to an Alaska Supreme Court ruling on the same issue, citing that court's reasoning that an arbitration clause would be meaningless if it did not constitute a waiver of whatever immunity the tribe possessed.<sup>77</sup>

The Court then confronted the Tribe's second main argument, that a form contract, designed for private parties who normally have no immunity to waive, cannot establish a clear waiver of tribal sovereign immunity.<sup>78</sup> The Court rejected this argument, reasoning that the normal rule applying to these situations is the common-law rule of contract interpretation that courts should construe ambiguous language against the drafter.<sup>79</sup> The Court noted that this basic rule of contract interpretation is inapposite in this case where the contract was not ambiguous to begin with and where the Tribe itself drafted the contract.<sup>80</sup>

Since the Court found the arbitration agreement to be clear and unambiguous, the Court held that under the agreement the Tribe proposed and signed, "the Tribe had clearly consented to arbitration and enforcement of the arbitral award in Oklahoma state court," thereby waiving its sovereign immunity.<sup>81</sup> Given the fact that the Tribe had signed a clear and unambiguous arbitration agreement waiving its tribal sovereign immunity, the unanimous Court reversed the opinion of the Oklahoma Court of Civil Appeals and remanded the case for further proceedings consistent with its opinion.<sup>82</sup>

## V. COMMENT

The Court in *C&L Enterprises* clearly sets forth an instance where clear and unequivocal waiver in a contract eliminates tribal immunity, resulting in the preservation of the contract and the ability to enforce the results of the arbitration in a judicial forum. The Court clearly and correctly balanced the competing policies at stake in this case by determining that in this instance, there was a clear and unambiguous waiver. However, the weakness in the Court's opinion is that it does not give predictable guidelines for interpreting whether waiver has occurred where the contract language is not as explicit a potential waiver as the present case, but not as vague and tenuous as in *Kiowa*.

### A. Tribal Sovereignty and Foreign Sovereignty

In *C&L*, the Court cited foreign sovereign immunity as instructive on the issue of the waiver of tribal immunity.<sup>83</sup> The Court reiterated the likening of tribal and

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77. *Id.* (citing *National Village of Eyak*, 658 P.2d at 760).

78. *Id.* at 423.

79. *Id.* (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 513 U.S. 52, 62 (1995)).

80. *Id.*

81. *Id.*

82. *Id.*

83. *C&L*, 532 U.S. at 419.

foreign sovereignty it made in *Kiowa*, where the Court set forth the two doctrines as both beginning as judicial doctrine, both matters of federal law, and both able to be limited by the Court and the resulting limitations able to be altered by Congress through explicit legislation.<sup>84</sup> In *Kiowa*, the Court recognized the competing policy concerns and reliance interests at stake in the question of the waiver of both foreign and tribal immunity and determined that Congress is in the best position to weigh these interests.<sup>85</sup> Since Congress is better equipped for the task, the Court indicated it would proceed with caution in this area.<sup>86</sup> After citing its discussion of the likeness between foreign and tribal sovereign immunity in *Kiowa*, the C&L Court showed that under American law, a foreign sovereign waives its immunity from jurisdiction in an action to enforce an arbitral award rendered pursuant to an arbitration agreement when it signs the agreement to arbitrate.<sup>87</sup> This leads to the conclusion that a tribal sovereign, like a foreign sovereign, can waive its sovereign immunity by agreeing to arbitrate.<sup>88</sup>

*B. Balancing the Interests at Stake in C&L:  
Tribal, Third Party, and Arbitral Validity*

The Native American tribes have a significant interest in the preservation of their traditional tribal sovereignty. Historically, the purpose of tribal sovereignty has been to promote tribal self-sufficiency and economic development.<sup>89</sup> Sovereign immunity is considered the best way to recognize Native American tribes' rights and dignity as self-sufficient units, providing psychological and political recognition of the tribes as sovereigns apart from the American rule of law.<sup>90</sup> Additionally, sovereign immunity benefits tribes by protecting their economic bases.<sup>91</sup> It protects their economic bases by curtailing suits against the tribes and protecting the tribes from court judgments that could deplete the wealth of the tribe.<sup>92</sup> Although the Court has indicated that the traditional economic reasons supporting the need for tribal sovereignty have declined with the advent of increasing tribal economic wealth,<sup>93</sup> the Court has consistently declined to abrogate the tribal immunity doctrine.<sup>94</sup>

The policy competing with tribal sovereign immunity is the policy behind upholding a contract between a tribe and a third party, protecting the reliance interest

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84. *Kiowa*, 523 U.S. at 759.

