

# **Waiver of Tribal Sovereign Immunity**

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**SHORT CRESSMAN  
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The U.S. Supreme Court issued a decision on May 7, 2001 that weakens the ability of Tribes to assert the sovereign immunity defense to contractual liability. Deciding against the Tribe and the United States, which filed an *amicus* brief in support of the Tribe, the Court held in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. \_\_\_\_\_ (2001), No. 00-292, that the arbitration clause in the construction contract used by the Tribe was an implicit waiver of sovereign immunity that subjected the Tribe to the enforcement of an arbitration award in state court.

While paying lip service to the rule that "an Indian tribe is not subject to suit in a state court - even for breach of contract involving off-reservation commercial conduct - unless 'Congress has authorized the suit or the tribe has waived its immunity'," the Supreme Court in a unanimous opinion authored by Justice Ginsburg, stated that by agreeing to the arbitration clause in the agreement, the Tribe had waived, with the requisite clarity, its immunity from suit by the contractor to enforce the arbitration decision issued against the Tribe.

The specific arbitration clause was part of a form construction contract which provided that:  
All claims or disputes between the Contractor and the Owner 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.... 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. *C & L Enterprises, Inc.*, slip op. at 5.

The American Arbitration Association rules state 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." The U.S. Supreme Court decision is consistent with several other courts, including the Court of Appeals for the Seventh Circuit and the Alaska Supreme Court, which have held that such arbitration clauses expressly waive sovereign immunity from a suit arising out of the contract. The Supreme Court decision in *C&L Enterprises, Inc.*, effectively overruled the 1989 decision of Court of Appeals for the Ninth Circuit, which held in *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989), that such arbitration clauses did not expressly waive tribal immunity.

Tribes should be very wary when entering into contracts that contain arbitration clauses. In *C & L Enterprises*, the Court rejected the Tribe's argument that the form contract designed for private parties should not be read as a clear waiver of immunity. In this case, the Tribe itself had selected the form contract at issue. Consequently, any form contracts used by Tribes should be carefully reviewed for dispute resolution provisions that may be interpreted as an implicit waiver of tribal sovereign immunity.

Following the U.S. Supreme Court's latest decision, particular attention should be paid to the language of any rules, statutes, or guidelines incorporated into such contracts, such as the commonly-used arbitration rules of the American Arbitration Association. Incorporated language, although not contained within the four corners of the contract signed by the Tribe, may well be sufficient to be deemed a waiver of sovereign immunity.

If you have questions, or would like additional information, contact me at [rdubey@scblaw.com](mailto:rdubey@scblaw.com). For more information about me, click here: [Richard Du Bey](#)