THESEUS, THE LABYRINTH, AND THE BALL OF STRING: NAVIGATING THE REGULATORY MAZE TO ENSURE ENFORCEABILITY OF TRIBAL GAMING CONTRACTS

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I. EXECUTIVE SUMMARY

Since the Indian Gaming Regulatory Act ("IGRA") was passed nearly twenty years ago, countless non-Indian contractors and businesses have entered into casino management or consulting agreements with tribes and tribal entities. Under the IGRA, all casino management contracts require approval by the National Indian Gaming Commission ("NIGC") to be valid and enforceable, while "consulting agreements" do not. As recent litigation involving a prominent gaming-law firm emphasized, mistakes in distinguishing between these two types of agreements can have devastating consequences.

Unfortunately for the tribes and their business partners, the NIGC approval process can be time-consuming and costly. Because time is often of the essence in gaming-related transactions, clients may balk at the prospect of shelving a development deal worth several million dollars while they await NIGC review of a minor document such as a trademark licensing agreement. Accordingly, clients may charge counsel with sidestepping this process and preparing agreements for which NIGC approval is unnecessary.

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In the five years since *Catskill Development, LLC v. Park Place Entertainment Corp.*[1] and *United States v. Casino Magic Corp.*[2] discussed the distinction between agreements requiring NIGC approval and those that do not, several other courts have weighed in on the issue. This article surveys the most pertinent cases construing the NIGC approval requirements since *Catskills* and *Casino Magic*, in an effort to provide practical guidelines to practitioners attempting to identify which transaction documents should be submitted to the NIGC for approval.

II. NECESSARY DELAY: THE NIGC APPROVAL PROCESS

Gaming law practitioners review and prepare countless agreements, contracts, and subcontracts relating to various aspects of casino development, construction, and operation. Under the IGRA, all casino management contracts relating to a tribal gaming operation must be submitted to the NIGC for approval or the issuance of a declination letter.[3] Federal regulations identify two categories of such contracts: (1) "management" agreements[4] and (2) all agreements and other documents "collateral" to the management contracts.[5] A document is considered "collateral" to a management contract if it is "related, directly or indirectly, to a management contract, or to any rights, duties or obligations

1. Catskill Dev., L.L.C. v. Park Place Entm't Corp. *(Catskill I)*, 144 F. Supp. 2d 215 (S.D.N.Y. 2001); Catskill Dev., L.L.C. v. Park Place Entm't Corp. (*Catskill II*), 154 F. Supp. 2d 696 (S.D.N.Y. 2001); Catskill Dev., L.L.C. v. Park Place Entm't Corp. (*Catskill III*), 217 F. Supp. 2d 423 (S.D.N.Y. 2002).

2. United States v. Casino Magic Corp., 293 F.3d 419 (8th Cir. 2002).

3. 25 C.F.R. § 533.1 (2007). Unlike management contracts, consulting agreements do not require full NIGC approval to be enforceable. *Infra* note 10 and accompanying text. Nonetheless, a consulting agreement should still be submitted to the NIGC for the issuance of a declination letter confirming its enforceability as a non-management contract. While full NIGC approval can take a year or longer, a declination letter can often be obtained within a few months.

Practitioners should be aware, however, that securing a declination letter does not guarantee future enforceability of the subject transaction documents under all circumstances. Even after the NIGC has issued a declination letter finding that full approval is unnecessary with regard to particular documents, additional agreements negotiated subsequent to the declination letter's issuance can alter this status. Accordingly, if a client, after obtaining a declination letter for a particular agreement, later enters additional agreements that relate to the same transaction, counsel should advise the client to either seek a second NIGC declination letter for these additional documents, or to confirm with the NIGC that they are covered by the original declination letter. For an in-depth discussion of the NIGC approval process, see Heidi McNeil Staudenmaier, *Negotiating Enforceable Tribal Gaming Management Agreements*, 7 GAMING L. REV. 31 (2003).

4. 25 C.F.R. § 502.15 (2007).

5. 25 C.F.R. § 502.5 (2007).

created between a tribe . . . and a management contractor."[6] Absent NIGC approval, both management contracts and their collateral agreements are void *ab initio*, and thus unenforceable.[7]

The NIGC approval process has three components: (1) legal and financial review of the management contract and its collateral documents; (2) scrutiny of the proposed project's compliance with the National Environmental Policy Act; and (3) investigation of the suitability of all companies, entities, and individuals with direct or indirect financial interests.[8] While these components may proceed simultaneously, all must be completed before the NIGC Chairman can approve an agreement.[9] The NIGC will not begin the approval process until it has received the management contract and all collateral documents. The actual approval process can take a year or more to complete.

Frequently in gaming-related transactions, time is of the essence. Developers and other contractors are eager to maximize profits and are understandably reluctant to shelve a multimillion dollar development project for a year or more, pending NIGC review of the transaction documents. In an effort to sidestep this delay, many entities choose to enter consulting agreements with

6. *Id.*

7. 25 C.F.R. § 533.7 (2007).

8. 25 U.S.C. § 2711(e)(1)(D) (2000); 25 C.F.R. § 533.6(c) (2007). Background investigations are generally performed by the tribe or the State (depending on the applicable tribal-state gaming compact), but the NIGC itself must issue the suitability finding. Moreover, regardless of the result of an investigation, the NIGC retains the discretion to nevertheless refuse approval for a management contract based on other information that intimates that a financially-interested entity is "unsuitable." 25 U.S.C. § 2711(e)(1)(D); 25 C.F.R. § 533.6(c).

9. 25. U.S.C. § 2711(a)(1) (2000). Pursuant to the IGRA and applicable NIGC regulations, a management contract must contain certain terms. *See* 25 U.S.C. § 2711(b) (2000) (requiring the contract provide adequate accounting procedures, tribal access to daily operation records, a minimum guaranteed payment to the tribe, a ceiling for the repayment of construction costs, a contract term no more than five years, and grounds for termination of the contract); *see also* 25 C.F.R. §§ 531, 533 (2007) (mandating, in addition to the requirements enumerated in 25 U.S.C. § 2711(b), that management contracts shall contain provisions detailing compensation arrangements, establishing the extent to which the contract may be assigned or subcontracted, notifying the parties of approval required by the tribe for changes in ownership interests). For a brief overview of these required terms, see Staudenmaier, *supra* note 3, at 32. The NIGC also offers a practical checklist and suggests that each item be completed before a management contract or collateral agreement is submitted for NIGC approval. Practitioners can obtain copies of this checklist, along with a list of applicable NIGC regulations and other useful information from the NIGC website at http://www.nigc.gov or via the NIGC Fax On Demand System at (202) 632-1006. The checklist is also available in hard copy, upon written request to the NIGC at 1441 L Street NW, 9th Floor, Washington, D.C. 20005. Questions regarding the review process should be directed to NIGC staff at (202) 632-7003.

tribes, tribal contractors, or subcontractors. Unlike a management or collateral agreement, a consulting agreement may not require NIGC approval to be enforceable.[10]

The challenge for gaming law practitioners lies in determining whether a particular gaming-related contract or document is a consulting agreement or an agreement collateral to a management contract. The incorrect categorization carries severe consequences.[11] When the enforceability of an agreement is tested, that agreement may be deemed void *ab initio*,[12] and thus unenforceable as an unapproved "agreement collateral to a management contract."[13]

Despite the importance of correctly identifying which gaming-related contracts require approval, the NIGC regulations provide scant guidance to distinguish a consulting agreement from a management or collateral agreement. Nonetheless, certain characteristics appear to be significant to this distinction, including the method for calculating the contractor's compensation (flat fee or percentage of gaming revenue); the length of the agreement's term; and whether the consultant will also perform activities that the NIGC considers to be management-related.[14] The murky distinction between these two types of agreements has spawned a substantial body of case law, beginning with *Catskills* and *Casino Magic*.[15] As those cases remind practitioners, obtaining an NIGC declination letter for a questionable contract is the most reliable way to avoid liability and ensure an agreement's enforceability.

III. SEVERE CONSEQUENCES OF FAILURE TO SEEK NIGC APPROVAL

While obtaining a declination letter for a questionable contract is the most prudent way of dispelling doubts as to the enforceability of any gaming-related contract, the declination

10. National Indian Gaming Commission, Bulletin 94-5, *Approved Management Contracts vs. Consulting Agreements* (Oct. 14, 1994), *available at* http://www.nigc.gov/ReadingRoom/Bulletins/BulletinNo19945/tabid/181/Default.aspx [hereinafter NIGC Bulletin 94-5]. The NIGC considers a contract to be a consulting agreement, which does not require approval, when the agreement provides for completing a finite task with a defined completion date, for a fixed fee, daily, or hourly rate. *Id.*

11. *See id.* ("[C]onsequences are severe for a manager who mistakes his management agreement for a consulting agreement.").

12. 25 C.F.R. § 533.7.

13. 25 C.F.R. § 502.5.

