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The Chair's Comments

A Word from Kenneth P. Carlson, Jr.

As I type these notes for my final "Chair's Comments," my overriding thoughts are how fortunate and thankful I am to have been part of such a wonderful section over the past year. From the somewhat unique perspective of the chair's position I have seen first-hand the tremendous expertise, dedication and energy of our council and section members in advancing the cause of alternative dispute resolution – and it's truly humbling to be part of those efforts.



Ken Carlson

The names are too many to mention, but my deepest thanks are extended to all of you

for having made this year so memorable. I'm also confident that our new slate of officers, with **Barney Barnhardt** at our helm as section chair, can look forward to the same if not even greater levels of support.

When I look back on the past year, two items come into particular focus. Perhaps the most important in terms of helping to clarify the appropriate role of mediation in our court system is the proposed amendment to Rule 8.3 of the Rules of Professional Conduct. After years of discussion, the Dispute Resolution Section spearheaded an effort to amend this rule of reporting known attorney misconduct to exclude, as another exception to its requirements, any such information learned by an attorney-mediator during the course of mediation. Simply stated, the primary issue is preserving the confidential nature of mediation, which as reflected in Standard III of the Standards of Professional Conduct for Mediators is perhaps its most fundamental cornerstone. That Standard imposes an obligation upon mediators to keep confidential "all information obtained within the mediation process," and therein lies the conflict with RPC 8.3 that our section is trying so hard to resolve – a resolution that hopefully will occur this year with the North Carolina State Bar adopting the proposed amendment.

The second item is more of an emphasis that we've had this year as reflected in our committee and liaison growth, as well as the theme for our outstanding CLE held in March at the Grandover Resort. In summary, we made special efforts to embrace mediation and other ADR resources outside the judicial system in order to build on a concept of "beyond settling cases." The primary thought has been to address conflict resolution in a way that, while certainly important, is not

satisfied with merely helping opposing parties settle their lawsuits in state or federal court. Rather, the objective has been to explore avenues for scratching beneath the lawsuit surface to the underlying dispute itself, and then seeing if that initial foundation can be addressed either before or during litigation in order to truly resolve the conflict. It is this approach that, at least for mediation purposes, has the best possibility for achieving much more than a settlement which, as the legal saying goes, may result in dismissing a lawsuit but which often leaves opposing parties equally dissatisfied in its wake.

When I last wrote these "Chair's Comments" in January, I included some initial thoughts about this "conflict resolution" goal within the context of court-ordered mediation, my most familiar ADR setting. I spoke of how parties should first acknowledge the true facts of a dispute in order to better understand why it occurred, then force themselves to identify with their opponent in order to better understand their opposing party's position. I also spoke of how humility, combined with the concepts of forgiveness and sacrificial living, may be the only realistic avenue to actually resolve most disputes. And I spoke of how critical principles of truth and justice must always be maintained while pursuing these worthy goals in order to help keep the mediation process from merely appeasing what should never be appealed to simply "get the deal done" – none of which is particularly original, but all of which have likely troubled each of us in different ways as we engage in alternative dispute resolution.

In my January "Chair's Comments," I hinted at trying to bring some closure to these conflict resolution thoughts. Frankly, I have no closure and I expect that I'll continue

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Comments *from page 1*

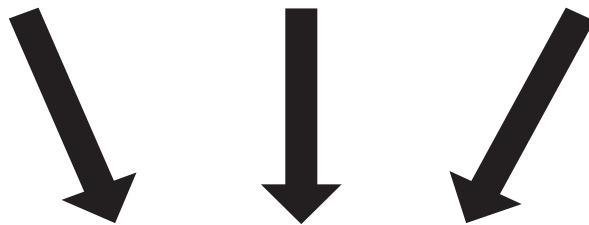
ue to explore and debate these issues for as long as I practice ADR. But I will say that I recently experienced yet another situation in which any skills I may have as a lawyer/mediator at delving beneath a dispute to actually resolve it were tested. What especially intrigued me was how the prospect of litigation – with its time, effort, expense and risks by all parties – became not a threat but a creative force in reaching a resolution that all parties are now considering. So in this particular pre-litigation setting, the prospect of a consequence that neither party wants, and whose specter ADR seeks to avoid or short-circuit, has become the reality whose existence is necessary to help move the parties closer together.

