

LAWORLD

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Doing business with American Indian tribal businesses

The last decade has seen an explosion in commercial ventures owned and operated by Native American Indian tribes. Most of the world knows American Indians through old Hollywood movies, but it has become increasingly important to have a basic understanding of the legal principles that are involved in doing business with Indian tribes; or what are known as tribal business entities.

Basically, there is a network of treaties between the United States government and numerous Indian tribes, which allocate certain tracts of land to these tribes as tribal "reservations." The Indian tribes enjoy "tribal sovereignty," or "sovereign immunity" within their reservations. The tribes and their reservation lands are treated, under the law, like quasi-sovereign nations. Reservations typically have their own courts, their own civil and criminal laws, and their own police forces.

This system did not have real commercial significance until Indian tribes began to conduct business activities that gradually stretched beyond the boundaries of their reservations. For example, the last decade has seen Indian tribes building, owning, and operating huge resorts and casinos on tribal lands; or manufacturing and selling (including exporting) vast quantities of alcohol and cigarettes. (Tribal entities are not subject to most of the taxes that other businesses are required to pay — and can therefore offer significant price advantages.) These types of activities necessarily bring the tribal businesses into contact with off-reservation businesses: construction companies, materials suppliers, shipping

companies, freight handlers, advertising agencies, to cite just a few examples. And it is at this point that the unwary can fall into a trap.

Cases in several Federal Courts over the last decade have expanded the concept of tribal sovereign immunity to hold that tribal business entities are immune from suit in the regular State or Federal Courts of the United States, and are not subject to judgments and orders rendered in these courts. One case goes so far as to hold that Indian businesses are not subject to the U.S. copyright laws — and, by implication, the laws against patent and trademark infringement.

The result is that the Italian supplier that sold \$1,000,000 worth of carpet to a huge casino on a tribal reservation cannot sue in the courts of the United States when the tribal casino refuses to pay the bill, and cannot take any action in a U.S. court to attach assets. Tribal immunity — sovereign immunity — protects the tribal business from such a suit, and makes any judgment from such a court unenforceable. Any action would have to be brought in an Indian tribal court, where the chances of success would be small. Similarly, the Hong Kong distributor of cigarettes could not sue in a U.S. court when the tribal cigarette manufacturer breached the distributorship agreement or withheld funds or refused to ship product. (American Indian cigarette manufacturers are becoming very aggressive in registering their trademarks abroad and setting up new distribution systems abroad, as the global demand for cigarettes increases while the U.S. demand stagnates.) The risk, as can be seen, is enormous.

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How can you protect your clients who may find themselves doing business with an American Indian tribal business? The cases hold that a tribal business entity can be sued in a regular U.S. court if it has specifically waived sovereign immunity. Therefore, any business that enters into a contract with a tribal business enterprise should be sure to include in the contract a provision that the tribal entity specifically waives sovereign immunity. Otherwise, the tribal business can basically breach the contract anytime it wishes, with impunity.

Article written by Val H. Stieglitz,
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LAWWorld member Lungerich & Lenz from Cologne, Germany, had been retained by one of its major clients, the German subsidiary of the leading European engineering group for the oil and gas industry, in order to lift a preliminary injunction which prohibited the client from receiving monies from a call of a first demand bank guarantee. The guarantee to secure the proper performance and the warranty obligations of an Italian subcontractor to the German client had been issued on behalf of the subcontractor by an Italian bank. Simultaneously with the injunction issued by a court in Düsseldorf, Germany, the subcontractor obtained an injunction against both the German client and the Italian bank by the court in Brescia, Italy. The Italian bank was prohibited from making payment.

Since parallel actions became necessary Lungerich & Lenz chose as its Italian

needed as the substantive law to be applied was German law, which was also to be applied by the Italian court.

The legal issues related to whether or not the call of the guarantee on first demand was abusive, and the level of necessary evidence to demonstrate the abuse, are challenging in most jurisdictions. In this case, additional problems arose in connection with the uniquely strict application of the German Standard Contracts Act. According to the latest decisions of the German Federal Court of Justice, an obligation to provide a bank guarantee on first demand for warranty obligations (and also for performance) is held void when such agreement is contained in General



a claim in at least the amount of the guarantee could not be ruled out, whereas in Germany the only remaining question was whether the contractual obligation undertaken to provide a guarantee on first demand was deemed to be a General Condition of Contract.

