WHO, WHAT, WHERE, AND HOW: THE FUNDAMENTAL ELEMENTS FOR CONTRACTS IMPLICATING TRIBAL SOVEREIGN IMMUNITY

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INTRODUCTION

With 574 federally recognized Indian tribes in the United States,[1] both Indian and non-Indian business partners may find themselves overwhelmed by the uncertainty surrounding tribal sovereign immunity. Each tribe's uniqueness in societal, cultural, and geographic contexts also carries over to its differing business practices and economic capacities. Each tribe and its legal teams may use distinctive tribal sovereign immunity language in their contracts, language based on many factors affecting the tribe. With a better understanding of this reality, tribes and their contractual partners will better position themselves to enter fruitful business relationships.

A few factors call attention to this niche topic in contract law. First is the notoriety tribal sovereign immunity has gained in the recent past. For example, in 2018 and 2019, a partnership between the Saint Regis Mohawk and Mylan Pharmaceuticals, Inc. bore intense scrutiny outside of

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1. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554, 7554 (Jan. 29, 2021).

Indian country and even in the halls of Congress.[2] Both sides of the American political aisle criticized the Saint Regis Mohawk's contract with the pharmaceutical giant as a ploy to exploit tribal sovereign immunity for patent protection.[3] Republican Senator Tom Cotton of Arkansas accused the pharmaceutical company of "attempt[ing] to purchase sovereign immunity to rip off consumers."[4] Democratic Congressman Nadler of New York described the contract as a "cynical ploy to shield [the pharmaceutical company's] patents."[5] Both Senator Cotton and Congressman Nadler neglected to mention the enormous role the contract played in the Saint Regis Mohawk's economic development, however.[6] What could be described as shams or "rent-a-tribe" schemes by outsiders is, in reality, tribes' attempts to bolster their economies with legitimate business decisions.[7]

The immense opportunity for economic development across Indian country is another reason to discuss the topic. Some non-Indian businesses and people may not believe that all tribal governments and reservations are business-friendly partners or places.[8] But in reality, tribal homelands and "reservations are comprised of both fee and trust lands, with opportunities for federal, state, and tribal government programs, as well as for both public and private investment."[9] Tribes possess business, commercial, and contractual codes to attract non-Indian business partners.[10] Tribal governments also house experienced and robust judiciaries to hear contract disputes.[11]

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2. *Saint Regis Mohawk Tribe v. Mylan Pharms., Inc.*, 896 F.3d 1322, 1325 (Fed. Cir. 2018).

3. Robert Pear, *Indian Tribe Joins Big Pharma at the Supreme Court, Defending a Lucrative Deal*, N.Y. TIMES (Jan. 26, 2019), https://www.nytimes.com/2019/01/26/us/politics/allergan-eye-drops-indian-tribe.html [https://perma.cc/CZ9F-HMCM].

4. *Id.*

5. *Id.*

6. The Saint Regis Mohawk received $13.75 million up front and contracted to receive up to $15 million a year in royalties. *Id.*

7. *See* Daniel C. Kennedy, Note, *Strange Bedfellows: Native American Tribes, Big Pharma, and the Legitimacy of Their Alliance*, 68 DUKE L.J. 1433, 1463 (2019) (discussing the St. Regis Mohawk Tribe's legitimate economic reasons to enter into a patent contract over cries of big pharma exploiting tribal sovereign immunity).

8. *See* Robert J. Miller, *American Indian Entrepreneurs: Unique Challenges, Unlimited Potential*, 40 ARIZ. ST. L.J. 1297, 1309–10 (2008) (explaining that not all tribes have attractive business or corporate codes, as well as misconceptions that tribal courts lack adequate expertise in this area of law).

9. Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791, 877 (2019).

10. *See, e.g.*, 5 HCC § 7 (2004) (amended 2005).

11. *See, e.g.*, *Judicial Branch*, CHEROKEE NATION, https://www.cherokee.org/our-government/judicial-branch/ [https://perma.cc/AB7B-ASTM]; Robert Yazzie, *History of the Courts of the Navajo Nation*, THE JUD. BRANCH OF

More importantly to current or potential non-Indian contractual partners, tribes across Indian country have contractual sovereign immunity waivers on their agendas. In 2019 the National Congress of American Indians (NCAI) passed a resolution titled "Affirming and Protecting Tribal Sovereign Immunity by Committing to Risk Management to Prevent Losses and Provide a System of Solutions for Claimants Alleging Torts or Other Economic Harms."[12] The resolution, in part, called on the federal government to work with tribes "to develop tribal self-determination contracts and grant programs to assist tribal nations with . . . claims resolution processes."[13] The resolution further called on the federal government to collaborate with tribes in developing forms of "alternative dispute resolution, and preserving tribal sovereign immunity in the context of economic development."[14] This topic is on tribes' minds throughout Indian country. Pointedly, the resolution cites tribal sovereign immunity in the contractual and economic spheres.[15]

Non-Indian contractual parties should be on notice with Indian country buzzing about sovereign immunity. The sea of differences between tribes can be shored up by some bright-line rules when tribal sovereign immunity is concerned. Indian tribes possess sovereign immunity from suit absent an express congressional abrogation or waiver.[16] In 2014 the U.S. Supreme Court upheld the validity of this tribal sovereign immunity precedent.[17] But the Court never spelled out the exact parameters required for a clear waiver.[18] This area of law largely remains ambiguous for tribes and their business partners. Luckily, the Restatement of the Law of American Indians helps provide accessible and clear rules in this area of law.[19] The Restatement encapsulates common law, statutory law, and other sources of law in an effort to craft "concrete" and "uncontroversial" rules in Indian law.[20] This Essay discusses sections of the Restatement that directly relate to contracting with respect to tribal

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THE NAVAJO NATION, http://www.courts.navajo-nsn.gov/Index.htm [https://perma.cc/7FLJ-H8CY] (last visited Feb. 23, 2022).

12. NCAI Res. 19-004 (2019 mid-year session).

13. *Id.*

14. *Id.*

15. *Id.*

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

17. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785 (2014).

18. *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 415–16, 420–21 (2001) (holding that standardized alternative dispute resolution language, without any mention of "immunity" or "waiver," amounted to a waiver of sovereign immunity).

19. RESTATEMENT OF THE L. OF AM. INDIANS §§ 51–54 (AM. L. INST., Proposed Final Draft 2021) [hereinafter RESTATEMENT L. AM. INDIANS].

20. *See* Matthew L.M. Fletcher, *The Restatement of the Law for American Indians: The Process and Why It Matters*, 80 MONT. L. REV. 1, 3 (2019).

sovereign immunity.[21] But contracting parties should not rely solely on this Essay and the Restatement. Depending on the circumstances surrounding the contract, both tribes and their business partners must thoughtfully tailor their tribal sovereign immunity clauses to conform to the relevant jurisdiction's rules and the distinct circumstances surrounding each tribe.

