

# Arbitration award on tribal i-gaming with non-US players

An arbitration award by a sole arbitrator recently approved a submission by the State of Oklahoma and the Iowa Tribe of Oklahoma as to the legality of internet gaming in which the server is located on Indian lands in Oklahoma and the players are located outside of the US. Graydon Dean Luthey, Jr., Partner at Gable Gotwals, discusses the award and the questions it raises.

An arbitration award by a sole arbitrator recently approved a submission by the State of Oklahoma and the Iowa Tribe of Oklahoma as to the legality of internet gaming in which the server is located on Indian lands in Oklahoma and the players are located outside of the United States (the 'Award')<sup>1</sup>. The Award was confirmed as a ministerial act at the request of both parties by the United States District Court for the Western District of Oklahoma without a review of the merits<sup>2</sup>. The Award, to which no federal officer or agency is a party, raises significant questions as to the matters it decides.

Oklahoma, by a referendum to the people, adopted a model state-tribal gaming compact that authorises certain 'covered games' to be played as Class III games under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ('IGRA')<sup>3</sup>. The Compact does not mention internet gaming, much less internet gaming when the player is not located on Indian land<sup>4</sup>. Likewise, the IGRA does not mention such gaming<sup>5</sup>. The Oklahoma Statutes do not authorise such gaming<sup>6</sup>.

In 2013, the Cheyenne and Arapaho Tribes and the Governor of Oklahoma negotiated an

amendment to their Compact authorising the type of internet gaming ultimately addressed by the Award, apparently, due to the belief that the Compact required amendment to lawfully include such games. In the review process provided by the IRGA<sup>7</sup>, the Department of the Interior ('DOI') rejected the Compact on the basis that the increased fees due the State were not justified by any meaningful concession from the State<sup>8</sup>. The parties agreed to another amendment providing for fees equal to the exclusivity fees for other covered games. Again, the DOI rejected the amendment, this time finding that because internet play could not be exclusive, exclusivity fees were inappropriate<sup>9</sup>.

The Iowa Tribe picked up the Cheyenne and Arapaho Tribes' torch and pursued a different approach. Rather than amend the Compact and endure DOI scrutiny, the Iowa Tribe and the State turned to the dispute resolution provision of the Compact. If the parties have a dispute over compliance with or the meaning of Compact language, they are required to meet and attempt a resolution of the dispute. If the dispute cannot be resolved by such an effort, then either party can invoke arbitration to resolve the dispute. If a party is aggrieved by the arbitration award, that party may seek *de novo* review of the disputed issue in federal court<sup>10</sup>.

No trial was held with live witnesses. Rather, the parties submitted briefs with exhibits, all of which were admitted into evidence, apparently without objection<sup>11</sup>. The State, represented by the Governor's General Counsel, rather than the Attorney General, previously had stated that the Compact fully authorised internet gaming directed to an international market<sup>12</sup>. In the arbitration, the State agreed with

the Tribe's claim that internet gaming was permitted under the Compact<sup>13</sup>. The arbitrator defined the question in dispute and then recognised there was no real dispute: "This Arbitration involves only the question of whether or not the Tribe is permitted pursuant to IGRA, the Tribal-State Gaming Act, the Iowa Tribal Gaming Ordinance, and the Compact to offer and conduct covered games through the use of the Internet using computer servers located on Tribal lands to players located outside the boundaries of Oklahoma and the United States where such gaming is lawful. Both parties agree that the Tribe may do so. The Parties do not intend that their agreement shall change, amend, modify, or alter in any way any term or provision in the Compact. Rather, they agree that the Compact permits the Tribe to conduct Internet gaming of a covered game and that all provisions of the Compact are applicable to such gaming."

The arbitrator then spent the balance of his award adopting as his result the unchallenged agreement of the parties. In doing so, the arbitrator concluded that the gambler does not need to be on Indian land to comply with the IGRA<sup>14</sup>. He cited no judicial decision involving IGRA's requirement that compact gaming occur on Indian land, although he did recognise that the National Indian Gaming Commission ('NIGC') had taken restrictive views of the 'on Indian land' required<sup>15</sup>.

The Award was confirmed by the U.S. District Court for the Western District of Oklahoma. Both parties supported confirmation, thus precluding any obstacle to confirmation<sup>16</sup>. The Court's order did not comment on the merits of the Award, or the apparent lack of a real dispute between the parties.