14. NIGC Bulletin 94-5, *supra* note 10.

15. *Catskill I*, 144 F. Supp. 2d 215; *Catskill II*, 154 F. Supp. 2d 696; *Catskill III*, 217 F. Supp. 2d 423; *Casino Magic*, 293 F.3d 419; *see also* Staudenmaier, *supra* note 5, at 33–36 (discussing the holdings of the *Catskill* trilogy and *Casino Magic* cases with regard to the distinction between management and consulting agreements).

process can take several months or longer. Clients involved in a minor aspect of a gaming facility's development, construction, or operation may bristle at the inconvenience this delay causes. The practitioner, however, must persuade the client not to overlook this important step. Recent litigation involving a prominent national law firm highlights the importance of encouraging clients to exercise the patience required to obtain a declination letter for any document pertaining to any aspect of the financing required for the development, construction, or operation of the gaming facility.[16]

The aforementioned litigation arose from a twenty-eight million dollar casino financing project that involved a well-known Minnesota investment bank.[17] The bank hired the law firm to document the loans to fund the construction of a new casino owned by the St. Regis Mohawk Tribe ("St. Regis").[18] Before the loans closed, the attorneys discussed whether one particular document, the Notice and Acknowledgement of Pledge ("Pledge Agreement"), required NIGC approval.[19] The law firm did not mention its concern to its banking client, nor did the firm advise its client to seek NIGC approval or declination of the Pledge Agreement.[20] The transaction closed and the loans were funded, but the client was not made aware that its Pledge Agreement with the borrower might be unenforceable.[21]

Thereafter, the borrower defaulted.[22] The bank once again retained the law firm, this time to collect the amount due per the loan.[23] During the course of this representation, St. Regis, who owned the casino, claimed that the unapproved Pledge Agreement was unenforceable.[24] Because the NIGC never approved or declined the Pledge Agreement, St. Regis disclaimed liability for repaying the loans.[25] The law firm did not mention its earlier concerns regarding this exact issue, and maintained that it had always believed that the Pledge Agreement did not require approval.[26] The ensuing litigation yielded a multi-million dollar

16. *In re* SRC Holding Corp., Nos. 02-40284 to 02-40286, 2007 WL 1080002, at *1 (Bankr. D. Minn. Apr. 6, 2007).
17. *Id.* at *5.
18. *Id.* at *1.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at *2.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* Plaintiffs, in response to the law firm's contention that it never believed that the Pledge Agreement required NIGC approval, pointed to an internal memo labeled "Privileged Document Subject to Attorney-Client Privilege." *Id.* at **10-11. The memo, which was addressed to the firm's client as well as other banks involved in the transaction's financing, discussed the

legal malpractice verdict against the law firm.[27]

IV. DETERMINING WHEN NIGC APPROVAL MAY BE NECESSARY

In the five years since *Catskills* and *Casino Magic* discussed the differences between management and consulting agreements, several circuits have shed light on the characteristics distinguishing the two agreements. The body of case law that has developed since *Catskills* and *Casino Magic* provides additional guidance and direction to practitioners of tribal gaming law with respect to which collateral agreements and documents should be submitted to the NIGC for review and approval or declination.

This section begins with a discussion of the most important of the cases, the Tenth Circuit's decision in *First American Kickapoo Operations, L.L.C. v. Multimedia Gamers, Inc.* ("*Kickapoo*").[28] *Kickapoo* offers useful advice for practitioners seeking to draft enforceable contracts. *Kickapoo* identifies specific contract terms, which if present, require NIGC approval. An analysis of other recent cases in which the documents at issue were deemed collateral and required NIGC approval follows the discussion of *Kickapoo*. The section concludes with an overview of two cases in which collateral documents required no approval.

A. Kickapoo: Follow the Money

In *Kickapoo*, the Tenth Circuit determined that an Operating Lease Agreement (the "Lease") between a non-tribal contractor and an Indian tribe was "unambiguously" a management contract.[29] The non-tribal contractor argued in favor of severing any management-related provisions and declaring the lease a mere construction loan and lease agreement.[30] The court, however, pointed to several key terms that indicated that the overall function of the Lease, and the parties' original intent in entering it, was to transfer responsibility for managerial activities from the Tribe to the non-tribal contractor.[31] Accordingly, because the Lease did not receive NIGC approval, it was void *ab initio*, and thus unenforceable against the Tribe as the breaching party.[32]

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firm's concerns as to the enforceability of the unapproved Pledge Agreement. *Id.* at *10. For further details on the casino financing debacle, see *In re SRC Holding Corp.*, 2007 WL 1080002, at *1.

27. Leigh Jones, *Dorsey & Whitney on the hook for botched Indian casino deal,* NAT'L L.J., Apr. 10, 2007, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=117612245767.

28. First American Kickapoo Operations, L.L.C. v. Multimedia Gamers, Inc., 412 F.3d 1166 (10th Cir. 2005).

29. *Id.* at 1175.

30. *Id.* at 1169.

31. *Id.* at 1172-73.

32. *Id.* at 1176.

In reaching its holding, the *Kickapoo* Court considered the provisions of the Lease in light of the applicable statutory and regulatory authority, as well as the pertinent NIGC materials.[33] Principles gleaned from all three sources allowed the Tenth Circuit to identify specific contract terms that indicated that the agreement functioned and was intended to function as a management contract, thus requiring NIGC approval.[34]

1. Procedural and Factual Background

In *Kickapoo*, the Kickapoo Tribe of Oklahoma ("Tribe") and First American entered into an operating lease.[35] Pursuant to the lease, First American was to construct and operate a Class II gaming facility on tribal land, and lease all gaming equipment required by the operation.[36] The Tribe would repay the construction costs, but First American had to guarantee a $20,000 monthly payment to the Tribe.[37] That monthly payment had precedence over the Tribe's repayment of the construction loan.[38] Under the lease, First American would also receive forty percent of the net revenue from the gaming operation in exchange for leasing all of the required equipment.[39]

Weeks after the casino opened for business in 2001, the NIGC informed the Tribe that its gaming ordinances violated applicable IGRA requirements.[40] The Tribe promptly closed the casino and amended its gaming ordinances to comply with IGRA.[41] It also submitted the Operating Lease to the NIGC for a determination as to whether the Lease would be considered a management contract requiring NICG approval.[42] When the NIGC responded in the affirmative, the Tribe, counting on the Lease's unenforceability, broke off business dealings with First American and began leasing equipment from defendant Multimedia instead.[43] Soon thereafter, First American sued Multimedia for tortious interference with contractual relations and requested injunctive relief.[44]

After the district court refused to grant a preliminary injunction against Multimedia, Multimedia moved for summary judgment on the theory that the Lease was void *ab initio* as an

33. *Id.* at 1172-75.
34. *Id.* at 1175.
35. *Id.* at 1168.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*

unapproved management contract.[45] As a void contract, it could not form the basis for any claim sounding in contract.[46] The court denied this motion but wavered as to whether the language of the Lease actually indicated it was a management contract.[47]

Several months later, however, the district court changed its position. When the parties agreed that "the determination as to whether the agreement is a management contract is a question of law for the court,"[48] the court agreed to consider extrinsic evidence, in order to better understand the factual context and circumstances under which the Lease was negotiated and executed.[49] Ultimately, the court determined that the Operating Lease was unambiguously a management contract and, therefore, void because it was not approved by the NIGC.[50]

2. Significant Characteristics of the Kickapoo Agreement

In reaching its holding that the Operating Lease was a management contract, the *Kickapoo* court consulted both federal and NIGC materials. Federal regulations promulgated under IGRA define management activity in terms of "set[ting] up working policy for the gaming operation."[51] Based on this, the Tenth Circuit found it significant that the Operating Lease gave First American full responsibility for establishing employee management procedures.[52] The court further emphasized the autonomy the Lease granted to First American in developing and establishing "working policy" with respect to all other aspects of

45. *Id.* at 1168. First American also moved for summary judgment, contending that any management-related provisions in the Lease were severable. *Id.* at 1169. It argued that, without the offending provisions, the Lease was only a construction loan and equipment lease. *Id.* The court denied this motion because unresolved issues of fact remained outstanding. *Id.*

46. *Id.*

47. *Id.* The district court declared the Lease to be "ambiguous with respect to whether . . . [it] provides for management of the gaming operation by First American." *Id.* (internal quotation omitted) (internal citations omitted).

48. *See id.* at 1170–71 ("[T]he parties and the court were in apparent agreement that the construction of the contract was a matter of law, an agreement inconsistent with a continuing belief that the Operating Lease is ambiguous.").

49. *Id.* at 1171.

50. *Id.* at 1172. The district court determined that the Operating Lease was "much more than a vendor's agreement to provide gaming equipment." *Id.* The court's revised determination that the Operating Lease was void as an unapproved management contract effectively eviscerated First American's claim of tortious interference with contract, leaving it with a single claim, for tortious interference with business relations, on which it was also unable to prevail. *Id.* at 1169.

51. 25 C.F.R. § 502.19 (2007).

52. *Kickapoo*, 412 F.3d at 1172-73.

"the maintenance, operation and management" of the gaming operation.[53]

For additional guidance as to whether the Lease was truly a management contract, the *Kickapoo* court turned to the NIGC materials.[54] The NIGC, in an effort to provide more practical guidance as to what differentiates contracts requiring approval from those that do not, has identified seven activities of a gaming operation that constitute management activities.[55] A contract need not include terms relating to all seven activities to require NIGC approval: "The presence of some or all of these activities in a contract with a tribe strongly suggests that the contract . . . is a management contract requiring Commission approval."[56]

The *Kickapoo* Operating Lease contained terms providing for five of the seven management activities enumerated by the NIGC,[57] including: (1) maintaining accounting procedures and preparing monthly financial reports; (2) paying a minimum guaranteed amount to the Tribe; (3) financing for construction and development provided by a non-tribal entity; (4) establishing an ongoing relationship between the Tribe and non-tribal entity; and (5) calculating compensation based on a percentage fee (performance-based compensation).[58] The other two management-suggestive terms identified by the NIGC, but not present in the *Kickapoo* Lease, relate to providing "access to the gaming operation by appropriate tribal officials" and terms providing "for assignment or subcontracting of responsibilities."[59]

Besides containing five of the seven NIGC management terms, the *Kickapoo* Lease conformed closely to the three statutory and regulatory requirements specific to management contracts. First, the five-year term, and the percentage of monthly net gaming revenue the contractor was to receive (forty percent), were the maximum allowed by statute.[60] Second, the Lease required the minimum payment guaranteed to the Tribe by the non-tribal contractor ($20,000 per month under the *Kickapoo* Lease) to take

53. *Id.* at 1172.