Where this situation will end is anyone's guess, but it does help illustrate the often

complex interaction and interdependency of ADR and the judicial system in addressing private disputes. It also serves as a reminder to me that lawsuits, like mediation, arbitration and other forms of alternative dispute resolution, each have their place in the universe of resolving conflict. But knowing the parties as I've come to know them, I do hope the situation ends with everyone shaking hands, understanding each other at least a little better, and forgiving or forgetting as they move forward together. If so, then there's at least a chance it will also end in a way similar to how my tenure as section chair is coming to a close: with heartfelt thanks for the wonderful efforts and progress of all our members in advancing ADR over the past year, and with the prospect of an even better tomorrow. ■

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**NORTH CAROLINA
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CONTINUING LEGAL EDUCATION

Finding an International Mediator

Identifying Suitable Candidates to Mediate an International Commercial Dispute: Part 2

by Michael McIlwrath, Diane Levin, Giovanni Nicola Giudice & Jeremy Lack

(It can be difficult for parties to identify suitable candidates to mediate an international commercial dispute. This is Part 2 of an article that proposes some avenues available to parties that can help get the initial part of the mediation process – agreement on a mediator – underway.)

Emerging Information Sources

If cross-border dispute resolution is to keep pace with the growth of international business, it would be reasonable to expect that growth to be accompanied not only by increased use of arbitration and mediation, but also the specialization of the providers of these professional services and information about them. Two emerging trends are mediator directories and “blogs.”

Mediator Directories

There are multiple directories that exist in different locations that provide basic biographical data about mediators. As these are mainly marketing devices for mediators, we see little utility in them for parties to a cross-border commercial dispute. As mediation grows internationally, however, an interesting development has been the announcement of publicly-accessible databases that will provide feedback from parties with their impressions of the mediator and his or her capabilities, in addition to basic biographical information. These databases are accessible at no charge. As of publication, two such databases have been announced. One is the “Mediator Directory” hosted by The Mediator Magazine in the UK, www.themediatordirectory.co.uk. Although initially intended for the UK market, mediators may still use this directory to list qualifications that may be attractive to litigants in an international dispute. Internationally, the International Mediation Institute (IMI), www.IMImediation.org, a non-profit organization in the Netherlands dedicated to promoting international mediation standards, has announced that it will provide a publicly-accessible database of all mediators who meet IMI standards. The database will initially list only those mediators considered at

the top of the profession in different countries, and over time add mediators who meet IMI’s certification standards.

Blogs

The number of “blogs” by and about mediators is an interesting source of information that appears to be growing. To give some examples: Mediator Blah Blah, www.mediatorblahblah.blogspot.com, Mediation Channel, [**“Arguably, the issue of nationality is less important where the neutral has no authority and cannot impose an outcome, but it may paradoxically be an advantage. . . .”**](http://www.mediationchan-</p></div><div data-bbox=)

[nel.com](http://www.settleitnow.com), and Settle It Now!, www.negotiationlawblog.com. There is even a directory of global mediation blogs, ADR Blogs of the World, www.adrblogs.com. These blogs can provide information about the mediators who write and maintain them, and if nothing else underscore their passion for the process. Taking by way of example one of the blogs listed above, a party checking it as of this writing would learn that in a period of just two months, the blog’s author had attended a week-long international mediation training conducted in another country, was corresponding with mediators in different jurisdictions, and held strong opinions about what techniques were most effective in persuading parties to settle their disputes or for overcoming roadblocks to settlement. The ability to refer the opposing party to a suggested candidate’s “blog” for information may also be useful if a party wishes to recommend that mediator to the other side. And even if these professional blogs appear to be intended more for mediation peers than for

parties, they can also be a means of identifying global trends, negotiation tips, and other useful information.