This Essay addresses the problems created by courts' failure to spell out the exact parameters required for contractual provisions regarding tribal sovereign immunity. As a companion to the Restatement, this Essay seeks to develop a simpler framework to craft effective contract language for all tribes and their business partners to employ. Other articles offer model contractual provisions for waivers of tribal sovereign immunity.[22] This Essay touches on these approaches and suggestions for drafting effective provisions. This Essay, however, takes a different approach by discussing the four key components of any tribal sovereign immunity contract provision with guidance from the Restatement. Like the foundational "five 'W's" of journalism,[23] this Essay emphasizes four key questions contract drafters need to ask: *Who* is immune from suit? *What* is the tribe waiving or not waiving? *Where* will dispute resolution take place? *How* will enforcement of the provision or waiver occur?[24] Each question is a fundamental element that effective contract provisions for tribal sovereign immunity require.

Part I of this Essay introduces the doctrinal underpinnings of tribal sovereign immunity. Part II details jurisprudence on waivers of tribal sovereign immunity. Part III offers four model contract elements—centered on the themes of *who*, *what*, *where*, and *how*—for both Indian and non-Indian parties to use when drafting and negotiating tribal sovereign immunity by outlining recent caselaw defining the limits of the doctrine. Part IV concludes by stressing the model elements' utility for

21. Many sections of the Restatement can apply to the subject of this Essay, but Chapter 4 Subchapter 2, *Indian Tribes as Economic Actors*, speaks to tribal sovereign immunity in the area of tribal economic development and contracting. RESTATEMENT L. AM. INDIANS, *supra* note 19, §§ 50–59.

22. Rob Roy Smith, *Contract Waivers for Tribal Sovereign Immunity: What Every Idaho Attorney Needs to Know*, ADVOCATE, Mar./Apr. 2018, at 28; Thomas P. Schlosser, *Sovereign Immunity: Should the Sovereign Control the Purse?*, 24 AM. INDIAN L. REV. 309, 325–28 (1999–2000).

23. Anthony Santiago, *Understanding the 5W's and What Journalists Really Want to Know*, *Press Release Writing Tips*, NEWSWIRE (June 23, 2017), https://www.newswire.com/blog/understanding-the-5ws-and-what-journalists-really-want-to-know [https://perma.cc/PR9H-G48C].

24. This Essay is an updated successor to William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169 (1994), and narrowly focuses on tribal sovereign immunity. Unlike Vetter's article, this Essay does not discuss secretarial approval or subject matter jurisdiction.

parties in reaching the twin goals of protecting and respecting tribal sovereignty while encouraging beneficially reciprocal business relationships. Throughout the discussion, this Essay leans on and builds upon the Restatement's guidance. Particular attention is paid to the Restatement sections on tribal economic activity and tribal sovereign immunity. This Essay argues that without clear and express inclusion of the four elements, the tribal sovereign immunity provision may not reflect the true intentions of the contractual parties, may damage tribal sovereignty, and may lead to damaged business relationships and economies.

I. TRIBAL SOVEREIGN IMMUNITY'S DOCTRINAL UNDERPINNINGS IN THE COMMERCIAL CONTEXT

Indian tribes are "distinct, independent political communities" within the territorial boundaries of the United States.[25] Indian tribes are sovereign governments that exercise inherent sovereign authority over their members and territories.[26] They exist as "subnational American government—like states that exist as subnational sovereigns whose powers are limited and shaped by federal law—growing in the federal framework's shadow."[27] One aspect of these federally defined powers is tribal sovereign immunity. This Part provides an overview of the doctrine of tribal sovereign immunity and key decisions in which the Supreme Court has upheld its use in tribal commercial activity disputes.

Tribal sovereign immunity differs from state sovereign immunity because tribes did not surrender aspects of their sovereignty to join in the American federal structure as states did.[28] Some commentators and jurists claim the U.S. Supreme Court first recognized tribal sovereign immunity in 1919.[29] Some posit, however, that the Court first acknowledged tribal sovereign immunity as early as 1850.[30] In *Parks v. Ross*,[31] the Court held "that the national status of [tribes] foreclosed federal court authority".[32]

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25. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

26. *See id.*

27. Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 559 (2021); *see Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

28. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991).

29. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (citing *Turner v. United States*, 248 U.S. 354, 358 (1919)); *cf. Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 756–57 (1998) ("Though *Turner* is indeed cited as authority for [tribal] immunity, examination shows it simply does not stand for that proposition. . . . [*Turner*] is, at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine.").

30. *See, e.g.*, MATTHEW L.M. FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW § 6.5, at 176 (2017).

31. 52 U.S. (11 How.) 362 (1850).

32. FLETCHER, *supra* note 30, at 176 (citing *Parks*, 52 U.S. at 374).

There, the petitioner brought a contract dispute for alleged debts owed by the Principal Chief of the Cherokee Nation.[33] *Parks* reveals that tribal contract disputes, and their interplay with sovereign immunity, are not a recent phenomenon to the American judicial system.

More recently, in the tribal Self-Determination Era of federal Indian law and policy,[34] the Supreme Court in *Santa Clara Pueblo v. Martinez*[35] built upon its earlier understandings of tribal sovereign immunity.[36] This 1978 case considered whether the Indian Civil Rights Act of 1968 (ICRA) authorized suits against Indian tribes in federal court for alleged violations of the Act.[37] Rather than determining the merits of the ICRA claim,[38] the Court analyzed whether tribal sovereign immunity barred the suit. The question of sovereign immunity required the Court to "parse the [ICRA] in order to balance and resolve the essential tension between the tribes and the federal government and the tribe and its members."[39] The Court held tribal sovereign immunity shielded the Pueblo from suit.[40] The decision recognized that sovereign immunity bars suits brought against Indian tribes absent a clear waiver by the tribe or absent congressional abrogation.[41]

The question of tribal sovereign immunity prominently entered the tribal economic development sector in 1991. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*,[42] the Potawatomi filed suit in federal court seeking an injunction after the Oklahoma Tax Commission attempted to collect back taxes on tribal cigarette sales.[43] The State of Oklahoma counterclaimed and argued that the Potawatomi waived their sovereign immunity by seeking an injunction against the Commission's assessment.[44] The Court rejected Oklahoma's waiver argument and its invitation to abandon or undercut the doctrine of tribal sovereign immunity.[45] In relation to contractual and economic purposes, the Court rejected the State's claim that the doctrine should not extend to

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33. *Parks*, 52 U.S. at 373.

34. From 1968 to present. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 32–37 (7th ed. 2020).

35. 436 U.S. 49 (1978).

36. *Id.* at 60.

37. *Id.* at 51–52.

38. A member of the Santa Clara Pueblo claimed the Pueblo's membership ordinance violated ICRA. *Id.*

39. FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 256 (2009).

40. *Santa Clara Pueblo*, 436 U.S. at 72.