54. *Id.* at 1174. The Tenth Circuit recognized, in so doing, that "informal pronouncements of an agency" are not entitled to the same deference as statutory or regulatory materials, but reasoned nonetheless that "the NIGC's apparent position [as expressed in an NIGC advisory bulletin and its informal Opinion Letter to the Tribe] coincides with our holding in this case [that the Lease is a management contract requiring approval]." *Id.*

55. NIGC Bulletin 94-5, *supra* note 10.

56. *Kickapoo,* 412 F.3d at 1174 (quoting NIGC Bulletin 94-5).

57. *Id.* at 1174.

58. *Id.; see also* NIGC Bulletin 94-5, *supra* note 10 (listing the required provisions in a management contract).

59. NIGC Bulletin 94-5, *supra* note 10.

60. *Kickapoo*, 412 F.3d at 1173–74 n.3; 25 U.S.C. § 2711(c)(1) (2000); 25 C.F.R. § 531.1(i)(1) (2007); 25 U.S.C. § 2711(b)(5) (2000); 25 C.F.R. § 531.1(h) (2007).

precedence over the Tribe's repayment of construction costs advanced by the contractor.[61] Third, the Lease limited both the amount First American could spend on development and improvement as well as the amount of these costs it could recover from the Tribe.[62]

3. Pointers for Practitioners: Terms Transferring Responsibility and Parties' Original Incentive

One of *Kickapoo*'s most important contributions to practitioners of Indian gaming law lies in identifying specific contract terms that indicate the need for NIGC approval or, at least, declination. As the NIGC suggests, this list is non-exhaustive.[63] Moreover, the presence of any one term may suffice to render an unapproved contract void.[64] Accordingly, gaming law practitioners should scrutinize any contract or agreement that is connected to a casino development project, no matter how insignificant, and follow the money by tracing how and why the payments are made between the parties to the contract.

Any contract term that transfers responsibility from a tribe to a non-tribal entity is sufficient grounds for advising a client to seek NIGC approval of the entire agreement. Suspect contract terms include: any that transfer responsibility for performing daily operations and/or maintenance of a gaming operation; any that transfer responsibility for establishing and maintaining accounting procedures for a gaming operation; any that transfer responsibility for financing procedures, for example, financial reporting, paying taxes, compensating employees, or paying other costs; any that set term limits for transferring certain powers or conferring certain rights; any that quantify the payments or compensation to which parties are entitled; any that delineate the sources from which payments are to be made (particularly when these specify that payments are to be based on revenues from gaming operations); and any that transfer responsibility, authority, and/or control over the construction of a gaming operation (beyond contracts for mere construction of the physical facilities).

Kickapoo further suggests two principles that practitioners may apply to any contract relating to tribal gaming operations in order to determine whether the contract should be submitted to the NIGC for approval or declination. First, what is the overall

61. *Kickapoo*, 412 F.3d at 1173; 25 U.S.C. § 2711 (b)(3) (2000); 25 C.F.R. § 531.1(f) (2007).

62. *Kickapoo*, 412 F.3d at 1174; 25 U.S.C. § 2711 (b)(4) (2000); 25 C.F.R. § 531.1(g) (2007).

63. NIGC Bulletin 94-5, *supra* note 10.

64. 25 U.S.C. § 2711 (2000); *see also* 25 C.F.R. § 531.1 (2007) (listing required provisions for gaming-related management agreements).

effect of the agreement? Regardless of whether the agreement contains a formal provision relating to management obligations, does it effectively transfer responsibility for any management-related functions from the tribe to a non-tribal entity? The second principle looks to the parties' original incentive for entering the agreement: Does this original incentive relate to the non-tribal party's performance of some arguably management-related function?

With regard to the contract's overall effect, *Kickapoo* made clear that a contract may require NIGC approval even if no term formally obligates the non-tribal contractor to perform management functions *per se*.[65] The Tenth Circuit noted that the definition of a management contract contained in the federal regulations is "partial rather than absolute, contingent rather than comprehensive."[66] Accordingly, even though First American's primary obligations under the Lease related to construction activities and the provision of gaming equipment, per the Code of Federal Regulations' ("C.F.R.") definition of "management contract," the features of the agreement that resembled "minimum requirements of a management contract" overshadowed the obligations.[67] The overall effect was to give the contractor "considerable and continuing influence over the day-to-day running of the Tribe's gaming operation."[68]

More importantly, regarding the original incentive behind the parties' decision to enter the agreement, *Kickapoo* posits that an arguably void, unapproved management contract cannot be saved by a court's blue-penciling if the parties' original intent pertains to shifting responsibility for some management-related function from the tribe to the non-tribal entity. The *Kickapoo* court determined that the Tribe's original intent for entering into the Operating Lease was to delegate certain day-to-day management functions to First American, in exchange for a guaranteed monthly payment.[69] First American "held itself out to the Tribe as experienced" in developing and managing business enterprises, and guaranteed the Tribe the monthly $20,000 payment that had precedence over the Tribe's construction loan repayment.[70] The guaranteed payment was a "material and substantial term" of the Lease.[71] More significantly, guaranteed payments such as the above are

65. *Kickapoo*, 412 F.3d at 1175.
66. *Id.* at 1175 (citing 25 C.F.R. § 502.15).
67. *Id.*
68. *Id.* at 1178. The Lease delegated to First American the responsibility for developing employment policy, supervising employees for the first three months of the casino's operation, outlining an operating plan for the casino, and establishing both the start-up budget and the operating budget. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*

required features of management contracts under federal law.[72] Accordingly, the original parties' intent prevented the court from exercising the contract's severability clause to strike the management-related provisions.[73] The Lease, including the management provisions, was a "package deal" and the provision whereby First American guaranteed payment to the Tribe in exchange for being allowed to assume certain responsibilities was "almost certainly part of the package for which the Tribe bargained."[74] Without the guaranteed payment, the Tribe likely would not have allowed First American to assume the management-related functions.[75]

Accordingly, the Tenth Circuit's analysis sheds considerable light on exactly which contracts likely require NIGC approval as management contracts. Practitioners considering whether to advise a client to seek NIGC approval or declination should disregard, as did the *Kickapoo* court, the issue of whether a contract contains a formal provision relating to management obligations. Instead, practitioners should evaluate the practical function and overall effect of the agreement as well as the parties' original incentive for entering into it. *Kickapoo* suggests that the most fruitful approach to this evaluation is to follow the money, considering the manner in which parties are to receive payments under the contract. Guaranteed minimum payments to a tribe that take precedence over the tribe's repayment of the costs advanced by the non-tribal contractor, or fees calculated as a percentage of gaming revenue, strongly suggest that the agreement in question is a management contract.

B. Agreements Collateral to a Management Agreement

Often in gaming-facility development projects, practitioners are asked to draft agreements that will allow the preliminary stages of the project to proceed while the client awaits NIGC approval of the management contracts and related transaction documents. Practitioners, reasoning that these interim agreements are not intended to be management contracts or transfer management responsibility, may believe them to be enforceable without NIGC approval or declination. As the cases in this section illustrate, however, that belief is often misguided.

When the enforceability of such an interim agreement is challenged, a court ultimately may determine that the agreement is unenforceable for lack of NIGC approval. Notwithstanding the contract's language, disclaimer provisions, or other formalities, a

72. *Id.* (internal citations omitted).
73. *Id.*
74. *Id.*
75. *Id.*

court may find several reasons for labeling the contract a management or collateral-to-management agreement. In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Kean-Argovitz Resorts, L.L.C.* ("*Kean-Argovitz*"),[76] the court held that the Development Agreement, which was drafted to allow a casino development project to proceed during the NIGC approval process of the primary transaction documents, was unenforceable.[77] The court determined that the agreement, which had not been submitted for NIGC approval, was collateral to a management contract per the IGRA.[78] The court ignored two express disclaimer provisions in the contract. Instead, the court pointed to the overall structure of the transaction and the agreement's function within that structure, which linked it to the actual Management Contract.[79] Likewise, in *Machal, Inc. v. Jena Banc of Choctaw Indians* and *Jena Band of Choctaw Indians v. Tri-Millennium Corp., Inc.* ("Jena Band cases"),[80] the court looked beyond the parties' benign intent in entering the Development and Settlement agreements and the promises of future performance contained in those agreements. The court fixated on the practical consequences of a particular provision that effectuated an immediate transfer of managerial authority. As the discussion below reveals, practitioners seeking to draft enforceable interim agreements can learn much from the approach and reasoning employed by the two district courts in these cases. Ultimately, both courts found the agreements at issue to be collateral to a management contract, and thus void for lack of NIGC approval.

1. Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Kean-Argovitz Resorts, L.L.C.

The district court in *Kean-Argovitz* evaluated the enforceability of two agreements between a newly recognized Tribe[81] and a non-tribal casino management and development company.[82] Neither the Management Agreement nor the Development Agreement for the project had been submitted to the

76. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Kean-Argovitz Resorts, L.L.C., 249 F. Supp. 2d 901 (W.D. Mich. 2003), *overruled on other grounds*, 383 F.3d 512 (6th Cir. 2004).