Nationality

The issue of nationality is often important in an arbitration context. This can also be the case in mediation, but for different reasons and in different ways. Some institutions recommend that the mediator should not have the same nationality as one of the parties. This approach, whoever, can be too limiting and should be reconsidered on a case-by-case basis. In some cases nationality will be meaningless (*e.g.*, the mediator may have been raised as a “third culture kid”) and in others, it can hide a cultural bias (*e.g.*, assuming a person to be of an Asian culture, based on their passport, whereas they may have been raised and completely educated in an American or European culture). Arguably, the issue of nationality is less important where the neutral has no authority and cannot impose an outcome, but it may paradoxically be an advantage in certain cases to have a mediator who is of the same nationality or culture as the other party. This may help to ensure a better appreciation or any cultural issues that may be acting as an impediment to settlement, where the cultural differences are great. It can also be helpful to have a mediator who is a bi-national (or is familiar with both parties’ cultures). Offering the other party to choose any mediator of its preference and of their nationality, or to suggest a list of three neutrals having the same nationality as the other party can be a way of conveying confidence and trust in the process and the other party, although it is obviously important to know that such a neutral is properly trained and would not be biased as a result.

A Checklist of Possible Issues to Consider

There is a very broad range of mediation styles and mediators. Choosing “the right” mediator can be very important in a cross-cultural/international context. For example

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in some countries the terms “mediation” and “conciliation” are used interchangeably and may mean the same thing, whereas in others they can mean very different things. In Switzerland, for example, the word “mediation” is used to describe a process in which a neutral is expected to be elicitive and non-evaluative, who refrains from making any proposals, and where the outcome should be based on subjective interests, whereas “conciliation” is used to describe a more directive and evaluative process, in which the neutral is expected to express a non-binding opinion based on objective or legal norms and to suggest a zone of possible agreement. Both involve a process in which a neutral assists the parties in reaching a settlement, but the styles and processes can be very different experiences for the parties and their lawyers. Even if this distinction is clear, does it make a difference? What do the parties really want, and what difference does it make whether they choose an evaluative norms-based process, or an elicitive subjective interests-based process? Often it may make no difference, as the parties are simply interested in achieving a faster and cheaper outcome. In other cases, however, the difference may be extremely important. The process of probing more deeply into subjective interests and perceptions may result in generating a broader range of options and different outcomes, which may be better aligned with the parties’ future interests (for example, in understanding one-another better and strengthening a future business relationship). These differences are becoming more apparent in certain international commercial mediations, where different emphases can be seen to emerge in some common law jurisdictions (*e.g.*, greater use of caucuses) as opposed to other continental jurisdictions (*e.g.*, greater use of joint sessions or co-mediation). It is impossible to generalize and stereotype, but there can be a danger in underestimating these differences when seeking to set up a mediation process. It is thus possible for a French and a US company to both agree on “mediation” using an institution, but with very different expectations as to what the process and the substantive skills of the mediator should be about, which may only be discovered too late. If one party wants an “objective,” facts and law-oriented conciliation based on specific subject-matter

expertise applied to past facts, and the other wants a future-looking “subjective” business interests-based process, spending substantive time on interpersonal and relationship-based issues, the parties may never agree on the neutral to be appointed and the issue of appointment may become contentious in and of itself. This can leave the institution in the difficult situation of having to appoint the neutral itself, who may be a disappointment or frustration to one of the parties (possibly even both) if this issue has not been identified and properly discussed. An excellent discussion on the topic of mediator’s styles and the kind of mediations that can be sought can be found in Lenny Riskin’s article “The New Old Grid.” Professor Harold Abramson has also written a lot of excellent material on this topic, as has Kenneth Cloke (the author of *Mediating Dangerously* and *Crossroads of Conflict*).

For these reasons, the following may be a useful checklist of issues to consider when setting up a mediation process or selecting a mediator:

1. The Mediator’s Credentials

- a. “mental model” (family history, education, and professional training)
- b. cross-cultural experience (*e.g.*, trainings, travel or education)
- c. professional experience (source profession and business experience)
- d. national trainings & continuing professional development interests
- e. subject matter expertise/areas of specialization
- f. checking their understanding of what it means to be “neutral, impartial and independent” or “multipartial” (and ensuring that they are indeed!)
- g. checking their understanding of what “confidentiality” means to them and how they intend to handle this issue

2. The Mediator’s Preferred Procedural Approaches

- a. facilitative/elicitive, evaluative, transformative, narrative etc?
- b. their attitude towards emotions and how to deal with them
- c. their use of caucuses (when and why)