85. *Id.*

86. *Id.*

87. *Id.* (citing *Restatement (Third) of the Foreign Relations Law of the United States* § 456(2)(b)(ii)).

88. *Id.*

89. *Id.* at 757. See also *Governo*, *supra* n. 30, at 203; *Wilson*, *supra* n. 30, at 102.

90. *Wagman*, *supra* n. 30. See also *Krakoff*, *supra* n. 33, at 125-26.

91. *Wagman*, *supra* n. 30. See also *Governo*, *supra* n. 30, at 204 ("The tribes' fragile economies are insulated, to a degree, by the prevention of crippling lawsuits.")

92. *Wagman*, *supra* n. 30; *Governo*, *supra* n. 30, at 204.

93. *Kiowa*, 523 at 758-59.

94. *Id.*

of that third party. By deciding that tribes can waive their tribal sovereignty, the Court's holding can quell the fears of critics who worry that unbridled tribal sovereignty results in a deterrence to outside entities from transacting with tribes.<sup>95</sup> These critics fear that if outside entities view the tribes as not being held accountable in court for contracts, the outside entities will not transact with tribes for fear that their contracts will not be enforced.<sup>96</sup> The Court protected the contracting parties' reliance interests by holding the Tribe to its contract, balancing this policy with tribal sovereignty principles requiring any waiver to be clear and unequivocal.<sup>97</sup>

A third policy at stake in the instant case is the Court's support of arbitration as a valid mechanism of dispute resolution. The Court recognized in its decision that the results of arbitration, to be effective, must be enforceable in a judicial forum if the parties do not adhere to the arbitral resolution.<sup>98</sup> The Court's stated policy behind upholding judicial enforcement of arbitration agreements in spite of sovereign immunity is one of practicality: if the courts are not able to enforce an arbitration agreement, tribes could simply agree to arbitrate and then not comply with the results of the arbitration, rendering the arbitration agreement and resolution meaningless.<sup>99</sup> The Court supports arbitration as an effective dispute resolution mechanism by providing real-world enforcement powers for arbitral decisions in allowing judicial enforcement of arbitration agreements by an entity with sovereign immunity.<sup>100</sup>

In its decision, the Court upheld the concept of tribal sovereignty and balanced the historic interest of the protection of tribal immunity from suit against the policy behind upholding a party's ability to waive its rights by contract. The Court preserved the policy of protection of tribal immunity by requiring any waiver by the tribe to be clear and unequivocal.<sup>101</sup> This preserves tribal immunity in all circumstances except for when the tribe clearly and unequivocally waives its immunity, supporting the historical purposes of tribal immunity: benefit to the weak economic bases of tribes by preventing suits and recognition of the individual rights of Native American nations as self-sufficient units.<sup>102</sup> The Court protects this legitimate and historical tribal interest by requiring tribal sovereign immunity to trump any waiver of that immunity unless that waiver is clear and unequivocal.<sup>103</sup>

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95. *Id.* at 418 n. 33. See also Wilson, *supra* n. 31, at 126; Governo, *supra* n. 30, at 207.

96. *C & L*, 532 U.S. at 418.

97. *Id.*

98. *Id.* at 422.

99. *Id.*

100. *Id.*

101. *Id.* at 418.

102. Wagman, *supra* n. 30, at 422; Governo, *supra* n. 30, at 204.

103. *C&L*, 532 U.S. at 418.

### C. Consequences of C&L

The ramifications of C&L are just and fair. Under this decision, a tribe's historic interest in immunity from suits is preserved in situations where the tribe has not expressly waived its privilege. This preservation recognizes the historic and present interest of Native Americans as sovereigns or quasi-sovereigns who are not automatically subject to the jurisdiction of American courts.

This decision also correctly holds that Native Americans have the ability to waive their sovereign immunity when the waiver is clear and express. This ability to waive protects third parties who rely on contracts by holding the tribes to their end of the bargain when there is waiver. This will encourage such contracts with tribes because third parties will be able to trust that disputes can be resolved when there is tribal waiver, resulting in more commercial transactions with the tribes. Outsiders' fears of transacting with tribes will be distilled when third parties recognize that disputes can be arbitrated or litigated under a contract in which tribes have waived their immunity.

