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# CONSEQUENCES OF THE INDIAN GAMING REGULATORY ACT ON ARBITRABILITY: A COMMENT ON *SENECA NATION OF INDIANS V. NEW YORK*

By
Amy Zigarovich*

## I. INTRODUCTION

In the 2021 case *Seneca Nation of Indians v. New York*, the Second Circuit Court of Appeals held that an arbitration panel has discretion to weigh applicable governing law when parties agree to arbitrate, and, as long as the panel does not manifestly disregard the law, their determination should be upheld.[1] The decision in *Seneca Nation of Indians* expands the discretionary power of arbitration panels, at the risk of harming parties similarly situated to the Seneca Nation of Indians (the "Nation").[2]

The Nation's case fixated on the argument that the panel did not properly weigh the Indian Gaming Regulatory Act (the "IGRA") in their decision.[3] At issue were the rules governing Class III gaming under the IGRA, where gaming agreements require approval from the Secretary of the Department of the Interior (the "DOI").[4] Under 25 U.S.C. § 2710(d)(8), the Secretary must authorize compacts between Indian Tribes and States.[5] The Nation claimed the renewal provision in its contract with New York violated this provision of the IGRA.[6] On appeal, the Second Circuit addressed whether the IGRA required that the renewal term of an already approved contract between the Nation and New York needed re-approval by the Secretary, and, if so, whether the arbitration panel ignored the governing law of the IGRA in its decision.[7]

This was an issue of first impression for the Second Circuit.[8] In its holding, the Second Circuit upheld the arbitrators' decision even though they did not necessarily

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1. Seneca Nation of Indians v. New York, 988 F.3d 620, 621 (2d Cir. 2021).

2. *See* 25 U.S.C. § 2701-21.

3. 25 U.S.C. § 2710.

4. *See* 25 U.S.C. § 2710(d).

5. *See id.*

6. *See Seneca Nation of Indians*, 988 F.3d at 620.

7. *See id.*

8. *See id.* at 628.

consider it the wisest.[9] The ineffectual reasoning used by the Second Circuit exposes alternative dispute resolution to critics who allege that arbitration is not a judicious form of conflict resolution, but merely a means to an imbalanced award.[10]

## II. CASE BACKGROUND

In August 2002, the Nation and New York entered into a compact (the "Compact") under which the Nation was permitted to conduct casino-style gaming, classified as Class III gaming under 25 U.S.C. § 2710(d), in the state of New York.[11] In November 2002, the Secretary of the Interior completed its review of the compact and declined to approve or disapprove it.[12] The relevant statute, 25 U.S.C. § 2710(d)(8)(C), states:

> If the secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this Act.[13]

Through the statute's automatic approval system, the Compact became effective in December 2002 with an initial term of fourteen years.[14] Without objection from either party, the Compact automatically renewed for an additional seven years according to its renewal term.[15]

The purpose of the Compact provided the Nation with exclusive rights in an area of Western New York (the "Exclusivity Zone") to maintain certain types of gaming machines.[16] In return, New York received graduated revenue-sharing payments from the

9. *See Seneca Nation of Indians*, 988 F.3d at 630 (explaining that when parties agree to leave the difficult questions to the arbitrators, and the arbitrators' decision is without a manifest disregard for governing law, the decision should be upheld).

10. *See* Jessica Silver-Greenberg, Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, NEW YORK TIMES, Oct. 31, 2015, https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.

11. *Seneca Nation of Indians*, 988 F.3d at 621.

12. *Id.*

13. 25 U.S.C. § 2710(d)(8)(C).

14. *Seneca Nation of Indians*, 988 F.3d at 621.