- d. their (un)willingness to coach the parties
- e. who directs the process: the mediator, the parties, the lawyers, all of the above (the mediator as “director” v. “orchestrator”)?
- f. how they like to involve clients
- g. how they like to involve attorneys (*e.g.*, restrictively v. actively)
- h. what preparation work they request pre-mediation (*e.g.*, fully or partial briefing v. no prior knowledge v. a brief summary of the party’s needs and interests – but not their positions)
 - i. use of time constraints
 - j. willingness/ability to co-mediate and work with other neutrals / co-mediation (why, when and how?)
 - k. attitudes to hybrid processes (*e.g.*, Med-Arb. MEDALOA, Arb-Med, Shadow arbitrator etc)
 - l. familiarity with brainstorming and trust-generating techniques (De Bono lateral thinking/ stimulation techniques, confidence-building exercises, non-violent communication, NLP, systemic theory etc).
 - m. broad v. narrow
 - n. (un)willingness to conduct joint witness conferences, as opposed to sequential fact gathering sessions
 - o. (un)willingness to carry messages

3. The Mediator’s Cultural Preferences

- a. formality v. informality of proceedings
- b. dress code
- c. propensity to be “left brain” v. “right brain” oriented, neither or both
- d. preferences as to venue
- e. emphasis on a “social” program or event
- f. attitude to power and distance to power
- g. individualism v. collectivism (seeking consensus v. a majority decision)
- h. (dis)comfort with emotions and the importance (or lack of importance) in demonstrating empathy

- i. preference to avoid uncertainty
- v. comfort with uncertainty (*e.g.*, on procedural or substantive issues)
- j. creativity and willingness to “experiment” with the parties
- k. long-term v. short term orientation
- l. attitude towards “face” and “saving face” issues
- m. willingness to be confrontational, direct or to do “reality testing” with the parties and their counsel
- n. emphasis on seeking “a settlement” v. a “win-win” outcome.

These are only some considerations, many of which may be irrelevant in certain cases, and there are no doubt others that should be mentioned. They are certainly worth bearing in mind before embarking down the road with a mediation and selecting a sole mediator. ■

*This is Part 2 of an abridgment of an article produced collaboratively online as a “knol.” The article may be found in its entirety at <http://knol.google.com/k/finding-an-international-mediator#>. Part 1 appeared in the January 2010 issue of *The Peacemaker*.*

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Custody Mediation in Guilford County

by Chief District Court Justice Joseph E. Turner

Without a question in my mind, Custody Mediation is the best public service, outside our core function, the N.C. Courts have offered to our citizens. Other alternative dispute resolution efforts have offered potential and actual litigants effective and efficient means of resolving disputes over the years. However, not only is custody mediation free, it is professionally delivered, very successful, preserves the dignity of the participants and, most importantly from my perspective, has protected thousands of our children from the ravages of battle between parents fighting over custody.

Custody mediation has been used in Guilford County since 2003 after I became Chief Judge. Planning began during the tenure of Chief Judge William L. Daisy. Since its inception, 3840 cases have gone through the mediation process in Guilford County. Since the program is free to the litigants, I have exempted only a very few cases from participation. Even when one party lives at some distance away (and may qualify for exemption), we have found that scheduling the mediation in coordination with the hearing date has resulted in pretrial agreements.

We have two outstanding Custody Mediators, Nancy Stevens and Sarah

Rogers, ably assisted by their Custody Coordinator Michelle McRae, who professionally and successfully schedule, instruct and mediate in all of our cases. Ms. Stevens and Ms. Rogers have served five and four years, respectively. Because their caseload is so high, we have an additional “contracted” part-time mediator, Nina Cohen, whose experience dates back to helping create the program in N.C. It has been my observation these women look forward to coming to work each day with the hope of helping one more set of parents figure out a way to continue to be parents to their children, even though they do not live together.

There are few more ardent defenders of the “American system of civil justice than me. However, I believe that our legal system does not enhance the dynamics of parents who each want more time with their child than there are hours in the day. In fact, a custody trial, more often than not, results in exacerbating the dysfunction and acrimony which results from parents being separated from each other and their child. Custody mediation, on the other hand, allows parents safely and confidentially to discuss their concerns and to attempt to work out a resolution of the question: “What is in

the best interest of our child, now that we are separated from each other, and at times when the child is with the other parent, separated from our child?”