77. *Kean-Argovitz*, 249 F. Supp. 2d at 902.

78. *Id.* at 907.

79. *Id.*

80. Machal, Inc. v. Jena Band of Choctaw Indians, 387 F. Supp. 2d 659 (W.D. La. 2005); Jena Band of Choctaw Indians v. Tri-Millennium Corp., 387 F. Supp. 2d 671 (W.D. La. 2005).

81. Apparently, the Tribe did not become a federally-recognized tribe until August of 1999, almost a year after it entered the two agreements with the developer. *Kean-Argovitz*, 383 F.3d at 514.

82. *Kean-Argovitz*, 249 F. Supp. 2d at 902.

NIGC for approval.[83] The court ultimately determined that both were void *ab initio* for lack of NIGC approval.[84] The Development Agreement was collateral to the Management Agreement and could not escape the NIGC approval requirement, despite two express disclaimer provisions stating it was not intended as a management contract.[85] In support of this finding, the court pointed to three provisions of the Development Agreement that related to the "management of future gaming operations," thereby closely linking the Development Agreement with the Management Contract.[86] Even though the decision was reversed on appeal,[87] the court's reasoning is instructive for practitioners seeking to guide clients through the regulatory hurdles involved in ensuring that agreements relating to development and management of tribal gaming facilities will be enforceable.

a. Procedural and Factual Background

In 1998, the Match-E-Be-Nash-She-Wish Band of Potawatomi Indians (the "Tribe") and a non-tribal casino developer negotiated and entered into two agreements providing for development and management of a proposed casino.[88] Shortly thereafter, before either agreement could be approved by the NIGC, the Tribe broke off its business relationship with the developer.[89] Relying on the unapproved status of the agreements to ensure their unenforceability, the Tribe filed for declaratory and injunctive relief to prevent enforcement of either agreement.[90]

The district court wasted little time in determining that the Management Agreement was void for lack of NIGC approval.[91] Neither party disputed that the Management Agreement fell within the official definition of a management agreement,[92] and federal statutory and regulatory authority unequivocally require NIGC approval of all management contracts pertaining to Indian gaming facilities.[93] Because the Tribe had terminated its relationship with the developer and filed suit before the NIGC

83. *Id.* at 904.
84. *Id.* at 904-05.
85. *Id.* at 907.
86. *Id.* at 905–06.
87. *Kean-Argovitz*, 383 F.3d at 514.
88. *Kean-Argovitz*, 249 F. Supp. 2d at 902-03.
89. *Id.* at 902.
90. *Id.* at 903.
91. *Id.* at 904.
92. *Id.* (internal citation omitted).
93. *Id.* (internal quotation omitted). "Management contracts and changes in persons with a financial interest in or management responsibility for a management contract, that have not been approved by the Secretary of the Interior or the Chairman . . . are void." 25 C.F.R. § 533.7 (2007).

approved the Management Agreement, the Agreement was undeniably void *ab initio* and, therefore, unenforceable.[94]

b. The Development Agreement

The determination of whether the Development Agreement also required NIGC approval to be enforceable demanded more extensive analysis, especially of the agreement's substance and the transaction's structure. On the one hand, if the Development Agreement was collateral to the management contract, it would be void absent NIGC approval.[95] On the other hand, if it was not collateral, the Development Agreement might be enforceable even without NIGC approval. As the defendant developer who sought to enforce the Agreement reminded the court, "not every contract that is merely peripherally associated with tribal gaming is subject to IGRA's constraints."[96]

In support of its argument for enforceability, the developer pointed to two express disclaimer provisions in the Development Agreement. The first stated unambiguously that that the parties did not intend the Development Agreement to be a management contract, and that it was not to be construed as such.[97] The second disclaimer stated that the parties' objective in entering into the Development Agreement was to establish a legally enforceable means to move ahead with the land acquisition and development aspects of the project "prior to the approval of the Management Agreement by the NIGC."[98] Further, the second disclaimer specified that the Development Agreement was "intended to be . . . independent of the Management Agreement" and to be enforceable "regardless of whether the [Development] Agreement or the Management Agreement [was] approved by the Chairperson of the NIGC."[99]

Unfortunately for the non-tribal developer, neither disclaimer provision had the intended effect of rendering the unapproved Development Agreement enforceable.[100] The court pointed to other

94. *Kean-Argovitz*, 249 F. Supp. 2d at 903-05.

95. *Id.* at 904 (internal citation omitted). Federal regulations define a collateral agreement requiring NIGC approval as "any contract . . . related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe . . . and a management contractor or subcontractor." 25 C.F.R. § 502.5.

96. *Kean-Argovitz*, 249 F. Supp. 2d at 905 (quoting Casino Res. Corp. v. Harrah's Entm't, Inc., 243 F.3d 435, 439 (8th Cir. 2001) (internal citations omitted).

97. *Id.* at 905.

98. *Id.*

99. *Id.*

100. *Id.* at 907. "Despite the parties' best efforts to insert language into the Development Agreement labeling it separate and distinct from the Management Agreement, the terms of the Development Agreement evidence

terms as "ample evidence" of the Development Agreement's "linkage to the Management Agreement, thus rendering it collateral to the Management Agreement."[101] In focusing on the interrelation between the two agreements within the development project's overall structure, the district court adopted the "combined effect" approach taken by the Eighth Circuit in *United States v. Casino Magic Corp.*[102] By taking this broad view, the court identified three specific management-related provisions in the Development Agreement.[103]

First, the Development Agreement provided that the non-tribal developer would arrange all of the funding for the casino development and pre-opening costs.[104] Pursuant to this provision, the loans were to be repaid solely from the gaming revenues—a feature that the NIGC considers suggestive of a Management Agreement requiring approval.[105] Moreover, the developer's loan commitment was expressly identified as consideration for the Tribe's grant of exclusive development rights.[106] The exclusive rights included not only development-related rights, but also the right to manage the casino per the Management Agreement.[107]

Second, the exclusivity provision in the Development Agreement was linked to the Management Agreement.[108] Under the exclusivity provision, the Tribe agreed to deal solely with the non-tribal developer for all of the gaming-related development on the tribal land.[109] This requirement started on the effective date of the Development Agreement, and would not end until the "termination of the Management Contract."[110]

Third, the developer's loan commitment was expressly conditioned on the execution of a Management Agreement with

that it was directly related to the Management Agreement and [the non-tribal developer]'s management of the gaming facility." *Id.*

101. *Id.* at 905.

102. *See Casino Magic Corp.*, 293 F.3d at 425 (noting that the "combined effect of the series of agreements" had the practical effect of giving "managerial control" to the non-tribal casino developer).

103. *Kean-Argovitz*, 249 F. Supp. 2d at 907.

104. *See id.* at 906 (stating that the developer:

> agreed to make available to [the Tribe] . . . sufficient funds to finance the acquisition of the Tribal Land and the Gaming Facility, and has agreed to make certain other loans directly to [the Tribe] and advance certain other fees for [the Tribe] as consideration for the exclusive right to develop and manage the Gaming Facility pursuant to the Management Agreement. . . .).

105. *Id.*; *see also* NIGC Bulletin 94-5, *supra* note 10.

106. *Kean-Argovitz*, 249 F. Supp. 2d at 906.

107. *Id.* at 906–07.

108. *Id.* at 906.

109. *Id.*

110. *Id.* at 906–07.

the Tribe, and subsequent approval by the NIGC.[111] As such, the non-tribal contractor's promised consideration was conditioned on the enforceability and NIGC approval of the Management Agreement. This feature supported the court's finding that the Development and Management Agreements were "directly related" to each other.[112]

c. Pointers for Practitioners: Substance Over Form

Accordingly, *Kean-Argovitz* offers practical, cautionary guidance for practitioners that seek to draft enforceable contracts that will allow preliminary aspects of a gaming facility's construction or development to proceed pending NIGC approval. The *Kean-Argovitz* court's reasoning accorded much greater weight to the practical effect of the Development Agreement and its functional relationship with the Management Agreement, than to the parties' formal language choices.[113] The financial and practical structure of the development project was revealed through a reading of the three provisions regarding exclusivity and loan commitment.[114] The structure had the practical effect of rendering the disclaimer language a nullity.[115]

In the tradition of *Casino Magic*, this analytical method focuses on the structure of the transaction as a whole, particularly the financing aspects. The overall structure carries far greater weight in determining which agreements require NIGC approval than the language of any particular agreement associated with the transaction. The substantive content embodied in the terms of the *Kean-Argovitz* Development Agreement only confirmed that it was "directly related to the Management Agreement" and the non-tribal contractor's "management of the gaming facility."[116] Practitioners should be aware that drafting formalities will not save an unapproved agreement from unenforceability if management-related features are interwoven into the collateral document. Any interim contracts should be scrupulously analyzed to ensure that they contain no terms relating to a contractor's management of future gaming activities, or terms linking loan repayments and other compensation to revenues generated by future gaming operations. Moreover, after inspecting a collateral agreement to ensure it passes muster and does not require NIGC approval, practitioners should encourage clients nonetheless to seek an NIGC declination letter to confirm the agreement's future enforceability.

111. *Id.*
112. *Id.* at 907.
113. *Id.*
114. *Id.* at 906-07.
115. *Id.*
116. *Id.*

2. Machal, Inc. v. Jena Band of Choctaw Indians[117] *and* Jena Band of Choctaw Indians v. Tri-Millennium Corp.[118]

a. Procedural and Factual Background

Both cases involving the Jena Band arose from the same casino development project. Each case challenged the enforceability of various agreements between the Jena Band of Choctaw Indians (the "Band") and the non-tribal casino developers Tri-Millennium, BBC, and Machal.