15. *Id.*

16. *Id.* at 622.

machines.[17] New York received a percentage of the money dropped into the machines, after payout, but before expenses.[18] The Compact outlined the following terms: (1) in years 1-4, New York received 18 percent; (2) in years 5-7, it received 22 percent; and (3) in years 8-14, it received 25 percent.[19]

In 2004, New York authorized other gaming devices within the Exclusivity Zone while continuing to collect payments only on the Nation's slot machine revenue.[20] Both parties to the Compact continued to benefit as New York received more than $1.6 billion in payments through 2016, and the Nation received around $6.5 billion in revenue over the Compact's entire term.[21]

At the end of the original term in December 2016, neither party objected to a continuation of the Compact, thus the automatic renewal period began.[22] The Compact was to be in effect until December 2023.[23] The Compact did not provide for any state contribution in the renewal period, and New York received no other consideration.[24] Before the original term of the Compact ended, the Nation contacted the DOI regarding the revenue-sharing provisions for the renewal period.[25] The DOI responded with a technical assistance letter stating that they understood the Compact terms to mean 14 years of revenue sharing in exchange for 21 years of exclusivity.[26] Further, if New York were to receive revenue sharing for the renewal, in exchange, the state would need to make an additional economic contribution to benefit the Nation.[27]

As a result of the DOI's letter, in March 2017, the Nation notified the Governor of New York that the state would receive its last installment of revenue sharing from 2016.[28] New York responded, claiming the Compact required payments at the 25 percent rate for

17. *Seneca Nation of Indians*, 988 F.3d at 622.

18. *Id.*

19. *Id.*

20. *See id.*

21. *Id.*

22. *See Seneca Nation of Indians*, 988 F.3d at 622.

23. *Id.*

24. *Id.* at 622.

25. *Id.*

26. *See id.*

27. *See Seneca Nation of Indians*, 988 F.3d at 622.

28. *See id.*

the duration of the renewal period.[29] As a result of the disputed contract renewal term, New York ordered arbitration as directed in the pre-dispute agreement, and the DOI rescinded the technical assistance letter, asserting it did not provide the necessary certainty for the parties to rely on in arbitration.[30]

### *A. The Arbitral Panel's Analysis*

The Compact provided for the parties to participate in "good faith negotiations," and if those proved unsuccessful, either party was permitted to submit the dispute to binding arbitration under the rules of the American Arbitration Association (the "AAA").[31] The parties appointed three arbitrators per the Compact, each selecting one while the panel selected the third.[32] Specifically, the parties' agreement stated that "the arbitral award would be final, binding and non-appealable," and the United States District Court for the Western District of New York had exclusive jurisdiction to enforce the award.[33]

The panel majority found that the renewal provision was ambiguous as to whether the Nation was required to continue with revenue sharing.[34] The majority panel concluded that reading the contract as a whole and in light of the evidence presented during the hearing, the Compact should be read to require the Nation to continue making revenue-sharing payments for the renewal period.[35] The panel believed it to be a central premise of the compact that the Nation make payments in exchange for the exclusivity of the agreement.[36]

The Nation argued that the panel could not require additional payments because the Secretary of the DOI needed to approve any additional terms to the contract requiring revenue sharing.[37] The panel determined that while it cannot usurp the Secretary's legal authority to approve the revenue sharing, it could determine whether the terms of the agreement had already provided for revenue sharing upon its renewal.[38] For the Nation's

29. *Seneca Nation of Indians*, 988 F.3d at 622.

30. *See id.* (appearing to agree with New York's position).

31. *See id.*

32. *Id.*

33. *Id.* at 622-23 (internal citations omitted) (quoting the Compact).

34. *Seneca Nation of Indians*, 988 F.3d at 623.

35. *See id.*

36. *See id.*

37. *See id.*; *see also* 25 U.S.C. § 2710(d)(8).

38. *Seneca Nation of Indians*, 988 F.3d at 623.

argument to work, the Compact's renewal term must never have been approved, thus making the Nation's gaming activities under the renewal term unlawful; the panel majority determined this would be an absurd result.[39]

The Nation's selected panelist dissented.[40] The dissent found the terms unambiguous, requiring only 14 years of revenue sharing and none due during the renewal.[41] The dissent reasoned that if the Compact were ambiguous, then under federal law and policy it should be interpreted in favor of the Nation, therefore, the panel could not claim that the Secretary approved of such a renewal provision.[42] The dissent further asserted that by enforcing the majority's opinion, the panel went beyond what was approved by the DOI and thus undermined the DOI's regulatory role.[43] Additionally, the dissent's view argued that the majority's interpretation of the Compact was in direct opposition to the purpose of the IGRA.[44]