During Fiscal Year 2008 - 2009, custody mediators in N.C. conducted 8,271 mediation sessions and drafted 5,682 Parenting Agreements, resolving issues in more than 60% of the cases. In Guilford County, 790 cases were referred to mediation and 665 of them were mediated. Parenting Agreements were drafted in 428 cases (64%) and 300 of those were executed and became court Orders. Many of those unsigned Agreements became the basis of subsequent court orders, after further negotiation and interpretation by lawyers for the parties. Custody Mediation is very successfully helping many parents and, therefore, even larger numbers of our children.

An additional benefit has been a reduction in “repeat” cases where the parties are returning to the battlefield. There is something about two parents reaching an agreement once which allows them to return to mediation with an expectation of reaching a further agreement, and they do. With the

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increasing number of parents who are attempting to represent themselves in Court without a lawyer, the Custody Mediation process is providing a less structured and demanding forum for resolving these difficult cases.

The only requirement of parents is that they attend the Orientation and, thereafter, one mediation session. There is no requirement that they set-

tle their case or that they agree to anything. They must, however, attend. If they will do so with an open mind – that the process might work for them – they have a much better than even chance that it will! ■

Judge Joseph E. Turner is Chief District Court Judge for District 18, Guilford County, North Carolina.

Editor's Note: The preceding article originally appeared in the November 2009 issue of The Court Watch of North Carolina Newsletter, Vol. 21, No. 3, and has been reprinted with permission. Court Watch of North Carolina can be contacted through their website, www.courtwatchnc.org

Ms. Mannerly Mediator

Lengthy Mediations

The following question was not actually submitted to Ms. Mannerly Mediator, but came about from discussions that Ms. Mannerly Mediator has had with refined, considerate practitioners. Ms. Mannerly Mediator has written the question to protect the innocent so as to educate others who are not so refined and considerate, which she is sure the gentle readers will appreciate.

Dear Ms. Mannerly Mediator:

I had a rather lengthy mediation, lasting from 9:00 a.m. until 10:00 p.m. One of the participants was very tired and wanted to leave, but the other wanted to stay to conclude the mediation. I made the parties stay and the case settled, but I felt uncomfortable with the length of the mediation. Should I have made the parties stay so late?

*Sincerely,
Sleepless in Salisbury*

Dear, dear Sleepless,

Ms. Mannerly Mediator certainly understands your dilemma. Your situation is akin to that of a host of a dinner party where one guest continues to linger and the other is anxious to leave and is nodding off over dessert. Should one rush the happy lingering guest out the door or continue the festivities whilst the tiring guest is sitting slumped on the settee? This is a

question that every successful host has had to consider.

Ms. Mannerly Mediator is certain that you checked in with the parties to ensure that they had sufficient nourishment and beverages, so that they were not physically uncomfortable. Any good host, as Ms. Mannerly Mediator knows that you are, would attend to the physical comfort of a guest. From your question, Ms. Mannerly Mediator knows that you asked about the parties' desire to continue, again as any good host would.

Ms. Mannerly Mediator would direct the Gentle Mediator to the Mediated Settlement Conference Rules. Rule 6A.(1) provides that the mediator is in control of the conference at all times. The Rule goes on to provide that "It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference."

According to these very proper rules, while the mediator has control of the conference, decisions about continuing the mediation should be made in consultation with the parties and should be made in a timely manner. From an etiquette perspective, continuing an event for a long time solely for the enjoyment of one of the guests is something that Ms. Mannerly Mediator frowns upon. Ms. Mannerly Mediator suggests that, just as

for a social event, continuing a mediation for an extraordinarily long time should be done with the agreement of the parties.

If the parties do not consent to continuing the lengthy mediation, although the mediator has control, one of the parties may claim that any agreement reached was not voluntary, or that the mediator was continuing the mediation just to increase a fee. Ms. Mannerly Mediator is certain that Sleepless would not want either of these circumstances to arise.

Ms. Mannerly Mediator commends Sleepless for having a successful event and hopes that there are many more in Sleepless' future.