41. *Id.* at 58.

42. 498 U.S. 505 (1991).

43. *Id.* at 507.

44. *Id.* at 507–08, 509.

45. *Id.* at 509–10 (citing *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506 (1940)).

a tribe's economic activity but only to "traditional tribal interests."[46] Significantly, the Court reaffirmed a tribe's ability to invoke its sovereign immunity when the tribe, as a nation, engaged in economic activity.[47]

Later, the Court elucidated tribal sovereign immunity in the contractual context in *Kiowa Tribe v. Manufacturing Technologies, Inc.*[48] There, one of the Kiowa Tribe's entities agreed to buy stock from the non-Indian respondent through a promissory note signed by the tribal chairperson.[49] The note included language expressing retention of the tribe's sovereign rights.[50] In deference to congressional expertise in Indian affairs, the Court denied another invitation to confine tribal sovereign immunity without congressional abrogation.[51] 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."[52]

This entrenchment of tribal sovereign immunity into commercial activities came at a perfect time for tribes. The *Kiowa Tribe* decision came just ten years after the Indian Gaming Regulatory Act (IGRA).[53] *Kiowa Tribe* reinforced tribes' ability to assert sovereign immunity more broadly into their recently authorized gaming activities. Consequently, the growth of tribal sovereign immunity litigation is primarily a result of increased tribal economic activity following the passage of the IGRA. That law opened up tribal gaming to all federally recognized tribes, drawing in businesses to get their share of the "economic boom" happening across parts of Indian country.[54]

The Court affirmed the contractual and economic utility of tribal sovereign immunity in *Michigan v. Bay Mills Indian Community*.[55] Justice Kagan's opinion reaffirmed that tribes may invoke sovereign immunity when a suit arises from off-reservation commercial activity.[56] *Bay Mills* concerned a dispute over whether the tribe violated its IGRA-required

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46. *Id.* at 510.

47. *Id.*

48. 523 U.S. 751 (1998).

49. *Id.* at 753.

50. *Id.* at 754.

51. *Id*. at 759.

52. *Id.* at 760.

53. 25 U.S.C. §§ 2701–2721.

54. Heidi McNeil Staudenmaier & Metchi Palaniappan, *The Intersection of Corporate America and Indian Country: Negotiating Successful Business Alliances*, 22 T.M. COOLEY L. REV. 569, 569 (2005). One survey of federal and state court opinions citing *Kiowa* from 1998 to 2009 found that seventy-one opinions cited *Kiowa* as the primary reason to extend sovereign immunity to a tribally owned commercial entity. Jeff M. Kosseff, Note, *Sovereignty for Profits: Courts' Expansion of Sovereign Immunity to Tribe-Owned Businesses*, 5 FLA. A&M U. L. REV. 131, 138 (2009).

55. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014).

56. *Id.* at 785.

gaming compact with the state when it opened a casino on land beyond the tribe's reservation boundaries.[57] The Court concluded "IGRA partially abrogates tribal sovereign immunity" for states "to enjoin a class III gaming activity located on Indian lands."[58] The gaming activity at issue, however, did not occur on "Indian lands."[59] Since the *Bay Mills* decision, the Court has not ruled on the doctrine in the commercial or contractual context.[60]

Even with Supreme Court precedent reaffirming tribal sovereign immunity's applicability in tribal commercial activities—albeit with some skepticism from Justice Kennedy in *Kiowa Tribe*[61] and from Justice Thomas in *Bay Mills*[62]—some scholars still question whether tribal sovereign immunity should apply.[63] This skepticism notwithstanding, tribes and non-tribal contractors should rely on this precedent unless Congress abrogates or constrains the doctrine.[64] The Restatement's incorporation of this precedent bolsters the precedent's legitimacy. Section 51, *Sovereign Immunity of Indian Tribes and Arms of Tribes* states,

> Absent express Congressional abrogation or an express waiver that is properly authorized by the tribe, Indian tribes and their unincorporated subdivisions, agencies, and instrumentalities described in § 50(a)-(b) have sovereign immunity from suit when engaged in economic activities within or outside of Indian country unless tribal law, or the governing document of such entity, clearly established that it is subject to suit.[65]

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57. *Id.* at 786.

58. *Id.* at 791 (citing 25 U.S.C. § 2710(d)(7)(A)(ii)).

59. *Id.*

60. While the Court most recently discussed the doctrine in *Lewis v. Clarke*, the case focused on tort liability and official-action immunity. *Lewis v. Clarke*, 137 S. Ct. 1285 (2017).

61. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998) ("In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce.").

62. *Bay Mills Indian Cmty.*, 572 U.S. at 814 (Thomas, J., dissenting) ("[*Kiowa*], wrong to begin with, has only worsened with the passage of time. In the 16 years since *Kiowa*, tribal commerce has proliferated and the inequities engendered by unwarranted tribal immunity have multiplied. Nevertheless, the Court turns down a chance to rectify its error.").

63. Matthew L.M. Fletcher, *(Re)Solving the Tribal No-Forum Conundrum:* Michigan v. Bay Mills Indian Community, 123 YALE L.J. ONLINE 311, 316 (2013) (citing *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727–28 (9th Cir. 2008) (Gould, J., concurring)); *see also* Kosseff, *supra* note 54, at 145–46.

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

65. RESTATEMENT L. AM. INDIANS, *supra* note 19, § 51.

Sections 50 and 51 ground the viability of tribal sovereign immunity in the business and contractual spheres.

Time will tell if the Roberts Court will shift the doctrine in another direction.[66] Until then, all of those involved should view a tribe's assertion of the doctrine as emblematic of its sovereign authority to dictate its economic development.[67] The Restatement's incorporation of this precedent further illustrates a national recognition of the doctrine as well.

II. WAIVER JURISPRUDENCE

With the foundations of tribal sovereign immunity in place, this Part focuses on American jurisprudence on the presence of express waivers of sovereign immunity. This Part revisits the specific contract language at issue in *Kiowa Tribe*. Next, a discussion of the Court's decision in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*[68] dominates the majority of this Part. Circuit courts' and state courts' understandings of the doctrine also guide this analysis. A brief note on other tribal sovereign immunity principles caps off this Section.