The LAWWorld member firms worked closely together and prepared their (partly differing) strategies and their briefs during various meetings in Cologne, Milan and Düsseldorf in the client's offices. The joint efforts were successful: both injunctions were lifted and the decisions of the first instance courts were confirmed on appeal.

Accordingly, the German client received payment from the bank and has tremendously improved its position in forthcoming arbitration proceedings for the

main dispute between the same parties in Düsseldorf.

The client has recognized the advantages of the close cooperation between the LAWWorld member firms which is a result of the personal relationship between the acting partners. At the same time the client has experienced the professionalism of a medium sized Italian firm which it would otherwise not have been aware of. Subsequently, the client has placed another mandate with Studio Corno in a matter with purely Italian implications.

For further information contact

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Successful cooperation between LAWWorld firms in Germany and Italy

partner its fellow LAWWorld member Studio Corno in Milan to represent the German client before the competent court in Brescia, Italy, in order to get the Italian injunction lifted. Close cooperation was

Conditions of Contract and not specifically negotiated. As a consequence, in such circumstances the beneficiary ends up with no security at all.

It proved difficult to familiarise the Italian Court on the one hand with the very sophisticated German approach and, on the other hand, to convince the court that exceptional circumstances allowed the application of the General Contracts Terms Act to be avoided. The latter, in this case, proved to be decisive.

During the course of two appearances in both countries, it was interesting to observe how differently the courts in Italy and Germany emphasized specific issues. In particular within the appeal proceedings it became obvious that in Italy the abusive element was measured by the potential entitlement to a claim which was covered by the guarantee in question, i.e. it was necessary to establish that



Claus Lenz

Monkey see, monkey do, monkey sue

Problem gambling in Canada

Various Canadian provinces offer problem gamblers voluntary "self exclusion policies". A problem gambler voluntarily reports to a casino that he has a problem. His photo is taken and distributed to security personnel at other casinos. He is barred for 6 months, and can face trespassing charges if he returns. Having offered such a program, the casino needs to make sure it actually works. Otherwise, it is holding out a cruelly false promise. If its program proves to be a sham, it has deceived people who are extremely vulnerable.

These self-exclusion programs are at the heart of three lawsuits commenced recently in Ontario: Lisa Dickert has filed a C\$1 million lawsuit against the Ontario Lottery and Gaming Corporation for not enforcing the self-exclusion order; Markham businessman Constantin Digalakis has filed a similar, C\$7 million claim; and Gabe Macaluso, a Hamilton businessman, filed a C\$3 million claim. It should be noted that the self-exclusion forms clearly state that the gaming facility assumes no liability.

Macaluso alleges that Casino Niagara barred him from the premises and sent

two officers from the Hamilton police force (suicide-prevention squad) to his house, after he allegedly said "What's the sense of living?" after a big loss at the baccarat tables in May 2001. The casino, Macaluso alleges, then invited him back ten weeks later.

We will have to see how the universe unfolds. Casinos should not have the collective responsibility of facilitating the self-exclusion of customers from all casinos. Responsibility for excessive gambling should be that of the gambler alone. At the same time, no one should ever be required or encouraged to advise a self-excluded gambler that it is now safe for him to gamble.

In a recent newspaper article, a professor at Osgoode Hall Law School in Toronto had occasion to comment on these "problem gaming" lawsuits. The professor acknowledged that "it is morally irresponsible to promote an expensive recreational activity without constructing meaningful safety nets to catch the inevitable few who blur use and abuse," and that "... in a government-sponsored [gaming] market, we expect ... some efforts to protect the

addictive consumer from the ravages of his/her foolish choice."

That said, the professor comes down generally against such lawsuits, stating that unless casino operators "... made no meaningful efforts to monitor and control the activities of known problem gamblers," he remains "skeptical about the merits of suing for compensation because you gambled away your life savings at the roulette wheel." He describes these lawsuits as a manifestation of the unfortunate legal maxim: "Monkey see, Monkey do, Monkey sue," and concludes: "As long as you are capable of understanding the risks involved in your choices, I think you have to live with the dream gone bad."