Ultimately, the majority's decision found that the Nation was to continue to provide revenue streams to New York under the Compact's renewal period at the 25 percent rate.[45] The arbitration panel required the Nation to pay all past-due payments and make all future payments for the entirety of the renewal period.[46]

### *B. The District Court's Analysis*

Following arbitration, the Nation submitted the final award to the Secretary of the DOI for review.[47] The DOI found the award lacked the necessary certification from the "Governor or other State representative, that he or she [was] authorized under State law to enter into the compact or amendment."[48] The DOI made clear it was not taking a position on whether the award amended the Compact.[49]

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39. *See Seneca Nation of Indians*, 988 F.3d at 623.

40. *See id.* at 624.

41. *See id.*

42. *See id.* (dissenting panelist reasoning).

43. *See id.* (dissenting panelist reasoning).

44. *See Seneca Nation of Indians*, 988 F.3d at 624.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* (quoting the DOI response letter); *see* 25 C.F.R. § 293(8)(c).

49. *Seneca Nation of Indians*, 988 F.3d at 624.

The Nation filed a petition to vacate the final award under the FAA,[50] while New York cross-appealed to affirm.[51] The district court confirmed the award, finding that the Nation was unable to show that the IGRA Secretary-approval requirement clearly governed and/or had been ignored by the panel.[52] The district court determined that the renewal provision had been approved during the initial Secretarial review, and therefore, the panel was merely interpreting the Compact's provision to require additional payments.[53] The district court determined that the panel did not manifestly disregard the IGRA, and declined to refer the issue to the DOI, finding that the issue was one of contract interpretation outside the expertise of the DOI.[54]

## III. Appellate Court Analysis

The Second Circuit Court of Appeals stated that under § 10 of the FAA, "an arbitrator's manifest disregard of the law or the terms of the arbitration agreement remains a valid ground for vacating arbitration awards."[55] However, the standard for manifest disregard is high, and vacating an award is only found in those situations with "egregious impropriety on the part of the arbitrator."[56] To be successful under a manifest disregard claim, a party must show: (1) "that the arbitrators knew of the relevant legal principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it;" and (2) "that the legal principle was 'well defined, explicit, and clearly applicable.'"[57]

The Second Circuit found that the panel did not manifestly disregard governing law and was aware of the IGRA requirement.[58] It reasoned that there was no clear and controlling legal principle which required the Secretary to approve an arbitrator's

50. *Seneca Nation of Indians*, 988 F.3d at 624; *see also* 9 U.S.C § 10.

51. *Id.* at 625.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Seneca Nation of Indians*, 988 F.3d at 625 (quoting Schwartz v. Merrill Lynch & Co., 665 F.3d 444, 451-52 (2d Cir. 2011); *see also* 9 USC § 10.

56. *Seneca Nation of Indians*, 988 F.3d at 626 (quoting T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 339 (2d Cir. 2010)).

57. *Id.* (quoting Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 209 (2d Cir. 2002)).

58. *See id.*

interpretation of an ambiguous contract.[59] The Nation argued that the use of extrinsic evidence should be viewed as requiring separate IGRA approval, however, the Second Circuit found nothing to support such a claim, stating that extrinsic evidence is a norm of contract interpretation.[60] Further, the Second Circuit asserted that extrinsic evidence does not create a new term to the Compact, rather it is used to determine the meaning of an existing term.[61]

The IGRA simply required approval for gaming contracts and amendments, not interpretation of the contractual terms and the use of extrinsic evidence.[62] The court determined that the Nation's alternative argument—referral back to the DOI—would be improper because it clashed with the goals of the FAA for speedy and efficient alternative dispute resolutions.[63] While initial approval by the DOI was required, the IGRA did not require additional approval upon an arbitrator's determination that additional payments must be made under an existing compact, and referral to the DOI would have been unnecessarily redundant.[64]