A deeper dive into the details and aftermath of *Kiowa Tribe* helps to center waiver jurisprudence generally across federal and state courts. In *Kiowa Tribe*, the promissory note included a paragraph entitled "Waivers and Governing Law."[69] The paragraph continued, "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma."[70] As noted above, the Court found that this language did not constitute an unequivocally expressed waiver.[71] That the Court did not require any magic words in its first ruling on written or contractually agreed-upon instruments of this kind is notable. Neither the word "immunity" nor the phrase "waiver of sovereign immunity" was expressly stated in the promissory note.[72] Without magic words, practitioners and jurists then had to decide what language sufficed to satisfy the *Santa Clara Pueblo* rule requiring an Indian tribe's express and clear waiver.[73]

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66. Three new Justices now sit on the Court since the *Bay Mills* decision. However, both Justices Scalia and Ginsburg dissented, and Justice Kennedy joined the majority. Justice Gorsuch's record on the Court suggests a remaining vote in favor of upholding tribal sovereign immunity as it currently exists in precedent. *See Herrera v. Wyoming*, 139 S. Ct. 1686 (2019); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

67. *See* Miller, *supra* note 8, at 1304.

68. 532 U.S. 411 (2001).

69. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

70. *Id.*

71. *Id.* at 760.

72. *Id.* at 754, 760.

73. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (requiring an express waiver of sovereign immunity).

One decision that strayed from that trend (and that was decided before *Kiowa*) was *Rosebud Sioux Tribe v. Val-U Construction Co.*[74] There, the Eighth Circuit considered an arbitration clause with the following language: "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."[75] The court treated the language as an unequivocal expression of waiver for claims arising under the contract.[76] The court's rationale centered on the agreement to arbitrate any contractual dispute, which the court determined was an express waiver that lifted the immunity shield and allowed the tribe to participate in an arbitration forum.[77] The Eighth Circuit's reliance on the arbitration clause was a precursor to the Supreme Court's decision in *C & L Enterprises*.[78]

Three years after handing down the *Kiowa Tribe* decision, the Court took up the doctrine again in *C & L Enterprises*.[79] There, the tribe signed a standard-form construction contract that contained an arbitration clause.[80] The clause specified the controlling arbitration rules, the jurisdiction of federal or state courts to enter the arbitration judgment, and a separate choice-of-law clause providing the state court jurisdiction to enforce the agreement or enter the judgment.[81] Writing for a unanimous Court, Justice Ginsburg held the standardized contract language amounted to an unequivocally expressed waiver.[82] Not only did the tribe agree to the arbitration dispute resolution, but the tribe also tendered the contract.[83] The contract's enforcement provision granting jurisdiction to federal or state courts to enter the judgment dealt the final blow to the tribe's arguments.[84] The Court also cited *Rosebud Sioux Tribe* and reasoned that the Eighth Circuit's ruling in the absence of an enforcement provision there strengthened the Court's rationale in finding a waiver where the tribe included an enforcement provision in the contract.[85] But how does an absence of "waiver of sovereign immunity" or similar language amount to

74. 50 F.3d 560 (8th Cir. 1995).

75. *Id.* at 562.

76. *Id.*; *cf. Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1376 (8th Cir. 1985) (holding that promissory note offering remedies "in addition to such other and further rights and remedies provided by law" did not amount to an unequivocally expressed waiver).

77. *Rosebud Sioux Tribe*, 50 F.3d at 562.

78. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418–19 (2001).

79. *Id.* at 414.

80. *Id.*

81. *Id.* at 415.

82. *Id.* at 423.

83. *Id.* at 420.

84. *Id.* at 422.

85. *Id.* at 422 (citing *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 562 (8th Cir. 1995)).

an unequivocal expression? And how does the language stack up to *Kiowa Tribe*?

One commentator answers this question by introducing a new analysis to the doctrine. The commentator posits that, following *C & L Enterprises*, a new waiver analysis appeared, under which the Court first looks to the contractual terms and then looks to the "facts of the nature of the business relationship between the parties."[86] This test better explains the Court's shift from a textualist approach in *Kiowa Tribe* to a more pragmatic approach in *C & L Enterprises*. From a functionalist perspective, the tribe tendered the contract (even if it was a standard form contract) and in theory would agree to whatever terms it proffered to the counterparty from the start of the relationship. The Court might have been wary of the broad latitude tribes would possess if they were immune from enforcement of arbitration awards. If tribes could escape arbitration award enforcement, arbitration clauses would be null, and counterparties could never receive a judgment or damages against the tribe.[87]

In sum, practitioners could pick up pieces of practical rules from Supreme Court jurisprudence on this issue: One, do not use standard form contracts.[88] Two, explicitly reserve tribal immunity.[89] Three, express waivers do not require that the contract contain magic words of "sovereign immunity" or "waiver of."[90] Contractors can also rely on the Restatement for the express waiver requirement. Sections 51–54 include the requirement of "an express waiver" that is "properly authorized" from the tribe or tribal arm and regardless whether the tribal entity was formed under the Indian Reorganization Act, the Oklahoma Indian Welfare Act, tribal law, or state law.[91] Thus, an express waiver is mandatory, but the bounds of what constitutes "express" still remain ambiguous.

Before shifting to the four fundamental elements, some additional rules arising from tribal sovereign immunity jurisprudence will aid the discussion going forward. Unsurprisingly, a tribe's voluntary consent to enter into a contract does not implicitly waive tribal sovereign immunity.[92]

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86. Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. REV. 398, 406 (2009).

87. Emily J. Huitsing, Note, *The Ability of Native American Tribes to Waive Their Tribal Sovereign Immunity in Clear and Unequivocal Contracts to Arbitrate*, 2002 J. DISP. RESOL. 213, 222.

88. Ryan Dreveskracht, *Doing Business in Indian Country: A Primer*, BUS. L. TODAY, Jan. 2016, at 2.

89. *Id.*

90. Schlosser, *supra* note 22, at 325. The article was published before the Court ruled in *C & L Enterprises*, but the takeaway still applies.

91. RESTATEMENT L. AM. INDIANS, *supra* note 19, §§ 51–54.

92. Michael P. O'Connell, *Fundamentals of Contracting by and with Indian Tribes*, 3 AM. INDIAN L.J. 159, 182 (2014); *see Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000).

Also, a waiver of immunity as to one tribal entity will not be construed as waiving the immunity of another tribal entity.[93] Finally, waivers must have authorization from the tribal governing body, or the body/official authorized by the tribe, and not from tribal officials who lack the requisite tribal approval.[94] One commentator labeled such unauthorized waivers as "erroneous waivers," where non-tribal counterparties mistakenly rely on agents or officials who are not authorized to waive sovereign immunity.[95] These precedents clear up questions surrounding the doctrine, but in this author's view, the Restatement and the proposed foundational elements offer clearer benchmarks to follow. Part III reintroduces the elements that will serve as tools for effective contract drafting in light of the Court's placing much of the onus on practitioners and jurists.