Sincerely,
M. Mannerly Mediator ■

Ms. Mannerly Mediator is the nom de plume of a mediator in Pilot Mountain, NC, who would like to remain anonymous. Further enquiries can be submitted to annanderson681@hotmail.com.



by Steven A. Savia

Are you confused about the economy? Most of the economists I follow in conjunction with my strategic planning consulting practice seem to be in little agreement, indicating to me they are also confused. Indicators seem to lead to a conclusion that the economy is beginning to right itself, but I'm convinced that one should approach this optimistic enthusiasm with some healthy skepticism. There is still record unemployment and the recovery so far has been described as a jobless recovery. This does not bode well for the long term recovery.

If you've followed the market lately, you've noticed some interesting, if not disturbing, hiccups. A computer order error causes the market to fall almost 1,000 points before making a recovery. The situation in Greece can both cause a fall and a rise in the market indicating to me a level of hyper-vigilance that says we are not in a sound economic position.

In addition, foreclosures continue, and most likely will continue to be a problem. At our last meeting, the Section Council discussed the role of mediators in foreclosure and a committee has been assigned to

fashion a proposal relating to the role of mediation in foreclosure. I look forward to seeing if we as mediators can engage this problem and make a difference. ■

Steven A. Savia, a North Carolina Certified Mediator, has enjoyed a 30-year management consulting practice focused on the financial services industry. His academic background is in public policy and economics, and also includes the Harvard Negotiation Project.

Remarks from the Seminar on the Trends in Arbitration in North Carolina

by Andrea Carska-Sheppard

This year the International Committee of the Dispute Resolution Section held its international arbitration seminar at Duke Law School. One part of the seminar was dedicated to examining the status of arbitration in North Carolina. The speakers shared their views on the advantages of arbitration versus litigation and brought their perspective on what role arbitration may play in the future in the legal practice in North Carolina.

Mark Bolin, J.D. /LL.M. student from Duke Law School, introduced the topic and the speakers. The first presentation was by Frank Laney, Circuit Mediator for the US Court of Appeals for the 4th Circuit, who opened his talk by focusing on consumer arbitration. After reviewing its history he noted that "[c]orporations' dissatisfaction with the prospects of defending against lawsuits in courts have lead to the biggest

recent growth in the arbitration market – arbitration of consumer or employment contracts by large corporations. In reaction to this trend is a push back which can be noted by the actions of federal courts and legislatures. There is no clear prospect of a federal act to protect consumers in arbitration agreements but the courts have issued opinions that limit the use of arbitration." He has analyzed some recent jurisprudence to ascertain the trend in the state (**Booker v. Robert Half International** 413 F.3d 77 (D.C. Cir. 2005), **Morrison v. Circuit City** 317 F.3d 646 (6th Cir. 2003), **Gannon v. Circuit City** 262 F.3d 677 (8th Cir. 2001), **Graham Oil v. ARCO** 43 F.3d 1244 (9th Cir. 1994), **Hooters v. Phillips** 173 F.3d 933 (4th Cir. 1999)). He noted in closing that the project of arbitration has a success story in North Carolina (as when a Dutch company building a plant introduced "arbi-

tration days," which prevented all litigation) and this model will likely be seen more often.

Judge Sid Eagles from Smith Moore Leatherwoods LLP, who has vast experience both as a judge and as an AAA arbitrator, reexamined the trend in North Carolina by reviewing evidence and statistical data on foreign investment in the state. As with a puzzle, he put together a picture which leaves no doubt that with the state's natural resources and exports (such as uranium, turbo jets and blood plasma) and trade figures, which in 2009 reached nearly \$2 billion in exports to Canada alone, arbitration, especially international arbitration, will be playing a more prominent role in the state. Foreign corporations are not particularly comfortable with U.S.-style litigation and this opens doors for growth in

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arbitration, especially related to the export deals. The foreign parties develop a certain level of trust with the arbitrator and appreciate that their matter is dealt with immediately. After reviewing the status of mandates of various international arbitral institutions, Judge Eagles noted that there is no reason why some of the international arbitration could not be conducted within North Carolina rather than in better known arbitration centers.