The ability to waive their immunity also gives the tribes an added bargaining chip in negotiations with third parties by being able to negotiate a waiver of sovereign immunity that third parties will take seriously. Ultimately, the tribes' ability to waive tribal immunity will encourage transactions with the tribes, while the requirement of clear and express waiver will protect the tribe's immunity in all other circumstances.

### D. Practical Problems with C&L

C&L clearly establishes that tribal waiver is possible and can be upheld in a court of law. The problem with the opinion, from a practical standpoint, is the Court does not explain what makes language clear and unambiguous. Instead, it gives two extreme examples of attempts to waive tribal immunity: the sparse and vague contract language of the *Kiowa* case and the detailed and specific arbitration clause in C&L. The Court stated that there is a clear and unambiguous waiver where a contract includes an arbitration clause requiring resolution of all contract related disputes and ensures that arbitral awards may be reduced to judgment "in accord with applicable laws or in any court having jurisdiction thereof."<sup>104</sup> The Court clearly distinguishes this instance of waiver from the *Kiowa* case, where there was not a clear and unequivocal waiver because the contract said only "[n]othing in this Note subjects or limits the sovereign rights of the [tribe]."<sup>105</sup>

The problem with this opinion will come when a court is faced with language found somewhere between the extremes of the *Kiowa* and C&L clauses, forcing that court to classify the language as *Kiowa*-like or C&L-like, when really it may be somewhere between the two. The Court's limited guidance on this matter is that the

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104. *Id.* at 419.

105. *Id.* at 418.

explicit words “sovereign immunity” are not required in the agreement, favoring the Seventh Circuit’s reasoning that no case has ever held that the exact words “sovereign immunity” are required for explicit waiver.<sup>106</sup> Because there are no magic words to determine whether sovereign immunity has been waived, it may be hard to tell in a specific case whether waiver has occurred, especially where the tribe’s waiver may be a limited, rather than a broad, waiver.<sup>107</sup> To determine if waiver has occurred, the court should look to whether a contract specifies a court or some other forum for the dispute resolution and what remedies are available to satisfy the judgment.<sup>108</sup>

### *E. C&L: The Proper Balance of All Interests Involved*

Although the Court leaves unclear the exact contract language that will establish waiver, the Court’s decision adequately balances the three competing interests needed to decide the issue of whether tribal immunity waiver has occurred in a specific instance. The result is tribal sovereignty protecting tribes when waiver is not clear or unequivocal, contract preservation when agreement to arbitrate expressly occurs, and the real-world enforcement of arbitral decisions. This decision protects tribal sovereign immunity by requiring an express waiver to trump the assumption of tribal immunity from being called to suit. However, this decision simultaneously recognizes the reliance interests of those who contract with tribes when the tribes clearly and unequivocally waive their sovereign immunity. From a practical standpoint, the Court also recognizes the importance of judicial enforcement of arbitral decisions in making arbitration meaningful as a method of conflict resolution.

The Court strikes the right balance between the need for the preservation of tribal sovereign immunity and the validity, enforceability, and reliance interest in contracts, while upholding the validity of arbitration as an effective means of dispute resolution.

## VI. CONCLUSION

In *C&L Enterprises*, the Court balances the competing policy interests behind tribal sovereign immunity and the preservation of an express contract to arbitrate a contract. In its decision, the Court preserves the tribal interest in sovereign immunity, holding that this sovereign immunity protects the tribes unless the tribes both clearly and unequivocally waive their immunity. In so holding, the Court

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106. *Id.* at 420.

107. Schlosser, *supra* n. 49, at 326. Schlosser notes that many Indian tribes and non-Indian contractors agree to include more limited waivers of immunity in their contracts. Limitations include limiting who may bring the claim, the types of claims and/or relief allowed, the choice of forum, the choice of law, the total judgment amount and source from which judgment may be satisfied, the types of damages, and the duration of the waiver. *Id.* at 326-27.

108. *Id.* at 325.

recognizes the interests of the other parties who contract with the tribes in preserving their contracts and the principles of contract law allowing the parties to contract away their rights. The Court also recognizes the necessity for judicial resolution of arbitral agreements, making arbitration a viable means of dispute resolution with staying enforcement power.

EMILY J. HUI TSING