III. MODEL ELEMENTS OF TRIBAL SOVEREIGN IMMUNITY CONTRACT PROVISIONS

Many of the recent, high-profile tribal sovereign immunity disputes arose in non-contractual contexts, mainly torts.[96] Still, contractual disputes over the applicability of tribal sovereign immunity regularly occur.[97] Last year, both the Sixth Circuit[98] and Central District of California[99] decided tribal contract cases. This Part outlines the four elements all parties should consider when drafting and negotiating tribal sovereign immunity provisions in a contractual relationship: *who*, *what*, *where*, and *how*. As noted, the finalized provision will largely depend on the particular circumstances surrounding the tribe or tribal entity, as well as on the relevant jurisdictions overseeing contractual disputes. The availability of relevant caselaw for each model element varies, but each foundational

93. O'Connell, *supra* note 92, at 183.

94. *See Calvello v. Yankton Sioux Tribe*, 584 N.W.2d 108, 113 (S.D. 1998); *Memphis Biofuels v. Chickasaw Nation Indus.*, 585 F.3d 917 (6th Cir. 2009).

95. Adam Keith, Comment, *Who Should Pay for the Errors of the Tribal Agent?: Why Courts Should Enforce Contractual Waivers of Tribal Immunity When an Agent Exceeds Her Authority Under Tribal Law*, 14 U. PA. J. BUS. L. 843, 844 (2012).

96. *See Hwal'Bay Ba:J Enters., Inc. v. Jantzen*, 458 P.3d 102 (Ariz. 2020) (plaintiff injured whitewater rafting on boat operated by a tribal corporation); *Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019) (plaintiffs seeking redress for allegedly high payday loan interest rates); *Saint Regis Mohawk Tribe v. Mylan Pharms. Inc.*, 896 F.3d 1322 (Fed. Cir. 2018) (involving a "rent-a-tribe" dispute between pharmaceutical companies in inter partes review over a patent); *Lewis v. Clarke*, 137 S. Ct. 1285, 1285 (2017) (involving a tribal employee sued in his individual capacity for negligence after causing motor vehicle collision while acting within the scope of his employment).

97. *See, e.g.*, *Swiger v. Rosette*, 989 F.3d 501 (6th Cir. 2021); *Engasser v. Tetra Tech, Inc*., 519 F. Supp. 3d 703 (C.D. Cal. 2021).

98. *Swiger*, 989 F.3d 501.

99. *Engasser*, 519 F. Supp. 3d 703.

element still applies for most business and commercial dealings with tribes and their arms. The Restatement's rules on the sovereign immunity of Indian tribes and arms of tribes also create a clearer path forward.[100] As noted, sections 50–54 of the Restatement help define *who* is immune from suit. Sections 55–59 help answer the question of *where* business and contractual claims can be heard. The four elements and the Restatement combine to create a workable framework for contractors to understand the issue of tribal sovereign immunity.

Tribal sovereignty need not be a zero-sum game. Arguably, most tribes are willing to negotiate clear, limited waivers of immunity.[101] The potential for fair immunity provisions is endless. Generally, this Part argues that without clear and express inclusion of the four elements, the tribal sovereign immunity provision may cause harmful consequences for all parties involved.

A. Who Is Immune?

Litigation surrounding who is immune from suit dominates this doctrine's jurisprudence. One certainty is that tribal sovereign immunity extends to tribal officials sued in their official capacities and acting within the scope of their official duties.[102] This wide extension of immunity reaches tribal officials and employees ranging from tribal council members to casino employees.[103] The bigger question emerges when determining whether a tribal authority, corporation, or subsidiary constitutes an "arm of the tribe" and thus falls under the tribe's shield of sovereign immunity.[104] Restatement section 50 lists five ways a tribe may engage in economic enterprises within and outside of Indian country.[105] A tribe may do so itself[106] through an unincorporated subdivision, agency, or instrumentality of the tribe;[107] through a corporation chartered under federal law under section 17 of the Indian Reorganization Act or the

100. RESTATEMENT L. AM. INDIANS, *supra* note 19, §§ 51–54.

101. Dreveskracht, *supra* note 88.

102. *Lewis v. Clarke*, 137 S. Ct. 1285, 1291–94 (2017).

103. *See Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 994–95 (9th Cir. 2020) (concluding that plaintiff cannot sue five council members or officials when the tribe is the real party in interest); Staudenmaier & Palaniappan, *supra* note 54, at 574–76; *cf. Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 574–75 (10th Cir. 1984) (concluding that tribal officials are not protected by a tribe's sovereign immunity when they act outside the scope of their official authority); *Lewis*, 137 S. Ct. at 1292–93 (concluding that respondent, although a casino employee, was being sued for his personal actions that occurred on state lands, and thus the tribe was not the real party in interest).

104. *See Lewis*, 137 S. Ct. at 1290–91 (explaining arms or instrumentality of sovereigns enjoy the same sovereign immunity as the sovereign itself).

105. RESTATEMENT L. AM. INDIANS, *supra* note 19, § 50.

106. *Id.* § 50(a).

107. *Id.* § 50(b).

Oklahoma Indian Welfare Act;[108] through a business entity established under tribal law;[109] and through a business entity established under state law.[110] Section 50(b) describes the "arm of the tribe" classification.[111] The "arm of the tribe" question is the most poignant one for tribes and their business partners to answer when drafting tribal sovereign immunity provisions.

The Supreme Court has not spoken directly to the question of what constitutes an "arm of the tribe." The test garnering wide acceptance across jurisdictions originated in the Tenth Circuit.[112] In *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*[113] (*Breakthrough*), the court developed a six-factor test to determine if a tribe's economic entity qualified as an arm of the tribe.[114] The analysis looks to the following:

> (1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; . . . (5) the financial relationship between the tribe and the entities[;] . . . [(6) whether] the policies underlying tribal sovereign immunity and its connection to tribal economic development . . . are served by granting immunity to the economic entities.[115]

Over the past decade, other jurisdictions adopted the *Breakthrough* test. In *White v. University of California*,[116] the Ninth Circuit adopted the test but eliminated the sixth factor because the analysis of underlying policies of tribal sovereign immunity plays an integral role in the analysis of the first five factors.[117] The Fourth Circuit mirrored the Ninth Circuit's

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108. *Id.* § 50(c).

109. *Id.* § 50(d).

110. *Id.* § 50(e).

111. *Id.* § 50(b).

112. *Breakthrough Mgmt. Grp., Inc. v. Chukchsansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010); *see also White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014) (applying a version of the *Breakthrough* test); *see, e.g.*, *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019) (applying a version of the *Breakthrough* test).

113. 629 F.3d 1173 (10th Cir. 2010).

114. *Id.* at 1187.

115. *Id.*

116. 765 F.3d 1010 (9th Cir. 2014).

117. *Id.* at 1025.

adoption and alteration of the test.[118] Arizona, California, and North Dakota state courts also incorporated the *Breakthrough* test into their own tests for arm-of-the-tribe questions or adopted versions of it.[119] The comments to Restatement section 51 provide a three-factor analysis of the arm of the tribe question.[120] That test looks to whether "(1) the entity is controlled by the governing body of the tribe, (2) the tribe owns the entity, and (3) a substantial portion of the net revenues earned by the entity inure to the tribe."[121] The Restatement's test simplifies the tests offered by *Breakthrough*, *White*, and others.