The lack of a real case or controversy between the parties to the arbitration is problematic as to any preclusive effect of the confirmed Award on state law enforcement. The Oklahoma Attorney General or an Oklahoma District Attorney might attempt to bring either criminal or civil enforcements proceedings. In such case, the defendant would no doubt argue that the confirmed Award was binding on Oklahoma law enforcement personnel, even though they were strangers to the arbitration and the power of the Governor to bind the Attorney General is undecided. Law enforcement likely would then explore the circumstances of the arbitration and why the Governor advocated gaming that the DOI had previously determined would provide no revenue for the State and for which the Governor had previously unsuccessfully sought a Compact amendment.

The Award, after adopting the parties' uncontested position that internet gaming involving international wagers is lawful, applied various federal criminal statutes and determined that those federal laws did not render the gaming in question unlawful<sup>17</sup>. No federal officer or agency was a party to the arbitration. The State lacks authority to enforce those federal criminal statutes. Neither party argued that the federal criminal statutes make the gaming unlawful. The absence of a federal party to the arbitration prevents any preclusive effect of the Award on federal law enforcement activity. The Federal Government continues in its ability to fully

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litigate all issues determined by the arbitrator.

As a practical matter, the confirmed Award legally settles little, if anything. The Award, whose merits have not been judicially reviewed in a contested action, much less endorsed, by a federal court, facially may provide comfort to tribes who seek to engage in international internet gaming from Indian land in Oklahoma. However, the Award may not preclude enforcement action by the Oklahoma Attorney General, an elected Constitutional officer independent of gubernatorial control. The Award is not binding on the Federal Government. The NIGC, congressionally charged with enforcing the IGRA, and the DOI, which approves compacts, have both expressed misgivings about the type of gaming addressed by the Award. Application of the 'on Indian lands' requirement of the IGRA has not been finally judicially determined in the internet gaming context. Most significantly, a major question remains as to whether the financial service providers subject to the Unlawful Internet Gambling Enforcement Act 2006 ('UIGEA') will regard the Award as sufficient legal authority to risk potential federal injunctive and criminal exposure arising from providing their services without which international wagers cannot be placed. While the Award was a step forward for tribes wanting to play such games, serious questions need resolution before such gaming becomes a reality.

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*The views expressed in this article are the author's alone and do not necessarily reflect the views of his firm, the Oklahoma Indian Gaming Association to which the author is General Counsel, its members or the author's other clients.*

1. In the Matter of the Referral to Binding Arbitration by the Iowa Tribe of Oklahoma and the State of Oklahoma of Disputes Under and/or Arising From the Iowa Tribe - State Gaming Compact, Arbitration Award, 24 November 2015, Oklahoma City, Oklahoma, Charles S. Chapel, Sole Arbitrator ('Award').
2. Iowa Tribe of Oklahoma v. State of Oklahoma, Case No. 5:15-cv-01379-R (W.D. Okl. 18 April 2016), Order.
3. 3A O.S. § 281.
4. Ibid.
5. 25 U.S.C. § 2701 et seq.
6. Oklahoma criminalises certain types of gambling and commercial gambling. 21 O.S. §§ 941; 982.
7. 25 U.S.C. § 2710(8)(A) & (B).
8. Award, p. 4, n. 24.
9. Award, p. 5, nn. 25-27. The DOI assumed, but did not decide, the legality of the internet gaming.
10. 3A O.S. § 281, part 12.
11. Award, p. 1.
12. Award, p. 5, quoting a 9 December 2013, letter from Steven K. Mullins, General Counsel, Office of Governor Mary Fallin.
13. Award, p. 7.
14. Award, pp. 13-15.
15. Award, p. 14, n. 60. The Award notes that the parties agreed that the game was conducted on Indian lands when the players are located outside Indian lands. Award, pp. 13-14.
16. See Order, p. 5, ('The State has stated in its response that certification of the Arbitration Award is proper by this Court').
17. Unlawful Internet Gaming Enforcement Act ('UIGEA'); Wire Act, 18 U.S.C. § 1084; 31 U.S.C. § 5362, the Travel Act, 18 U.S.C. § 1952; Illegal Gaming Business Act, 18 U.S.C. § 1958.

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