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Article written November 2003

Irish smokers fuming

A raging debate has erupted in recent months in Ireland as a result of the decision of the Health Minister Micheal Martin to introduce a total ban on smoking in the workplace in the New Year. Although announced some time ago as the commencement date approaches the debate is gathering intensity. Various groups against the ban have been formed to lobby for modifications. These generally range from publicans and those involved in the hospitality industry to tourism interests. It would seem that while the aspiration is

worthwhile the operation of a total ban is perceived as unworkable. Publicans argue for a partial ban to allow for designated smoking areas in pubs and restaurants but having taken the decision backed by the Government the Minister is intent on seeing it through with as little modification as possible. Publicans argue, with some justification, that they cannot be expected to have staff police such a ban and object to financial penalties being imposed on them for breaches that occur on their premises.

In recent times the Minister has considered a wide range of submissions made to him; to allow for final review and for the appropriate implementation regulations to be prepared the commencement date has been postponed to February 2004. Certain premises will be exempt such as prisons, psychiatric hospitals and hotel rooms but with few exceptions it seems likely the Government is intent on taking this bold public health initiative in the New Year to coincide with Ireland assuming the Presidency of the E.U.

**From Joe Murphy of
Connolly Sellors Geraghty Fitt,
LAWORLD member in Limerick, Ireland**

Mexico: NAFTA Chapter XI arbitration

LAWorld's Mexico member firm, Solórzano, Carvajal, González y Pérez-Correa has won two Chapter XI arbitrations. Last December their client won a US\$1.7 million arbitration award against the Mexican Government. The dispute — *Marvin Feldman v.s. Mexico*, ICSID Case No. ARB(AF)/99/1 — arose out of Mexico's denial of certain tax rebates in connection with cigarette export sales in 1997. A majority of the arbitration tribunal ruled that Mexico, having denied the company registration as a cigarette exporter, had improperly discriminated against it and thus violated article 1102 of NAFTA. In siding with Mr. Feldman, the majority concluded that "the factual pattern in this case reveals more than a minor error or two by [Mexico]. Rather, it demonstrates a pattern of official action (or inaction) over

a number of years, as well as de facto discrimination that is actionable under Article 1102" (page 79).

The most recent update concerning the case was an appeal presented by Mexico before the arbitration tribunal last March. Mexico insists on having the tribunal rule in its favor by constantly arguing that the denial of the company's registration as a cigarette exporter is founded on reasons which do not violate any chapter in NAFTA. The appeal is still being disputed fiercely before the arbitration tribunal.

Solórzano, Carvajal, González y Pérez-Correa will continue to represent the client by handling a negotiation proposal which stands on the discussion table. The outcome of this case may lead to new considerations on Mexico's performance



Luis González

when it comes to the way it stands before the international treaties that it enters.

The firm also acted as Mexican counsel for Metalclad Corporation in its successful NAFTA Chapter XI arbitration against Mexico (decided 30 August 2000). Metalclad and Feldman are the only Chapter XI arbitrations that Mexico has lost to date.

For more information contact Luis González of Solórzano, Carvajal, González y Pérez-Correa

Changed requirements for the nationality of directors in Swiss companies

Switzerland as a member of the European Free Trade Association (EFTA) is not a member of the European Union (EU). However, Switzerland has signed bilateral treaties with the EU which should facilitate cooperation between these parties. The bilateral treaties came into force on 1 June 2002 and have had in certain cases a direct impact on Swiss law. One case concerns requirements for the nationality of board members.

According to the wording of Article 708 of the Swiss Code of Obligations, in a limited public company (Aktiengesellschaft; AG) the majority of the members of the board of directors have to be of Swiss nationality and have to have residence in Switzerland. The bilateral treaties between Switzerland and the EU prohibit discrimination based on nationality. The Swiss Federal Office of the Register of Companies concludes therefore that members of boards still have to have residence in Switzerland. The change is that instead of Swiss nationality the citizenship of a state of the EU or of EFTA is sufficient for a board member. Hence, the majority of the directors have to be either of Swiss nationality or of the nationality of an EU/ EFTA country. A similar application of this rule is valid for "Kommandit-Aktiengesellschaften" and cooperatives (Genossenschaften).