This Essay advises practitioners to use the *Breakthrough* test as a checklist when drafting sovereign immunity provisions. At a minimum, contractors should implore the Restatement's test under section 51, comment d. A contract's "Recitals" section is an appropriate section to expressly address each factor of the test. The "Recitals" section's utility for providing background information would allow tribes and their entities to address each factor for both contractual partners and potential judicial review. Non-Indian contractors may also use the *Breakthrough* test as a checklist to determine if the entity would amount to an arm of the tribe for both negotiation and enforcement purposes.

Drafters may reduce their attention to the *Breakthrough* test and its progeny if the tribal entity is incorporated under section 17 of the Indian Reorganization Act of 1934.[122] This law allows tribes to petition the Department of Interior to form a wholly owned tribal business through a federal charter.[123] Section 17 tribal entities retain the tribe's sovereign immunity absent an express waiver.[124] Restatement section 52 codifies this retention as well.[125] Practitioners will wrestle with an express waiver question only in those cases, if immunity suits arise. However, courts lack consensus on whether tribal corporations implicitly waive sovereign immunity when they incorporate under state laws.[126] Restatement section 54 details the circumstances in which the tribal entity would retain

118. *Williams*, 929 F.3d at 177 ("[T]he extent to which a grant of arm-of-the-tribe immunity promotes the purposes of tribal sovereign immunity is too important to constitute a single factor and will instead inform the entire analysis.").

119. *Hwal'Bay Ba:J Enters., Inc. v. Jantzen*, 458 P.3d 102, 108–10 (Ariz. 2020); *People v. Miami Nation Enters.*, 386 P.3d 357, 371–72 (Cal. 2016); *State v. Cherokee Servs. Grp. LLC*, 955 N.W.2d 67, 74 (N.D. 2021).

120. RESTATEMENT L. AM. INDIANS, *supra* note 19, § 51 cmt. d.

121. *Id.*

122. 25 U.S.C. § 5124.

123. *Id.*

124. Dreveskracht, *supra* note 88; *see Memphis Biofuels, LLC v. Chickasaw Nation Indus.*, 585 F.3d 917, 920–22 (6th Cir. 2009).

125. RESTATEMENT L. AM. INDIANS, *supra* note 19, § 52.

126. Dreveskracht, *supra* note 88; *see Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596, 601 (N.D. 1983).

sovereign immunity even if it is formed under state law.[127] Practitioners in both of these situations should consider using the *Breakthrough* test in their contracts just in case the issue presents itself. Contractors dealing with an entity described under Restatement section 54 should rely on that rule for guidance.

Another question concerning the *who* element is, Who can bring a claim against the tribe if a waiver is express? Waiver usually sticks to the lender or contractor and not to any other party, including successors or assigns of the lender or contractor.[128] Still, one commentator advised tribes to contractually limit who can bring a claim to the beforementioned individuals.[129] A provision explicitly granting enforcement authority to limited individuals would minimize the litigation costs of determining who could sue in the first place. The *who* question serves clear purposes in contractual consequences, but tribal and non-tribal contractors should consider practical consequences attached to these questions.

The questions of who is immune and who can bring suit call upon the fairness of tribal entities to invoke tribal sovereign immunity as an arm of the tribe. Some contractors may be drawn to one of Judge Gould's proposed solutions to avoid unfair outcomes in this area stated in *Cook v. AVI Casino Enterprises*.[130] In that tort case, the non-Indian plaintiff suffered injuries after an intoxicated, off-duty tribal casino employee

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127. RESTATEMENT L. AM. INDIANS, *supra* note 19, § 54. Sections 54(a) and (b) state,

> (a) A corporation or other business association formed pursuant to state law by an Indian tribe or a tribe-created entity with sovereign immunity has sovereign immunity from suit when engaged in business enterprises within or outside of Indian country only if:
>
> (1) the state law under which the corporation or business association is formed does not render the entity subject to suit;
>
> (2) the tribe or a tribe-created entity with sovereign immunity controls the corporation or business association by, for example, holding power to appoint or discharge its governing body;
>
> (3) the tribe or a tribe-created entity with sovereign immunity owns the corporation or business association; and
>
> (4) either:
>
> (A) a substantial portion of the net revenues earned by the corporation or business association inures to the tribe; or
>
> (B) the corporation or business association is, pursuant to state law, not for profit and provides government services to the tribe or its members.
>
> (b) A corporation or other business association with sovereign immunity under subsection (a) will nevertheless be subject to suit if its sovereign immunity is expressly abrogated by Congress or by properly authorized tribal waiver.

Id. § 54(a)–(b).

128. Smith, *supra* note 22, at 29; Schlosser, *supra* note 22, at 326.

129. Smith, *supra* note 22, at 29.

130. *Cook v. AVI Casino Enters., Inc*., 548 F.3d 718 (9th Cir. 2008) (Gould, J., concurring).

crashed into the plaintiff's motorcycle while leaving a party at the casino.[131] The majority extended sovereign immunity to the casino,[132] but Judge Gould's concurring opinion reflected stark criticism of extending tribal sovereign immunity to tribal employees.[133] According to Judge Gould, unfairness would have been prevented if "the Tribe itself were to take responsibility for its casino employees' actions, and affirmatively waive sovereign immunity in this case permitting Cook's action to be resolved under a litigated adversarial process."[134] In addition to considering who to include or whether to enforce the sovereign immunity provision, drafters should consider the equitable and practical consequences of shields or waivers. The strategic limited waiver can help alleviate some unfairness, but to date, the public narrowly encounters tribal sovereign immunity as a "sham" or "ploy."[135] Importantly, non-Indian contractors must do their part to faithfully litigate these provisions and uphold public perception of tribal sovereignty if they end up in court. Economic concerns will take focus in contracting, but perceptions of fairness with business partners and the public could affect tribal sovereign immunity in the long run.

B. What Is the Tribe Waiving or Not Waiving?

When a tribe or tribal entity agrees to limited waivers of sovereign immunity, *what* is the tribe waiving or not waiving? The parameters of this element lack the same breadth of discussion as *who* questions. Still, the importance of *what* reflects transparency between the contracting parties and their expectations of the contractual relationship. This Section discusses expert advice but suggests that both tribal and non-tribal contractors start with an analysis of the tribe's constitutional or statutorily authorized waivers of immunity before negotiating.

Tribes may provide limited waivers of their tribal sovereign immunity without losing all protection. A waiver as to one thing does not waive immunity as to another, meaning waivers are limited to whatever is expressly waived.[136] Realistically, tribes should waive claims to the enforcement of or disputes under the contract while limiting the specific types of available relief as well—declaratory, injunctive, or monetary.[137]

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131. *Id.* at 720.