After becoming federally recognized in 1995, the Jena Band searched for land on which to build a casino, and negotiated with casino developers Tri-Millennium and BBC regarding potential collaboration on a casino development project.[119] Tri-Millennium and BBC promised, among other things, to help the Band acquire land and build the casino.[120] In exchange, the Band promised the developers certain payments and control rights over various aspects of the development project.[121] The parties executed several Development Agreements and Memoranda of Understanding to memorialize their agreement.[122]

To ensure that these preliminary contracts would be enforceable, the Band wisely sought NIGC declination letters for the Development Agreements.[123] The NIGC determined that the Development Agreements were indeed management contracts for the purposes of the IGRA, and would thus be void *ab initio* without full NIGC approval.[124] Although the Band reported this news to the casino developers, the parties did not further petition the NIGC for approval.[125] Instead, the Band signed a Financing and

117. 387 F. Supp. 2d 659 (W.D. La. 2005).
118. 387 F. Supp. 2d 671 (W.D. La. 2005).
119. *Tri-Millennium*, 387 F. Supp. 2d at 672.
120. *Id.*
121. *Id.*; *Machal*, 387 F. Supp. 2d at 661-62.
122. *Tri-Millennium*, 387 F. Supp. 2d at 673.
123. *Id.* at 673; *Machal*, 387 F. Supp. 2d at 661-62. The district court did not consider the enforceability of the Development Agreement in either Jena Band case. *Id.* at 672; *Machal*, 387 F. Supp. 2d at 663. Only Machal requested a declaratory judgment that these Agreements were void for lack of NIGC approval, Machal was not a party to, nor a third-party beneficiary of, the agreements and, therefore, lacked standing to challenge their validity. *Machal*, 387 F. Supp. 2d at 664. In both *Machal* and *Tri-Millennium*, the court considered primarily the settlement agreements that the various parties had entered into in an effort to effectuate some resolution to their complex dispute. *Tri-Millennium*, 387 F. Supp. 2d at 678-80; *Machal*, 387 F. Supp. 2d at 667-71.
124. *Tri-Millennium*, 387 F. Supp. 2d at 673.
125. *Id.*

Brokerage Agreement (the "Machal Agreement") with Machal.[126] The agreement gave Machal many of the rights and duties that the Band had already promised Tri-Millennium and BBC under the Development Agreements.[127]

A flurry of litigation followed in which the Band, Tri-Millennium, and Machal each played the role of plaintiff at least once.[128] At the heart of all the parties' claims lay the question of whether four unapproved agreements were enforceable. The following four unapproved agreements were at issue in these cases: (1) a Co-Managers Agreement between the Band, BBC, and Machal,[129] (2) a second agreement related to the Co-Managers Agreement,[130] (3) a settlement agreement executed by the Band, Machal and BBC (the "BBC Settlement Agreement"),[131] and (4) the Tri-Millennium Settlement Agreement.[132] Ultimately, all four were held to be collateral to a management contract, and thus void and unenforceable for lack of NIGC approval.[133]

b. The Four Agreements

(i) The Co-Managers Agreement: A Collateral Agreement Requiring NIGC Approval

The *Machal* court first considered the enforceability of the Co-Managers Agreement executed by the Band, BBC, and Machal. In an effort to circumvent the NIGC approval requirement for collateral agreements, the parties had included in the Co-Managers Agreement a stipulation that it was not a "gaming agreement."[134] Nonetheless, the *Machal* court followed the rationale of the Western District of Michigan in *Kean-Argovitz*, and accorded greater weight to the substance and content of the rights and duties outlined in the Co-Managers Agreement than to contract formalities.[135] This approach led the court to conclude that the Co-Managers Agreement was unenforceable as a collateral agreement because it lacked NIGC approval.[136]

Several characteristics of the Co-Managers Agreement

126. *Id.*
127. *Id.* at 673; *Machal*, 387 F. Supp. 2d at 662.
128. *Tri-Millennium*, 387 F. Supp. 2d at 673.
129. *Machal*, 387 F. Supp. 2d at 667.
130. *Id.* at 667–68.
131. *Tri-Millennium*, 387 F. Supp. 2d at 678–80; *Machal*, 387 F. Supp. 2d at 668–70.
132. *Tri-Millennium*, 387 F. Supp. 2d at 680.
133. *Id.*
134. *Machal*, 387 F. Supp. 2d at 667.
135. *Id.* The court reproved the parties for their transparent effort to subvert the NIGC approval process, admonishing that "[t]he requirements of the IGRA . . . cannot be so easily avoided." *Id.*
136. *Id.* at 667.

suggested that the Agreement's substance was management-related. The Co-Managers Agreement gave non-tribal entity BBC full responsibility for the construction and operation of the Band's gaming facility, including all responsibility for providing or securing financing for the construction.[137] Pursuant to federal regulations, the presence of a contract term conferring such responsibility strongly indicates that the agreement is sufficiently management-related to be unenforceable absent NIGC approval.[138] Further, the Co-Managers Agreement obligated Machal and BBC, both non-tribal contractors, to provide "oversight management" for the operation of the gaming facility.[139] The Agreement specifically allocated authority between the two entities as "co-managers."[140] Moreover, the duties, rights, and responsibilities delineated in the Agreement were "the types . . . usually included in a management contract."[141] Notwithstanding the parties' stipulation that the Co-Managers Agreement was not a gaming agreement, the Agreement's overall effect was to "give Machal and BBC authority over the management of an anticipated gaming operation."[142] As such, it was undeniably a management contract, and void for lack of NIGC approval.[143]

(ii) The Related Agreement: A Collateral Agreement Requiring NIGC Approval

The *Machal* court next considered the enforceability of a second agreement between the Band, BBC, and Machal. Finding that the terms of this second agreement "related to the Co-Managers Agreement,"[144] the court proceeded to evaluate the agreement's substance and effect.[145] Like the Co-Managers Agreement to which it was related, the second agreement "create[d] the type of rights and responsibilities allocated in a management contract."[146] The court identified four provisions of the agreement that indicated that it was collateral to a management contract.[147] Two of the provisions gave Machal the right to approve, along with the Band, the construction, design, and naming of any gaming-related facility, as well as the right to evaluate and jointly approve the banking arrangements for the

137. *Id.*
138. *Id.* (internal citation omitted).
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* The terms of this second Agreement "show[ed] that it [wa]s related to the Co-Managers Agreement." *Id.*
145. *Id.* at 667-68.
146. *Id.*
147. *Id.*

revenue generated.[148] In addition to transferring responsibility for these management-related functions, the agreement mandated that the Tribe repay the construction loans from the net revenue generated by the gaming operation.[149] Even more importantly, it gave Machal the right to receive a percentage of total net gaming revenues.[150] The overall effect of these four provisions was to "provide[] for the management of all or part of a gaming operation."[151] As such, the agreement was collateral to the Co-Managers Agreement (a management contract) and, therefore, void for lack of NIGC approval.[152]

(iii) The BBC Settlement Agreement: A Management Contract Requiring NIGC Approval

The BBC Settlement Agreement between Machal, BBC and the Band was also unenforceable for lack of NIGC approval.[153] The NIGC previously deemed the Settlement Agreement to be a management contract, reasoning that it allocated management authority for the future gaming operation among the parties.[154] The *Machal* court, after extensive discussion and analysis, disagreed with the NIGC's analysis because the provisions that the NIGC cited for support did not actually transfer managerial authority.[155] Nonetheless, one provision of the BBC Settlement Agreement convinced the *Machal* court that the Agreement was indeed a management contract and, therefore, void without NIGC approval.[156]

The BBC Settlement Agreement was meant to settle the parties' differences regarding their respective contractual rights in connection with the Development Agreements.[157] Among other things, the BBC Settlement Agreement made BBC responsible for coordinating and arranging construction financing and initial operating capital for the Band's future gaming operation.[158] Machal was responsible for the land acquisition process and for supplying the funding needed to conduct environmental or other studies that are required prior to construction of a gaming operation.[159] Machal also agreed to negotiate with the other parties in good faith, in order to create financing, development,

148. *Id.* at 668.
149. *Id.* at 667-68.
150. *Id.* at 668 (internal citation omitted).
151. *Id.*
152. *Id.*
153. *Id.* at 669.
154. *Id.*
155. *Id.*
156. *Id.* (internal citation omitted).
157. *Id.* at 668.
158. *Id.*
159. *Id.*; *Tri-Millennium*, 387 F. Supp. 2d at 678–79.

and management agreements related to the future gaming operation.[160] Further, both BBC and Machal were obligated to negotiate in good faith for the purpose of creating a Co-Managers Agreement[161] that would delineate their respective managerial duties.[162]

In exchange for these promises, the Band promised to repay the promissory notes it had given BBC and Machal to secure financial obligations created pursuant to the BBC Settlement Agreement.[163] The Band also promised to grant Machal and BBC exclusive management-related rights with respect to the future gaming operation, and to negotiate with them in good faith to develop a management agreement naming BBC and Machal co-managers of its first gaming operation.[164] The Band specifically agreed to allow certain terms to be included in that future management contract, including provisions that allow the contractors to be paid a percentage of gaming revenues.[165]

The NIGC deemed these features tell-tale evidence that the BBC Settlement Agreement was a management contract in disguise.[166] The *Machal* court, disagreeing with the NIGC's assessment, focused on the present effect of those provisions, not on their future implications.[167] The NIGC accorded great weight to the provisions that referred to BBC and Machal as co-managers of a future gaming operation and specified the manner in which managerial authority would be allocated between the two entities in a future management contract.[168] The court, however, emphasized that, "[r]ead in context . . . [neither] provision actually transfers any management authority to Machal or BBC."[169] Instead, the agreement obligated the parties only to negotiate in good faith, and dictated the substance of those negotiations.