Judge Eagles's presentation was followed up by the veteran mediator and arbitrator Jonathan Harkavy, from Patterson Harkavy LLP, who has arbitrated well over 100 disputes and was one of the first mediators to be part of the pilot project in the Middle District of N.C. which incorporated mediation into civil cases. He noted that North Carolina is one of the most progressive states when it comes to dispute resolution. The picture which he depicted brought yet a different angle to the discussion. Though he agreed that arbitration was a quick, less expensive and flexible tool for parties, he

questioned the effects of the secrecy of arbitration on the development of the body of law. Harkavy noted that if the proceedings are secret we do not have the decisions available, impairing the development of substantive law, and stated that the "law can not grow under these circumstances." As such he has sensed that there is a certain push-back against the arbitration; he feels that, nevertheless, this in no way undermines its importance.

The culmination of the discussion came with the presentation by Catherine Arrowood, from Parker Poe Adams & Bernstein LLP, who acts both as a counsel and an arbitrator in North Carolina and internationally. She shared her experience on how to become an international arbitrator. One of the most important factors that brought her to international arbitration was her extensive experience as a litigation counsel. She challenged the proposition that the international arbitrator must be fluent in several languages. Although it may be an advantage to speak other languages,

speaking only English is by no means a bar to entry into the international arbitration world. Then she turned to reviewing recent jurisprudence in North Carolina and, in particular, **Tillman v. Commercial Credit Loans, Inc.**, 362 N.C. 93, 655 S.E.2d 362 (N.C. 2008), dealing with arbitration provisions and class action waivers. In **Tillman**, the validity of a standard arbitration clause in a consumer-loan agreement was at issue. Adopting a sliding-scale analysis, Justices Patricia Timmons-Goodson, Edward Brady and Robin Hudson held the provision unconscionable and unenforceable due to the inequality of bargaining power between the parties and the agreement's one-sided and oppressive terms. Arrowood recommended that the audience watch U.S. Supreme Court case **Rent-A-Car, West, Inc. v. Jackson**, No. 09-497 (Certiorari granted Jan. 15, 2010). The court will have to decide whether an employer can bring a claim of racial discrimination in federal court when his employment contract contains a mandatory arbitration clause, even where the plaintiff claims the contract is unconscionable. The decision is expected later this term and should resolve the panoply of related cases, including **Tillman**.

To conclude, and to paraphrase Frank Laney, is then the wave of arbitration in North Carolina growing? Though the consensus reached by the speakers would lean towards yes, the presentations unveiled subtleties and complexities of the process. As Jonathan Harkavy pointed out, the law needs to grow and we still need court opinions to feed the jurisprudence and reflect the status of our law in our society. At the same time, the legal know-how that speakers shared concerning consumer and class-action arbitration, along with current statistical data on foreign exports and investment, leave no doubt that the need for the alternative resolution of commercial disputes will grow in North Carolina. ■

The International Committee sends out, from time to time, updates to its members. If you would like to be included on this list, please contact sid.eagles@smithmoorelaw.com; andrea.carska-sheppard@mail.com or andrea.carska@hblaw.eu.



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Techno-Trials and Tribulations

by Len Benade

One issue raised in my last article was that troublesome incompatibilities often accompany the rapid pace of technological advance. Windows 7 has some wonderful new features but likely not all software and hardware will be up to speed. For example, there is an annoying glitch that randomly disconnects you from the internet without disconnecting you from the network. Happily, that now seems fixed. Another problem was never resolved: the inability to recognize my wireless HP Laser Printer as a wireless device. That printer is now ready to be disposed of. My wireless Lexmark all-in-one will suffice.

My NeatScan to Office Portable scanner is another gadget that has likewise proved incompatible. This device and its software scan business cards into Office contacts and receipts into an expense-tracking Excel spreadsheet. Unfortunately, the driver is incompatible with Windows 7 64-bit. Now I just use the NeatScan to scan docs to pdf when I'm away from the office with my notebook – still a handy thing.

One major beef I have is the upgrade to Microsoft Windows 7 Professional. Almost all new computers are pre-equipped with Windows 7 Home Premium. If one has Vista or XP, it's been on the shelf forever. I'm embarrassed to say I'm not sure what advantages you get with Windows 7 Professional. Nevertheless, when I bought the new computer for my office that I described in my last article, I paid \$100 for the upgrade. They handed me a software container labeled "Windows Anytime Upgrade" when I picked up the computer. After I set up the computer, and opened the container, there was nothing inside but a license number ("Keep this number in case you have to use it again"). If you recall my last tech article, I discussed operating the office computer remotely using a program called LogMeIn. Since then, I purchased a powerful new computer for my home – with Windows 7 Home Premium. Eventually, I decided it would be more convenient to make the home computer primary and to operate it remotely when at the office. At this point I tell Windows to upgrade to Professional, which it does. Then I pull out my "Windows Anytime Upgrade" and key in the license number. After all, this is now the only computer I'll really be working with. Uh-oh, "Not a valid license number." Again and again I try. Perhaps you've