## IV. SIGNIFICANCE

*Seneca Nation of Indians* presents a case where federal agencies possess an opportunity to impact parties' ability to arbitrate and freely create pre-dispute agreements. The Second Circuit's opinion awards arbitration panels great discretion and power in their decisions.[65] So long as arbitral panels do not ignore governing law, it is unlikely that they will be found to have manifestly disregarded applicable law.[66] According to the Nation, the protections of the IGRA are no longer guaranteed but only afforded if arbitration panels decide to properly review and incorporate the IGRA in their analysis.[67]

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59. *Seneca Nation of Indians*, 988 F.3d at 626 (emphasizing the lack of authority requiring the Secretary to approve of an arbitral panel's interpretation of an existing contract term).

60. *See id.* at 627; *see also id.* at 621 (Seneca attempted to argue that the use of post agreement extrinsic evidence by the lower courts was improper and if used, the IGRA requires secretarial approve of judicial interpretations based on extrinsic evidence).

61. *See id.*

62. *See id.* at 626-27.

63. *See id.* at 629.

64. *See Seneca Nation of Indians*, 988 F.3d at 630.

65. *See id.* at 628.

66. *See id.* at 626-27.

67. *See id.* at 628.

The Second Circuit's decision solidifies the federal courts' deferral to arbitration, and the high standard required to vacate an arbitral panel's decision.[68] The court reinforces the idea that there are limited instances in which an arbitral panel's decision could be vacated.[69]

The Second Circuit's decision puts significant emphasis on the public policy goals of the FAA, those being to provide a speedy and efficient dispute resolution system.[70] By maintaining such a high standard and emphasizing the importance of efficiency, the Second Circuit's decision continues to promote the use of arbitration as an alternative dispute resolution capable of providing a judicious outcome for the parties. The decision of the Second Circuit strengthens the parties' ability to create binding pre-dispute agreements. Had the court decided differently, the opinion would have diminished the value of pre-dispute agreements and created uncertainty as to whether parties could rely on them for future dispute resolution.

The Second Circuit's analysis put significant emphasis on the ability of parties to use extrinsic evidence as part of the arbitral hearing.[71] Much of the Nation's argument centered on the improper use of extrinsic evidence to ultimately determine that the renewal contract was to continue the revenue-sharing provision.[72] The ability to present extrinsic evidence is an indispensable feature sought after by parties turning to arbitration, unlike in courts, where strict parol evidence rules are enforced. Rather than diminishing this feature, the Second Circuit emphasized its importance in reaching judicious resolutions for the parties. Overall, the Second Circuit has affirmed arbitration as a forum that parties can rely on for its favorable rules, speed and efficiency, but not thoroughness as the Nation desired.

## V. CRITIQUE

The Second Circuit indicated that its priority is to ensure that the public policy behind the FAA is upheld−but at what expense?[73] The Nation centered its argument on the idea that by allowing the panel majority to enforce its interpretation of the Compact, future arbitral panels will be permitted to evade the IGRA's secretarial review requirement.[74] The underlying concern of the Nation was that the revenue stream from their gambling business

68. *See Seneca Nation of Indians*, 988 F.3d at 625.

69. *Id.* at 625 (proper circumstances for vacatur include: fraud, corruption, partiality, misconduct, and arbitral panels exceeding their powers or manifestly disregarding applicable law); *see also* 9 U.S.C § 10.

70. *See id.* at 629.

71. *See id.* at 626.

72. *See id.* at 626-28.

73. *See Seneca Nation of Indians*, 988 F.3d at 629.

74. *See id.* at 626.

would be reduced and their financial independence undermined.[75] If parties are permitted to disregard different provisions of the IGRA, the economic security that was once guaranteed to Native American Tribes through the IGRA will subside.[76]

Unfortunately, the facts of *Seneca Nation of Indians* do not provide the Second Circuit with an opportunity to bring clarity on the issue of the IGRA's authority in such contracts. The Compact at issue contained the disputed renewal term when it was originally sent to the DOI for approval.[77] The Secretary subsequently declined to approve the Compact, and it was approved by default as far as it was in accordance with the IGRA.[78] An interesting aspect of this case was that the DOI issued a technical assistance letter seemingly agreeing with the Nation's theory that there was no additional revenue sharing required in the renewal term, implying that to hold otherwise was an unapproved amendment to the Compact.[79] However, the DOI retracted its letter when the parties sought arbitration.[80] Under such a unique situation, the Second Circuit decided to create a precedent that may lead to future unfavorable interpretations for parties in the same position as the Nation.