Likewise, the NIGC supported its finding by pointing to the portion of the BBC Settlement Agreement obligating Machal and BBC to enter a Co-Managers Agreement containing certain

160. *Machal*, 387 F. Supp. 2d at 668.

161. *See supra* notes 138–46 and accompanying text. The Co-Managers Agreement was, of course, held by the *Machal* court to be a management contract requiring NIGC approval. *Machal*, 387 F. Supp. 2d at 668.

162. *Machal*, 387 F. Supp. 2d at 668; *Tri-Millennium*, 387 F. Supp. 2d at 679.

163. *Machal*, 387 F. Supp. 2d at 668.

164. *Id.* at 668–69; *Tri-Millennium*, 387 F. Supp. 2d at 679.

165. *Machal*, 387 F. Supp. 2d. at 669. Notwithstanding the clever craftsmanship of this provision in arranging for the future payout of gaming revenues but not actively and presently securing that payout, the NIGC had cited this contract feature as further evidence that the Settlement Agreement was a collateral agreement to a management contract. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

management-related provisions.[170] Regarding this provision, the *Machal* court focused on the BBC Settlement Agreement's present effect. The court reiterated that the provision did not actually transfer authority.[171] It did not have the effect of granting BBC or Machal "the right to manage any aspect of an anticipated gaming operation."[172] Instead, the BBC Settlement Agreement obligated the Band only to "include certain provisions in a future management contract yet to be negotiated."[173] Because it did not effectively transfer management authority over a gaming operation, the second provision of the BBC Settlement Agreement was not considered to "provide for the management of a gaming operation" in the manner characteristic of management agreements.[174]

A third provision, however, convinced the *Machal* court that the BBC Settlement Agreement was indeed a management contract. The provision granted Machal and BBC exclusive rights to enter a management contract with the Band, as well as "gaming on the first Gaming Operation."[175] The court found it significant that this provision excluded not only other non-tribal contractors from the first gaming operation, but also the Band itself.[176] Unlike the other two provisions cited by the NIGC, this "alienation by the Jena Band of its right to manage gaming operations located on tribal lands in Louisiana" was a present transfer of management rights.[177] Based on the present effect of the transfer, the *Machal* court concluded that the BBC Settlement Agreement was a management contract and void for lack of NIGC approval.[178]

(iv) The Tri-Millennium Settlement Agreement: A Management Contract Requiring NIGC Approval

The second settlement agreement, between the Band and Tri-Millennium only, provided for, among other things, release by the contractor of its claims against the Band in exchange for the payment of $1,350,000.[179] The remainder of the Tri-Millennium Settlement Agreement provided for stock sales and potential additional payments, all conditioned on NIGC approval of the

170. *Id.* Pursuant to this section of the Settlement Agreement, the Co-Managers Agreement would allocate managerial authority in a certain manner between BBC and Machal. *Id.*
171. *Tri-Millennium*, 387 F. Supp. 2d at 679.
172. *Machal*, 387 F. Supp. 2d at 669.
173. *Id.*
174. *Id.*; NIGC Bulletin 94-5, *supra* note 10.
175. *Machal*, 387 F. Supp. 2d at 669; *Tri-Millennium*, 387 F. Supp. 2d at 680.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Tri-Millennium*, 387 F. Supp. 2d at 680.

Band's gaming operation and its related management, development, and financing contracts.[180]

The district court was puzzled by the NIGC's position that the Tri-Millennium Settlement Agreement was collateral to a management contract and thus void for lack of NICG approval.[181] Still, the court did not hesitate to affirm that position, albeit based upon different reasoning. The Tri-Millennium Settlement Agreement contained "the same fatal flaw" as the BBC Settlement Agreement.[182] For whatever reason, the drafters of the Tri-Millennium Settlement Agreement found it necessary to include the exclusivity provision of the BBC Settlement Agreement, whereby Machal and BBC were granted the right to operate the first gaming facility as well as the exclusive right to enter into a management contract with the Band.[183] That single provision rendered the otherwise benign Tri-Millennium Settlement Agreement void as an unapproved collateral agreement providing for the management of a gaming operation.[184]

c. Pointers for Practitioners: A Helpful Checklist

Beyond their extensive analysis of the four agreements, the Jena Band cases provide practitioners another useful tool by illuminating the issue of when an agreement should be submitted for NIGC approval. The reasoning in the cases closely tracked the reasoning used by the Tenth Circuit in *Kickapoo*. The Jena Band cases also offer a checklist of terms that are considered management-related. The presence of any of these terms in an agreement should alert practitioners that the agreement requires NIGC approval, or at least, a declination letter, to ensure its enforceability in the face of a challenge.

Taken together, the terms on the checklist "give content to the concept of management" in that they all "indicate a transfer of management authority" from an Indian tribe to a party other than the tribe.[185] As such, the district court's list should help practitioners identify the types of authority transfers that indicate a document is a management agreement, or collateral to a management agreement:

1. Transferring responsibility for the performance of the daily

180. *Id.*

181. *Id.* To the court, it appeared as though the NIGC's opinion was not based on any specific terms of the Tri-Millennium Agreement, but solely on the fact that it was collateral to the management contract. *Id.*

182. *Id.*

183. *Tri-Millennium*, 387 F. Supp. 2d at 680.

184. *Id.*

185. *Machal*, 387 F. Supp. 2d at 665; *Tri-Millennium*, 387 F. Supp. 2d at 676. The district court's checklist is drawn from *Kickapoo*, NIGC Bulletin 94-5, 25 U.S.C. § 2711, and 25 C.F.R. § 531.1.

> operations and maintenance of a gaming operation.
>
> 2. Transferring responsibility for the establishment and maintenance of accounting procedures for the gaming operation.
>
> 3. Transferring responsibility for financing procedures such as financial reporting and the paying of taxes, employees and other costs.
>
> 4. Setting term limits for transfers of powers or conferrals of rights.
>
> 5. Quantifying the payments or compensation to which the parties are entitled.
>
> 6. Delineating the sources from which payments are to be made . . . [or] specifying whether payments are to be based on a percentage of net revenues realized by a gaming operation.
>
> 7. Transferring responsibility for and control over the construction of a gaming operation.[186]

Agreements with terms that could be construed as accomplishing any of the above transfers of responsibility should be flagged as potential collateral agreements that require NIGC approval. Practitioners should then consult with their clients to determine whether the agreement can be rewritten in a way that does not run afoul of the IGRA approval requirement. If redrafting such an agreement is not possible, the agreement, no matter how remotely connected it is to the primary development project, should nevertheless be submitted to the NIGC for approval or declination.

Moreover, in the aftermath of *Kickapoo*, whenever the terms contained in a contract relate to any type of management activity, that agreement should be submitted to the NIGC for approval or declination. *Kickapoo* emphasizes that transfers of management responsibility may be partial rather than comprehensive.[187] Accordingly, any allocation of a management-type function may render the contract collateral and subject to NIGC approval, regardless of whether the obligation is accompanied by management-type rights, or whether a management function is performed as a matter of right granted in that contract. As *Kickapoo*, *Kean-Argovitz,* and the Jena Band cases illustrate, regardless of how carefully one structures the transaction, an enforceability challenge can result in unwelcome surprises. Depending on how the presiding court reads the *Kickapoo* line of

186. *Machal*, 387 F. Supp. 2d at 665; *Tri-Millennium*, 387 F. Supp. 2d at 676–77.

187. *Kickapoo*, 412 F.3d at 1175.

cases, contracts thought to be enforceable without NIGC approval might, in a post-*Kickapoo* world, nonetheless be deemed collateral to the management agreement (and therefore unenforceable) based on a single provision, as were the settlement agreements in the Jena Band cases.