132. *Id.* at 726.

133. *Id.* at 727–28 (Gould, J., concurring).

134. *Id.* at 728 (Gould, J., concurring)

135. *See* Pear, *supra* note 3.

136. O'Connell, *supra* note 92, at 182.

137. *Id.*; *see also* Smith, *supra* note 22, at 29 (exclude attorney's fees, for example).

Tribes may take the initiative in this element by statutorily implementing waivers of immunity.[138] Their statutes may then translate into their waivers in the contractual setting. Passage of these tribal codes with tribal court remedies can be seen as "affirmative tribal sovereignty" that counteracts what the public sees as "defensive tribal sovereignty" when tribes appear to use tribal sovereign immunity to escape liability.[139] Thus, reliance on enacted tribal sovereign immunity codes for contract-drafting purposes may also alleviate the negative perceptions of potential business partners unfamiliar with the concept. The tribe cannot mask its sovereign immunity prerogatives if contractual partners could access the tribe's sovereign immunity codes and find answers to questions such as, What does the tribe customarily waive? What ceilings or floors do the tribe's statutes require? Therefore, "affirmative tribal sovereignty" can eliminate cloaking of tribal sovereign immunity parameters in the contracting relationship.[140]

A place for non-Indian contractors to start their research into this element is a model corporation code provided on the Bureau of Indian Affairs' website that includes sovereign immunity provisions.[141] Specifically, the model provision requires corporations to be under tribal court jurisdiction, excluding corporations owned, in whole or in part, by the tribe.[142] The model provision expressly shields the tribe's sovereign immunity.[143] This model corporation code provided by the Michigan Economic Development Corporation is a great place for non-tribal parties to begin understanding the tenets of tribal sovereign immunity.[144] In particular, the model code would be beneficial for non-tribal parties who are entering into a contract with a tribe that does not have any business or commercial contracting codes, because this code serves as a baseline for tribes to build upon and emulate in their own tribal codes and contracts.

By starting with an analysis of a tribe's statutorily authorized waivers of immunity, non-Indian contractors will see the parameters of *what* the tribe can waive, if anything at all. The exercise also promotes transparency for all parties throughout the contractual and business relationship.

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138. Fletcher, *supra* note 63, at 312; *see* 6 GTBC §§ 201–11 (1999).

139. Kaighn Smith, Jr., 31st Ann. Fed. Bar Ass'n Indian L. Conf, Ethical "Obligations" and Affirmative Tribal Sovereignty: Some Considerations for Tribal Attorneys 3–5 (2006).

140. *Id.*

141. MODEL TRIBAL BUS. CORP. CODE § 8.1 (MICH. ECON. DEV. CORP. 2011).

142. *Id.*

143. *Id.*

144. *See generally* MODEL TRIBAL BUS. CORP. CODE, *supra* note 141.

C. Where Will Dispute Resolution Occur?

In the event of a contractual dispute, both parties must determine *where* the parties may seek enforcement or redress. Some available options include arbitration, federal court, state court, or tribal court. Non-Indian contractors' perceptions of tribal court will impact the agreed-upon venue if such a venue exists.[145] Tribal preference, arguably, would be their own tribal court, but a host of factors seems to point to arbitration as a compromise between the parties. This Section forecasts the considerations parties encounter when determining *where* the waiver will lead them.

Before agreeing to just one specific jurisdiction, the waiver may take a broad approach. The waiver may encompass "any forum that would otherwise have jurisdiction over the subject matter."[146] Realistically, the broad approach exposes both parties to their disfavored forums. Federal court is also an unlikely destination. While some parties may consent to federal court jurisdiction, tribal governments are not deemed citizens of any state for federal diversity jurisdiction purposes.[147] And tribes will likely not share the same comfort with state courts as non-Indian contractors.[148] The third alternative, tribal courts, implicates both non-Indian attitudes toward tribal courts and the tribal judiciary's capacity.

Restatement sections 55–59 lay out the parameters of federal and state court jurisdiction over tribes and their economic enterprises in enforcement of economic obligation actions. A federal court's diversity jurisdiction will apply to tribal corporations but will fail if a tribe or arm of the tribe is sued.[149] A tribal corporation is a state citizen for diversity jurisdiction.[150] Federal question jurisdiction is also inadequate to enforce economic obligations involving Indian tribes.[151] State courts lack subject-matter jurisdiction over such claims brought against a tribe or arm of the tribe unless either waives immunity or consents to a state-court forum.[152] A state court will have subject matter jurisdiction if a tribe brings the suit against a nonmember.[153] Importantly, parties must exhaust tribal

145. The Bureau of Indian Affairs estimates that nearly 400 tribal court systems exist among the 574 federally recognized tribes. *Tribal Court Systems*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFS., https://www.bia.gov/CFRCourts/tribal-justice-support-directorate [https://perma.cc/8C5S-T4L6] (last visited Mar. 7, 2022).

146. Schlosser, *supra* note 22, at 327; *see Engasser v. Tetra Tech, Inc.*, 519 F. Supp. 3d 703 (C.D. Cal. 2021).

147. *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974); Schlosser, *supra* note 22, at 329; RESTATEMENT L. AM. INDIANS, *supra* note 19, § 56.

148. Richard B. Collins, *To Sue and Be Sued: Capacity and Immunity of American Indian Nations*, 51 CREIGHTON L. REV. 391, 422 (2018).

149. RESTATEMENT L. AM. INDIANS, *supra* note 19, § 56.

150. *Id.* § 56(b).

151. *Id.* § 57.

152. *Id.* § 55(a).

153. *Id.* § 55(b).

adjudicatory forums with jurisdiction over the action before attempting to bring an action in federal or state court.[154]

While tribal courts may "differ from traditional American courts in a number of significant respects," tribal courts are adequate judicial forums with competent and experienced tribal court judges.[155] But potential non-Indian business partners sometimes mistakenly perceive some tribal court systems as "lack[ing] the experience and expertise to decide complex business and contractual disputes."[156] This misunderstanding is in addition to a perceived deficiency in tribal courts' contract-enforcement caselaw.[157] To combat these unfounded critiques, tribes should work to ensure their courts are attractive to outsiders by showcasing and marketing their judiciaries' capacity and sophistication. Tribes may do so by creating tribal court websites and databases that illustrate their judiciaries.[158] Non-Indian contractors also should conduct their due diligence to research the tribal courts and the applicable tribal codes.

If the parties agree to tribal jurisdiction, nonmembers of the tribe must exhaust all available tribal court remedies if a contract dispute arises before heading to federal or state court.[159] As Restatement section 59 states, however, "[P]arties may waive the exhaustion requirement pursuant to a forum-selection clause that eliminates the tribal forum."[160] The doctrine applies in federal court, but states vary in their application of the rule.[161] Questions also arise as to whether the tribe, or tribal entity, may waive its ability to invoke the doctrine.[162] Without the certainty of whether a state court will enforce the tribal court exhaustion doctrine, non-Indian contractual partners must be aware that tribal court will likely have the first crack at any contractual dispute, including a tribal sovereign immunity issue. The exhaustion doctrine, while recognizing tribal sovereignty, may be another deterrent for non-Indian contractors. This balancing act adds another consideration for contractors to weigh.