The treaties between Switzerland and the EU and EFTA also effect the nationality requirements of members of the boards of

directors of holding companies. According to Article 708 paragraph 1 sentence 2 of the Swiss Code of Obligations the Swiss Government can approve exceptions from the nationality — and residence requirements for members of the board of directors, if the main purpose of a company is to have stakes in other companies and the majority of those companies have their legal seats in foreign countries. As far as citizens of EU- or EFTA-countries are concerned, such an approval is no longer necessary.

The Swiss Federal Office of the Register of Companies has set out the above changes in a letter of information (Kreisschreiben) to the cantonal offices of the Register of Companies. An adaptation of these principles into the Swiss Code of Obligations has not taken place yet, but is planned. However, the letter to the cantonal offices of the Register of Companies contains instructions which generally need to be observed. Consequently, the offices of the Register of Companies will accept a change in the composition of the board of directors as indicated above, even though the wording of the law has not been changed yet.

Müller & Beerli is the Swiss member of LAWORLD.
For further information contact Martin Mueller.

Liberalisation of shopping hours in Austria

On 1 August 2003 a new Opening Time Law took effect in Austria. This law has as its goal the liberalization of store opening times – a hotly disputed area.

The law introduced some substantial innovations. Previously shops could open Monday to Friday from 6.00 am to 7.30 pm, and on Saturday from 6.00 am to 5.00 pm. The total opening time within one calendar week was limited to 66 hours.

With the new law shops may open Monday to Friday between the hours of 5.00 am and 9.00 pm and on Saturday from 5.00 am to 6.00 pm, with the total 66 hour limit retained. Sunday remains a rest day. If there are special conditions (local or regional) a head of government of a province can specify by regulation a weekly total opening time of up to 72 hours.

Shops at stations and airports have expanded sales opportunities. Instead of

just “travel supplies” now food in general can be sold. Businesses such as hairdressers and travel agencies which are similar to commercial enterprises can also open on Saturday afternoon until 6.00 pm.

Thanks to this new law it is easier for entrepreneurs and foreign investors to keep their shops open up to 72 hours a week - definitely a huge step forward.

The new Opening Time Law is one of the steps aimed at increasing competition in Austria.



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Madrid in May

This coming summer Madrid will be decorated and prepared for the wedding of Crown Prince Felipe and Letizia Ortiz Rocasolano, a journalist. Prior to the royal nuptials, LAWorld will hold its annual Conference and AGM in the city, from 5 –7 May. Representatives of member firms, and partners, will be attending. Before the Conference, tours will be arranged to nearby historic centres such as Toledo and Segovia.

At the Conference member firms will discuss issues related to LAWorld and its operations around the world.

Madrid has many famous museums, such as the Prado with its works by Goya, Velazquez and many other masters, the Reina Sofia with its 20th Century collection including works by Picasso, Salvador Dali and Miro, and the Thyssen-Bornemisza museum with its history of Western art. The vast Royal Palace should not be missed. Madrid is also famous for the tapas, meals and wines served at its bars and restaurants.

Jose Suarez of Suarez de la Dehesa & Sainz Dochado Abogados, LAWorld's member firm in Madrid, will host the Conference.

Phillips Nizer LLP in fashion

Phillips Nizer LLP was the exclusive law firm sponsor for the WWD/DNR CEO Retail/Apparel Summit, held November 5-7 at the Ritz-Carlton Battery Park.

The event was attended by over 250 designers and executives from the fashion, retail and apparel manufacturing sectors. Phillips Nizer clients Michael Kors and Diane Von Furstenberg were among the featured speakers.



David Jacoby

In addition to the opportunity to support our clients who were on the program, and to interact with other friends who were in attendance, the firm also developed new relationships while demonstrating prominence in the industry.

Partners James Frank, Donald Kreindler, Jonathan Tillem and Andrew Tunick all attended the three-day conference.

Phillips Nizer LLP is the LAWorld member in New York, NY, USA.

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