C. Agreements Not Collateral to a Management Agreement

1. BounceBack Technologies.com, Inc. v. Harrah's Entertainment, Inc. ("Bounceback")[188]

In this unreported case, a consulting agreement was neither a management contract nor an agreement collateral to a management contract, therefore, it did not require NIGC approval.[189] Like *Kickapoo*, *Kean-Argovitz*, and the Jena Band cases, *BounceBack* arose from an Indian tribe's efforts to develop casino gaming on tribal lands. To this end, the Pokagon Band of Potawatomi Indians (the "Pokagon") executed a Memorandum of Understanding with Harrah's Entertainment, followed by a Management Agreement and a Development Agreement between the Pokagon and various Harrah's subsidiaries.[190] In addition to assigning rights and responsibilities related to the development, construction, and oversight of the gaming facility, the Development Agreement contained a non-compete provision that applied to all the parties.[191]

Nearly a year after the primary management and development agreements were executed, one of the non-tribal contractor's subsidiaries, Harrah's Southwest, entered a Technical Assistance and Consulting Agreement ("Consulting Agreement") with a third party.[192] The third party later changed its name to BounceBack.[193] Harrah's Southwest was also a party to the Development Agreement that contained the non-compete provision.[194] The consulting agreement incorporated the Development Agreement's non-compete provision by reference.[195] The execution of the Consulting Agreement marked the termination of the original Memorandum of Understanding

188. No. Civ. 98-2058 (JNEJGL), 2003 WL 21432579, at *1 (D. Minn. June 13, 2003).
189. *Id.* at *4 (internal citation omitted).
190. *Bounceback*, 2003 WL 21432579, at *1.
191. *Id.*
192. *Id.*
193. *Id.* at *1 n.3.
194. *Id.* at *1.
195. *Id.* Harrah's Southwest was a party to the Development Agreement as well as to the consulting agreement with BounceBack. *Id.* BounceBack, however, was not a party to any agreements other than the consulting agreement with Harrah's Southwest that was at issue in the case. *Id.*

between the Pokagon and Harrah's Entertainment.[196]

More than a year after the Memorandum of Understanding was terminated pursuant to the parties' agreement, the Pokagon and the remaining Harrah's subsidiaries terminated the Management and Development Agreements, also by mutual agreement.[197] BounceBack then sued all of the Harrah's entities claiming, *inter alia*, breach of contract based on its consulting agreement with Harrah's Southwest.[198] In response, the Harrah's defendants moved for partial summary judgment, alleging that BounceBack breached its non-compete obligation.[199]

a. The Consulting Agreement: Not Collateral to a Management Contract

Whether BounceBack's motion for summary judgment on its breach of contract claim would succeed depended on whether the unapproved Consulting Agreement with Harrah's Southwest was enforceable,[200] or was an unapproved collateral agreement.[201] The *BounceBack* court considered the applicable federal regulations defining a "management contract."[202] Ultimately, the court determined that the Consulting Agreement did "not fall within this definition."[203] In reaching this determination, the District Court for the District of Minnesota employed a line of reasoning similar to that used in other circuits by the *Kickapoo* and *Kean-Argovitz* courts, and in the two Jena Band cases. As such, the court focused on the structure of the transaction as a whole and the functional role of the consulting agreement within the overall structure.[204]

In the Bounceback project, the agreement that allocated all of the rights and responsibilities for the management of the proposed gaming operation was the Management Agreement between Harrah's Southwest and the Pokagon.[205] The Managemenet Agreement effectively transferred the Pokagon's entire managerial responsibility to Harrah's Southwest. The Management Agreement also contained an exclusivity provision that granted

196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at *6.
200. *Id.* at *3. The parties did not dispute that the consulting agreement had not received NIGC approval. *Id.*
201. *Id.* at *6.
202. *Id.* at *4; *see, e.g.*, 25 C.F.R. § 502.15 (defining a "management contract" as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract provides for the management of all or part of a gaming operation.").
203. *BounceBack*, 2003 WL 21432579, at *4.
204. *Id.* at *7.
205. *Id.*

Harrah's Southwest the sole managerial rights regarding the whole gaming operation.[206] In exchange, Harrah's Southwest promised to oversee and direct the casino's day-to-day operations, and to assume responsibility for all of the affairs relating to the management, maintenance, and operation of the casino.[207]

By contrast, the consulting agreement between BounceBack and Harrah's Southwest did not provide BounceBack with any managerial authority.[208] It did not alter in any way the allocation of management authority outlined in the Management Agreement.[209] All management functions for the proposed casino were covered in the other agreements.[210] The other agreements gave managerial authority to entities other than BounceBack, and BounceBack was not a party to any of the agreements.[211] No term in the consulting agreement altered any of the management-related provisions in the other agreements; in fact, one section of the consulting agreement expressly disclaimed any intent to do so. The provision stated that BounceBack was to have "no right to affect the management decisions made by Harrah's Southwest in its performance of the Management Agreement."[212] Because the Consulting Agreement did not transfer any management-related authority or managerial rights, the court deemed the agreement valid and enforceable, despite its lack of NIGC approval.[213]

b. The Development Agreement: Not a Management Contract Requiring NIGC Approval

Like BounceBack's motion for summary judgment, the Harrah's defendants' motion for partial summary judgment on its breach of covenant not to compete claim depended on the enforceability of an unapproved gaming-related contract.[214] The Development Agreement contained the original non-compete provision.[215] Although BounceBack was not a party to the Development Agreement, BounceBack's Consulting Agreement

206. *Id.* at *4.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* (internal citations omitted) (interal punctuation omitted). Practitioners should note, however, that this term likely would not have saved the consulting agreement from being declared unenforceable as an unapproved collateral agreement if the effect of the agreement as a whole was to grant any managerial authority to BounceBack.
213. *See id.* at *4 ("[T]he TACA [consulting agreement] is not a 'management contract' requiring NIGC approval . . . [and is] legally enforceable . . . .").
214. *Id.* at *6.
215. *Id.* at **1-6.

expressly incorporated by reference the non-compete provision.[216]

Like the BounceBack consulting agreement, the NIGC did not approve the Development Agreement.[217] The Harrah's defendants argued that the Development Agreement was unenforceable given the Eighth Circuit's decision in *Casino Magic*.[218] The *BounceBack* court disagreed, however, and drew several distinctions between the two cases. *Casino Magic* involved three interrelated agreements. An initial agreement engaged the non-tribal contractor only as a consultant,[219] but was followed by two agreements that conferred managerial rights and responsibilities.[220] By contrast, all managerial aspects of the *BounceBack* development project were addressed in a single agreement, the Management Agreement between the Pokagon and the Harrah's entities.[221] Neither the Development Agreement, nor any of the other agreements related to the Pokagon's casino development project, altered the allocation of managerial authority in the monolithic Management Agreement.[222] Accordingly, the Development Agreement did not "provide[] for the management of all or part of a gaming operation,"[223] therefore, it was "not part of a 'management contract' that required NIGC approval under the IGRA."[224]

c. Pointers for Practitioners: An Aspirational Model for Structuring Gaming-Facility Development Transactions

Notwithstanding the Tenth Circuit's dismissal of *BounceBack* because it contained "no relevant analysis" on the issue of which gaming-related contracts require NIGC approval,[225] *BounceBack* may offer practitioners an aspirational model for structuring gaming facility development transactions. Ideally, all management-related activities and transfers of a tribe's responsibility to a non-tribal contractor should be cohesively contained in a single management agreement or series of management contracts. To be enforceable, these agreements would clearly require NIGC approval. The decision as to whether other transaction documents also require NIGC approval depends upon whether those agreements alter any rights or responsibilities allocated in the central management contracts. In this regard,

216. *Id.* at *6.
217. *Id.*
218. *Id.* at **6-7.
219. *Id.* at *7; *Casino Magic*, 293 F.3d at 421.
220. *Id.* at *6.
221. *Id.* at *7.
222. *Id.*
223. *Id.* (internal quotation omitted).
224. *Id.* at *7.
225. *Kickapoo*, 412 F.3d at 1175.

practitioners may find it useful to consult the checklist of management-type transfers of authority compiled by the district court in the Jena Band cases.[226]

Practitioners should be aware, however, of a potential flaw in this aspiration-filled approach. *BounceBack* was decided before the Tenth Circuit's extensive discussion of the management contract enforceability issue in *Kickapoo*. In *Kickapoo*, the Tenth Circuit construed the C.F.R. definition of "management contracts" as "partial rather than absolute."[227] *Kickapoo* rejected the notion that "only when [management] functions are performed as a matter of right" is a contract a management contract requiring approval. Accordingly, practitioners seeking to structure a gaming development project in the elegant, streamlined tradition of *BounceBack* should be aware that any agreement, no matter how minor, that contains arguably management-related terminology (regardless of whether the agreement transfers full rights or responsibilities) at the very least should be submitted to the NIGC for declination.

2. United States of America ex rel. Saint Regis Mohawk Tribe v. President R.C.- St. Regis Mgmt. Co.[228]

The events leading up to this *qui tam* action[229] began with a series of attempts by the St. Regis Mohawk Tribe ("St. Regis") to form business alliances that would allow it to develop a casino on tribal lands.[230] Eventually, the defendant management company in this case ("President") agreed to finance and construct the

226. *See supra* notes 113–87 and accompanying text (discussing *Machal v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d 659 (W.D. La. 2005) and *Jena Band of Choctaw Indians v. Tri-Millennium Corp.*, 387 F. Supp. 2d 671 (W.D. La. 2005)).

227. *Kickapoo*, 412 F.3d at 1175.

228. No. 7:02-CV-845, 2005 U.S. Dist LEXIS 12456, at *1 (N.D.N.Y. June 13, 2005).

229. *Id.* The case was originally brought as a *qui tam* action pursuant to 25 U.S.C. § 81 (2000). *Id.* This statute requires that any contract between an Indian tribe and a non-Indian party pertaining to Indian lands must be approved by the Secretary of the Interior and the Commissioner of Indian Affairs. Any contract violating these requirements can be challenged as void and unenforceable in a *qui tam* action for declaratory judgment. When the IGRA was passed in 1988, the authority for overseeing all Indian gaming activity was conferred upon the NIGC. Even though the *qui tam* provision of § 81 was repealed before the *St. Regis* decision was issued, a finding was made in this case that the repeal was not retroactive. *Id.* at *7. The *qui tam* provisions governed because they were in effect at the time the contract was executed. Nonetheless, the District Court for the Northern District of New York based its analysis on the familiar IGRA framework used in other management-contract cases, particularly 25 U.S.C. § 2711 and 25 C.F.R. § 502.15. *Id.* at *9.

230. *Id.* at **4-5.

