

ADR: A Practitioner's View Of A Changing Landscape

The Editor interviews **John L. Watkins**, McKenna Long & Aldridge LLP.

Editor: Mr. Watkins, would you tell our readers something about your professional background and experience?

Watkins: I graduated from the University of Georgia Law School in 1982. Following law school I practiced at another firm, which was then either the largest or second largest firm in Atlanta and is now a Jones Day office, for a little over four years as a litigation associate.

Editor: How did you come to McKenna Long? What were the things that attracted you to the firm?

Watkins: That was in 1986, when the firm was up and coming in Atlanta. About six months earlier, Al Norman and three other lawyers from my firm had joined McKenna Long & Aldridge. What attracted me to McKenna Long & Aldridge was a combination of where the firm was headed and the familiar faces that worked there.

Editor: Please tell us about your practice. How has it evolved over the course of your career?

Watkins: I started out as a general commercial litigator, handling a variety of cases, including tort and product liability cases, trade secrets, environmental claims, construction matters and insurance coverage claims. Interestingly, this very general background has proven to be immensely helpful in the more specialized work that I do now.

In the mid-1990s, a German client had a need for help regarding its international equipment supply contracts, which are similar in some respects to construction contracts. Since then, I have negotiated and drafted supply contracts and confidentiality agreements for projects in the U.S., Canada, and as far away as New Zealand, using local counsel as needed. Accordingly, part of my practice now involves purely commercial matters. We are working on building this experience into what might be termed a "doing business in the U.S." practice which seeks to help companies establish a presence in the U.S. and to minimize the risks associated with our highly litigious society. Because most of these companies export products, I work with our product liability group in this area. To assist German, Austrian and Swiss companies, we recently prepared a dual language German-English brochure on basic "doing business" issues that has been very well received.

Several years ago, a very talented group of lawyers, headed by Randy Evans (an old acquaintance from my college debating days) came to the firm with a very significant financial institutions practice, including assisting several large insurance companies with coverage and related issues. Because I had done a fair amount of coverage work over the years, I started working with Randy's group. Most of this work involves advising our clients regarding potentially large possible exposures,



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and, if necessary, litigating for them. Since the subject matter of the underlying claims can involve just about anything, my general litigation experience has been helpful.

Editor: And alternative dispute resolution? Has this been a part of your practice over the years?

Watkins: Absolutely. I have tried several large arbitrations to award, including two for a subsidiary of a European company. In the past several years, I have also litigated several cases where our opponents were litigating to try to stay out of arbitration. I have participated in numerous mediations, as is probably the case for almost all litigators in this day and age. I have also been involved in drafting and reviewing dispute resolution provisions in contracts.

Editor: How has ADR changed over the years you have been in practice?

Watkins: ADR has changed significantly over the years. The largest change has been the amazing expansion of mediation, beginning in the 1990s. In the early 1980s, mediation just was not used in commercial cases or in other civil cases. When mediation came into vogue in the early 1990s, many of us were skeptical because, after all, good lawyers settled cases anyway. Over time let's just say I have become a fan. There is no doubt that good mediators help settle cases. Mediations can produce earlier settlements and can bring creativity to the settlement process. In a few instances I have seen cases settle in mediation that seemed "unsettleable."

Turning to arbitration, and although it probably cannot be demonstrated statistically, arbitration provisions seem to be more common in commercial contracts.

Editor: In your experience, are there particular practice areas where ADR recommends itself over litigation?

Watkins: For arbitration, cases involving trade secrets or proprietary information come to mind because the process can be kept confidential. Disputes arising out of international transactions also tend to lend themselves to arbitration. Certain areas of the law – construction

disputes, for example – have a long established tradition of using arbitration. As a general matter, any case that involves highly technical issues or transactions that involve specialized knowledge lend themselves to arbitration, although that is not to say other cases would not benefit.

With respect to mediation, it is so flexible that it can be adapted to almost any dispute.