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154. *Id.* § 59.

155. *Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J., concurring).

156. Miller, *supra* note 8, at 1310.

157. *Id.*

158. *See, e.g.*, *Judicial Branch*, HO-CHUNK NATION, https://ho-chunknation.com/government/judicial-branch/ [https://perma.cc/RN3R-GELB] (last visited Mar. 7, 2022).

159. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

160. RESTATEMENT L. AM. INDIANS, *supra* note 19, § 59.

161. Pete Heidepriem, *Tribal Remedies, Exhaustion, and State Courts*, 44 AM. INDIAN L. REV. 241, 241–42 (2020) (explaining how eighteen states grappled with the question directly).

162. *Id.* at 275 (first citing *Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991); then citing *World Fuel Servs., Inc. v. Nambe Pueblo Dev. Corp.*, 362 F. Supp. 3d 1021, 1090 n.28 (D.N.M. 2019); and then citing *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31–32 n.7 (1st Cir. 2000)).

The majority of waivers will lead to arbitration because of the likely preferences between both sides, as noted above.[163] Still, as discussed, arbitration can lead to several issues.[164] In sum, both parties must assess all available jurisdictions and forums for the particular contractual activity. The Restatement offers clear direction for contractors to forecast and understand *where* a potential suit will be held. Tribal courts represent unique forums for tribal business, contract, and jurisdiction law to grow as a consequence of tribal waivers in contracts. Both Indian and non-Indian contractors must play their part to allow tribal courts the opportunity to foster such growth.

D. How Will Enforcement Manifest?

This Section follows up on the previous Section's arbitration cliffhanger. After an arbitrator issues an award for a party, *how* is the waiver ultimately enforced? A broader question asks *how* parties can enforce waivers in general, regardless of arbitration. This Section briefly resurfaces the enforcement issues at play in *C & L Enterprises* and discusses broader waiver enforcement considerations.

In *C & L Enterprises*, the agreed-upon waiver of sovereign immunity included arbitration as the site for dispute resolution.[165] After the arbitrator granted an award to the non-Indian party, the tribe disputed the contract's enforcement provision providing either federal or state-court jurisdiction to enter the arbitrator's award.[166] In upholding the state court's jurisdiction to enforce the arbitration award, a unanimous Court sought to give meaning to the arbitration waiver.[167] If not, tribes across Indian country could follow suit and consent to arbitration and avoid any awards against them. However, not all arbitration or enforcement clauses give the same protections as the clause in *C & L Enterprises*. In *Engasser v. Tetra Tech, Inc.*,[168] a federal district court reviewed a dispute resolution provision granting any court with competent jurisdiction the ability to enforce the contract's pre-litigation, good-faith resolution provision for the parties to "meet and confer."[169] The court held the dispute resolution provision did not amount to an express waiver because the provision did not contemplate arbitration, judicial enforcement of any resulting awards, or entry of

163. *See, e.g.*, *New York v. Oneida Indian Nation*, 90 F.3d 58 (2d Cir. 1996); *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921 (7th Cir. 2008).

164. *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560 (8th Cir. 1995); *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001).

165. *C & L Enters., Inc.*, 532 U.S. at 414.

166. *Id.* at 416.

167. Huitsing, *supra* note 87.

168. 519 F. Supp. 3d 703 (C.D. Cal. 2021).

169. *Id.* at 706.

judgments at all.[170] Thus, the dispute resolution waiver was unenforceable.[171]

Following *C & L Enterprises*, courts will continue to reason by analogy to determine what is required to enforce a waiver. *C & L Enterprises*' lack of predictable guidelines left practitioners with the two extremes of *C & L Enterprises* and *Kiowa Tribe*, creating vast uncertainty for the in-between cases.[172] Practitioners will have to navigate that open space and test the waters when enforcement issues arise. This Essay advises contractors to use *C & L Enterprises* as the high watermark of waiver enforcement, especially when arbitration is the agreed-upon forum for dispute resolution, as is the norm. Thus, each waiver should include an enforceable award or judgment followed by a clear enforcement provision with an agreed-upon forum.

To accomplish enforcement, a tribe or tribal entity filing suit to seek enforcement of a contract waives its immunity to the extent of the enforcement claim.[173] To confine the bounds of enforcement, commentators suggest tribes should limit claims to enforcement of the contract and only disputes arising under the contract, as well as limit the source of funds (or property) counterparties may seek to enforce any judgments.[174] Without proper enforcement, any waiver that overcomes the myriad hurdles to get to this stage would suffer the same fate as other poorly drafted waivers. Parties should include all the necessary safeguards to ensure waivers are enforced, if required—the main safeguard being an express enforcement provision for an actually enforceable award or judgment.

CONCLUSION

With hundreds of Indian tribes and their business entities operating in the economic sphere, non-Indian contractors need to understand a tribe's economic history, laws, and enforcement of contracts before entering into a contractual relationship with a tribe or tribal entity.[175] Such due diligence allows the non-Indian contractor to see the parameters of the tribe's ability to execute waivers of tribal sovereign immunity. The importance of the waiver cannot go unheeded. Tribal sovereign immunity protects the "financial and economic foundations of modern tribal nation

170. *Id.* at 707–08.

171. *Id.* at 709–10.

172. Huitsing, *supra* note 87, at 223–24.

173. O'Connell, *supra* note 92, at 190.

174. Smith, *supra* note 22, at 29; *see also* Schlosser, *supra* note 22, at 327 ("It is imperative that the tribe identify project funds, a steam of revenue, an insurance policy, or other specific property or asset to be used to satisfy a judgement in order to preclude the levy of any judgment, lien, or attachment upon other property or assets of the tribe.").

175. *See* Miller, *supra* note 8, at 1314.

building" with "scarce tribal assets" at stake.[176] Thus, tribes and their contractors must strive to draft clear and express waivers to protect tribal sovereignty while fostering mutually beneficial business relationships. The Restatement offers approachable guidance for contractors to rely on when drafting these contracts. The Restatement rules discussed in this Essay implicate the key questions of contracting with respect to tribal sovereign immunity. Reliance on the Restatement and this Essay will aid contractors in navigating this complex—and at times ambiguous—area of law. Tribes and their contractual partners will accomplish this goal only if they include the four foundational elements of tribal sovereign immunity: *who*, *what*, *where*, and *how*. Without all four, the parties will be forced to litigate—at each party's expense—whether the waiver is effective.

176. Fletcher, *supra* note 63, at 318.