Akwesasne Mohawk Casino.[231] President also agreed to manage the casino for the first five years of its operation.[232] In exchange, St. Regis promised to pay President a management fee, and to repay up to twenty million dollars of the development expenses incurred by President.[233] The expenses were to be repaid from the revenue generated by the casino.[234] St. Regis and President memorialized their promises in a Management Agreement that was subsequently approved by the NIGC.[235]

Under the Management Agreement, President had the authority to contract with other non-tribal entities for the construction of the casino.[236] One such non-tribal contractor was Anderson-Blake, with whom President entered a Construction Contract.[237] The enforceability of the Contract, which was not submitted for NIGC approval, was at issue in the *qui tam* action.[238]

Eight days after the casino opened, St. Regis fired President and took over the management of the casino.[239] President sued to recover under the Management Agreement.[240] St. Regis countered by asking the NIGC to modify or void the Management Agreement altogether.[241] The NIGC never responded to this request, leaving the Management Agreement unaltered.[242] President and sub-contractor Anderson-Blake then submitted the Construction Contract to the NIGC for approval.[243] The NIGC issued a declination letter opining that the Construction Contract was enforceable without NIGC approval.[244] The NIGC reasoned that no portion of the Construction Contract provided for management of the casino gaming operation for purposes of the IGRA.[245]

a. The Construction Contract: No NIGC Approval Required

The *St. Regis* court faced cross-motions for summary judgment.[246] At the heart of each party's motion lay the enforceability of the unapproved Construction Contract.[247] While St. Regis argued that the Construction Contract was a collateral

231. *Id.* at *5.
232. *Id.*
233. *Id*.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.* at *1.
239. *Id.* at *6.
240. *Id.*
241. *Id.*
242. *Id.* at **6-7.
243. *Id.* at *7.
244. *Id.*
245. *Id.*
246. *Id.* at *1.
247. *Id.*

agreement and, therefore, void for lack of approval, the non-tribal contractors insisted, based on the NIGC's opinion letter, that the Construction Contract was enforceable absent approval.[248]

The court's analysis of the Construction Contract led to approval of both the NIGC's opinion and the position of the non-tribal contractors.[249] Several features of the Construction Contract indicated that the Contract was not collateral to a management agreement for purposes of the IGRA.[250] It contained no terms relating to the "operation of games, receipt of revenue, issuance of prizes, or payment of expenses."[251] The Contract's "only possible connection to a gaming operation" was its use of the term "casino facility" to describe the building to be constructed.[252]

Further, the Contract was drafted according to the standard form endorsed by the contractor's professional organization.[253] It required that the sub-contractor only construct the physical structure for the gaming facility, and provide all labor, materials, equipment, and supervision related to that construction.[254] All of the parties' rights and obligations under the Construction Contract were finite and had a definite term.[255]

Most importantly, the payment-related terms in the Construction Contract proved it was not structured as a management or collateral agreement. The Contract provided that the sub-contractor would receive payment according to a specific schedule.[256] None of the payments were connected to any gaming facility revenues.[257] The Construction Contract also specified the total amount to be paid to the contractor.[258] This amount was to be paid in a definitive number of payments, with a final payment due upon completion of the construction.[259] In addition, the payments related to the construction of the casino only.[260] No term of the contract gave the construction company any stake in the gaming operation.[261]

248. *Id.* at *9.
249. *Id.* at **10-11.
250. *Id.* at *10.
251. *Id.*; *see also* 25 C.F.R. § 502.15 (defining "gaming operation" as an entity that "operates the games, receives the revenues, issues the prizes, and pays the expenses").
252. *St. Regis*, 2005 U.S. Dist LEXIS 12456, at **9-10.
253. *Id.* at *10. The Contract used the standard form approved by the Associated General Contractors of America. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* The total payable by the President (the casino management entity) to the sub-contractor construction company was $14,180,564.00. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*

b. Pointers for Practitioners

Even though *St. Regis* was decided days before *Kickapoo* and, therefore, lies outside that line of cases, it helpfully illustrates the types of provisions and overall structures that differentiate agreements requiring NIGC approval from those that do not. Striking contrasts distinguish the *Kean-Argovitz* Development Agreement, which was deemed collateral to a management agreement and required NIGC approval, from the *St. Regis* Construction Contract, which required no approval. The most crucial differences relate to the payment terms of the respective agreements. The structure of the payment terms reveals much regarding whether each contract created an ongoing management-type of relationship between the tribe and the non-tribal contractor, or whether any relationship was limited to a definite term.

The *St. Regis* Construction Contract specified the total payment due to the sub-contractor in exchange for the performance of the sub-contractor's obligations.[262] Pursuant to the Construction Contract, the sub-contractor's association with St. Regis was limited to a one-time performance of a specific task for a pre-defined price.[263] Once final payment was made and the casino construction was complete, the construction company would have no further claim to any revenues generated by the casino's operations.[264] All of the other rights and obligations created by the Construction Contract were also finite and terminated upon completion of the construction and the sub-contractor's receipt of the final payment.[265] By contrast, the *Kean-Argovitz* Development Agreement gave the contractor a future stake in the gaming operations, through the provision of payments derived from gaming revenues.[266] The payment terms of the Development Agreement thus suggested an ongoing relationship with no definite term.[267] The nature of the relationship as an ongoing, management-type relationship is further confirmed by the exclusivity provision of the Development Agreement.[268]

262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Kean-Argovitz*, 249 F. Supp. 2d at 906.
267. *Id.* NIGC Bulletin 94-5 suggests that this type of ongoing relationship is one possible indication that a contract creates a management-type relationship between a tribe and a non-tribal contractor. NIGC Bulletin 94-5, *supra* note 12.
268. *St. Regis*, 2005 U.S. Dist LEXIS 12456, at *10. The exclusivity provision was also linked to the loan commitment, which was expressly identified in the Agreement as consideration for the Tribe's grant of exclusive development rights to the contractor. *Id.*

Further, while the *St. Regis* Construction Contract obligated the contractor to provide the materials and labor, and incur additional costs associated with its obligations, the costs were not characterized as loans to St. Regis.[269] Nor was the fee paid to the contractor in exchange for its performance characterized as a loan repayment.[270] By contrast, the *Kean-Argovitz* Development Agreement characterized the developer's funding obligations as loans to the Band, payable "solely" from gaming revenues.[271] The NIGC considered this type of arrangement to be highly indicative of a Management Agreement that requires approval.[272]

Finally, the *St. Regis* Construction Contract contained nothing even remotely similar to the exclusivity provision of the *Kean-Argovitz* Development Agreement. In the *Kean-Argovitz* Development Agreement, the developer's loan commitment was expressly identified as consideration for the Band's grant of exclusive development rights.[273] The exclusivity provision encompassed not only development-related rights, but also the right to manage the casino under the Management Agreement.[274] Moreover, the language of the *Kean-Argovitz* Development Agreement linked the term of the exclusivity provision to the actual Management Agreement.[275] The *Kean-Argovitz* developer's complex relationship with the Band thus contrasts sharply with the simple, finite, short-term relationship created by the *St. Regis* Construction Contract.[276] Based on the vast differences in the effects of the two agreements, practitioners seeking to draft non-management agreements, which are not deemed collateral agreements requiring approval, should strive to pattern sub-contractor relationships with tribes after the finite, short-term relationship created by the *St. Regis* Construction Contract. Any contract creating a complex *Kean-Argovitz*-style relationship between a contractor and a tribe will almost certainly be deemed sufficiently management-related to require NIGC approval.

V. CONCLUSION

In the aftermath of *Kickapoo*, practitioners that seek to avoid running afoul of the NIGC approval requirements should carefully consider the overall structure of the gaming-facility project before drafting any agreement, no matter how minor. If any term of the contract relates to some type of management activity, as identified

269. *Id.*
270. *Id.*
271. *Kean-Argovitz*, 249 F. Supp. 2d at 906.
272. *Id.*; NIGC Bulletin 94-5, *supra* note 12.
273. *Kean-Argovitz*, 249 F. Supp. 2d at 906–07.
274. *Id.* at 906.
275. *Id.*
276. *St. Regis*, 2005 U.S. Dist LEXIS 12456, at *10.

by the *Kickapoo* court and the Jena Band cases, the agreement should be submitted to the NIGC for approval or declination. Practitioners should pay particular attention to payment provisions in gaming-related contracts, as such provisions reveal the type of relationship created by the agreement – whether finite or ongoing and potentially management-related.

Regardless of how carefully structured a transaction is, or how closely it adheres to the *BounceBack* aspirational model (with all management-related terms confined to certain instruments that are undeniably management agreements requiring NIGC approval), practitioners must not forget that an agreement may be deemed unenforceable for lack of NIGC approval on the basis of a single management-related term that transfers only a minor aspect of managerial responsibility. As *Kickapoo* cautions, such a transfer may be partial and may not necessarily be accompanied by a concomitant grant of management-related rights.

While checklists of potential management-related terms may be useful in flagging problematic management terms lurking in an otherwise benign document, any uncertainty as to a contract's future enforceability in the face of a challenge should be addressed by submitting the agreement to the NIGC for a declination letter, or even, as circumstances dictate, to undergo the full approval process. Had the law firm that drafted the Pledge Agreement in the recent bungled casino financing transaction taken this approach, instead of projecting unfounded confidence in the Pledge Agreement's enforceability, the client would have been spared the expense of being unable to collect on the defaulted Pledge Agreement. Furthermore, the law firm itself would have been spared the humiliation of malpractice sanctions. Accordingly, in the post-*Kickapoo* world, practitioners are well-advised to make every effort possible to convince impatient casino developers and other gaming contractors of the high price of avoiding the NIGC approval or declination process.