Editor: Your practice includes the representation of a number of European companies or their U.S. subsidiaries. Many European enterprises are reluctant to do business in the U.S. because of our litigious reputation. In counseling them, do you have recourse to ADR as a way to assuage their concerns?

Watkins: I have had the opportunity on a number of occasions to introduce business persons from other countries to the U.S. legal system. Most often, these people are highly educated and very sophisticated, but they are seldom familiar with the U.S. litigation process. If they become involved in a claim, they will usually ask when "the judge" will decide the case. At that point, you have to explain to them that the judge probably will *not* decide the case, but that it will be decided by a jury of individuals from all walks of life. You must then explain the wide-open discovery system to them, perhaps the possibility of punitive damages, and that, if they win, the other side in all probability will not have to pay the client's legal fees. All of this may seem normal to us – particularly those of us trained as American lawyers – but it often appears irrational to business persons from other countries. Our system is often viewed, rightly or wrongly, as a lottery.

Conversely, arbitration is well established in international transactions, so clients tend to be at least generally familiar with the process. Although arbitration is also not a perfect process, it provides a process where persons with some experience in the subject matter of the dispute can decide the case. Arbitration may also provide a more neutral forum. Not surprisingly, many international companies insist on arbitration clauses in their contracts.

Of course, an arbitration clause will not apply to tort claims or other third party claims. However, it is certainly true that arbitration assists non-U.S. companies in managing risks and being more comfortable with doing business in the United States.

Editor: What are some of the challenges in representing foreign companies or their subsidiaries in arbitration in the U.S.?

Watkins: The biggest challenge may be language. If the arbitration is in the U.S., it is almost certainly going to be held in English. This means that your witnesses are going to be testifying in a second or third language. We have been successful in not using translators, who totally destroy the flow and spontaneity of a witness's testimony. The key for the

lawyer, as always, is preparation. The lawyer needs to have spent a lot of time with the witness, and not only developed a thorough assessment of how well the witness understands English generally, but also any peculiarities in how the witness expresses himself in English. I know from my own struggles in trying to learn a little German that, once you understand a phrase in a foreign language and it seems to work, there is a tendency to revert to that expression even if it is not how a native speaker would necessarily say things. So long as things stay clear to the arbitrators, this is not a problem. If the arbitrators appear puzzled, however, the lawyer needs to be ready to jump in to clarify.

In one arbitration several years ago, a key witness, a project manager, knew English very well but had lived in the U.S. a short period of time and had a thick accent which made him difficult to understand. We keyed his examination off of his written work and took it slowly, and he was a very effective witness. It did not hurt that his true qualities as a totally competent project manager and a nice guy came through very quickly.

Editor: You have considerable experience in insurance coverage litigation. I think it would be extremely interesting for our readers if you were to share your thoughts on where, in this particular arena, ADR was more advantageous than litigation, and vice versa.

Watkins: There are many reasons why a carrier might prefer arbitration to litigation. Probably the main reason is to avoid surprises. Many people would conclude that, on balance, arbitration provides a more predictable forum for resolving disputes.

A coverage dispute might also involve the interpretation of a policy provision by a court that is either a "win/lose" proposition; in other words, whichever side wins that argument is going to win the case. Such a case is probably an especially good candidate for mediation because it provides a forum in which a compromise can be reached confidentially.

Editor: What are the characteristics of a good mediator?

Watkins: A good mediator has to be able to carefully maintain neutrality and the trust of the parties, while at the same time be willing to push the parties meaningfully to a settlement. Almost all litigators seem to agree that a passive mediator, or a mediator who simply carries notes back and forth between the parties, is of little value. A good mediator must also be a great listener and be good at assessing the psychological needs of the parties. Even in commercial cases, the CEO of a party may just need an opportunity to vent. A good mediator is sensitive to these issues. If an insurer is involved, the mediator needs to understand what coverage is available. Creativity can be important. More than anything else, maintaining trust is the key.

Please email the interviewee at jwatkins@mckennalong.com with questions about this interview.