The Second Circuit reasoned that the law only required the approval of the gaming contracts and any amendments; it did not require approval of interpretations of existing contractual terms.[81] Further, the Second Circuit found that the initial approval of the Compact included the renewal term and therefore did not need additional approval.[82] This reasoning glossed over a core discrepancy between the parties. The Nation contended that the arbitral panel and Second Circuit inserted an amendment to the Compact requiring revenue sharing for the renewal period, and such an amendment must be approved under the IGRA.[83] The Nation reasoned that New York was wrongfully allowed to add self-

75. *See* Stephen Dean, *Getting A Piece Of The Action: Should The Federal Government Be Able To Tax Native American Gambling Revenue?*, 32 COLUM. J.L. & SOC. PROBS. 157, 158, 178-82 (1999).

76. *Id.*

77. *See Seneca Nation of Indians*, 988 F.3d at 623-24.

78. *See id.* at 621, 623-24.

79. *See id.* at 622.

80. *See id.* at 622.

81. *See id.* at 627 (reasoning that amendments to an approved compact do not require additional secretarial review).

82. *See Seneca Nation of Indians*, 988 F.3d at 627.

83. *See id.*; *see also* 25 C.F.R. § 293.4(a)-(b) ("Compacts are subject to review and approval by the Secretary. All amendments, regardless of whether they are substantive amendments or technical amendments, are subject to review and approval by the Secretary.").

serving amendments, unchecked by the authority of the IGRA, so long as they are added after the initial approval of the Compact.[84]

The Second Circuit's dismissal of the Nation's argument for a second review of the Compact by the IGRA put significant emphasis on upholding the efficiency of arbitration.[85] While the public policy behind arbitration and the goals of the FAA are important to arbitral parties, in *Seneca Nation of Indians* the court seemingly puts speed and efficiency above judicious resolutions.[86] If arbitration is merely used as a fast solution that lacks fairness, the appeal of such an alternative dispute forum will be diminished.

This case presented an issue of first impression for the Second Circuit, and the court in its decision noted that though their answer may not be the best result, the arbitration award was not improper.[87] By making such a statement, the court casts doubt on their opinion, yet it lays down binding precedent regardless. This single sentence opens alternative dispute resolution to critics who claim that arbitration is not a judicious form of conflict resolution.[88] Out of fear of diminishing the FAA and deterring future arbitration, the Second Circuit created an opinion that risks infringing on parties' rights intended to be protected by the IGRA.

## VI. CONCLUSION

The decision in *Seneca Nation of Indians* is significant for the future of arbitration because of how much emphasis the Second Circuit puts on protecting the integrity of the FAA and alternative dispute resolution. In this opinion, the Second Circuit stresses the importance of efficiency and the ability of parties to rely on extrinsic evidence to seek a complete and truthful resolution.[89] However, while arbitration and pre-dispute agreements are protected by this opinion, parties to such agreements may find themselves at a disadvantage. Parties such as the Nation may find that the court's emphasis on speed, results in parties' issues not being given due attention.[90] Governing law may merely be

84. *See Seneca Nation of Indians*, 988 F.3d at 621, 628.

85. *See id.* at 629-30.

86. *See* Hiro N. Aragaki, *Does Rigorously Enforcing Arbitration Agreements Promote "Autonomy"?*, 91 IND. L.J. 1143 (2016) (proposing that autonomy and enforcement of arbitration creates a complexity around parties' right to contract and not contract).

87. *See Seneca Nation of Indians*, 988 F.3d at 630.

88. *See id.*

89. *See id.* at 626-27.

90. *See id.* at 629.

glanced over without proper consideration of its effect on the facts.[91] By failing to give adequate consideration to the IGRA, the Second Circuit puts speed above justice.

91. *See id.*