guessed: the 'anytime upgrade' is good only on one computer. I start to get an occasional message to enter a valid license number. Ok, I don't like it – I didn't see it in the fine print – but, hey, I don't need this upgrade anyway, I'll just go back to Home Premium. Problem was I couldn't figure out how to do it. Over the next two to three weeks the requests for a valid license became more frequent. Then came the day when my screen background turned black with each request. I could reset it, but five minutes later it would revert. A constant message in the lower right side of my screen announced that I was using an illegitimate copy of Windows. I called the Geek Squad in desperation. I was horrified to learn that the only option was to rewrite my hard drive, reinstall all my programs and upgrades, etc., or to pay the \$100. Folks, the package could have stated that the upgrade was only good on one computer. They could have asked for the key prior to processing the upgrade request. They could have made the process reversible. My view is that, at the least, this is not good trade practice. I sucked it in and paid.

A major reason I'm able to spend much of my time working at home is that I've finally achieved a 'paperless office.' My office file cabinets are now empty furniture. All my case files are on my home computer and backed up on the office computer.

My 88-year-old mother made me aware of several nice new Windows 7 features. Aero Snap allows you to grab a program's title bar and fling it to the right or left. It will then fill half the screen. This is useful to me for several combinations. For example, a text file of the cases newly ordered to mediation on the left half of the screen, my database program on the right: copy and paste. Also, Sticky Notes: like in Outlook, but you stick them on your desktop. And, finally, an incredibly improved, multi-functional calculator.

Office 2007 has some great improvements, particularly in Outlook. But, some features are missing. Are you still using Word 2003 and its Legal Pleading Wizard? If so, and you're planning to finally upgrade to 2007, keep at least one computer with the old version. The Wizard is missing from 2007 as are all the "wizards." Also missing is the ability to print delivery point barcodes on envelopes. Microsoft claims the barcodes change too often but I suspect they just

didn't want to spend the money.

Remember my praise for the Stowaway folding keyboard I used with my Touch Pro smart phone? Remember I traded the Touch Pro for a BlackBerry? Well, turns out the Stowaway keyboard won't work with the BlackBerry. Freedom makes an almost identical folding keyboard for the BlackBerry. So I spent \$125 for the Stowaway, I'll sell it on eBay for \$25 and buy a Freedom for \$150. Don't you just love it?

I'm now using it as a tethered modem with my BlackBerry when necessary. I sold the broadband modem described in my last article. When I'm out (which is not often) I can't get Internet access. In an emergency I use the BlackBerry. It's cheaper than the \$60 per month I was paying for the modem. That said, let me tell you about a recent tribulation and lesson learned. I was in New Orleans for arbitration when my BlackBerry 'crashed' and, despite repeated resets, wouldn't boot up. I turned on my notebook to Google the problem only to discover that the conference center's Wi-Fi was down that day. At lunch one of the attorneys loaned me his cell phone and I learned my only option would be to download the phone's operating system and start from scratch. You'd think I would have backed my BlackBerry up on my notebook. Not. I dashed to my hotel to get online. Twenty minutes into a 30 minute download, it spontaneously aborted. Thankfully, the second download worked. During a break I got the phone up and running again, but without my contacts or e-mail settings.

My latest techno-gadget just arrived so I can't yet review it: the DigiMemo. It's a standalone digital notepad that "digitally captures everything you write or draw...have it digitally organized and e-mailed through your computer." The promise that sold me was "Convert your handwriting into text – optional OCR software converts your handwritten notes into digital text to use in Microsoft Word or Outlook." I'm thinking, of course, of mediation notes and agreements. We'll see.... ■

Len Benade is the managing partner of Benade & Huggins LLP in Hickory, North Carolina. He has been a securities arbitrator (NASD, NYSE, NFA, and FINRA) for 20 years and is a certified FINRA mediator.

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