CPR: Innovator Of New Strategies

The Editor interviews ***Helena Tavares Erickson****, Senior Vice President and Secretary, International Institute for Conflict Prevention and Resolution (CPR).*

Editor: Helena, please describe your wide range of activities with CPR.

Erickson: I am Senior Vice President and Secretary at CPR. In this capacity, I direct CPR's dispute resolution services and panels departments, CLE training, our annual ADR awards program and our intern program. I have contributed to several of CPR's publications and currently act as liaison to a number of CPR's industry-focused committees through which much of our think-tank work is performed. I also serve as CPR's challenge officer and secretary to the board of directors.

Editor: Being in charge of the panels department, you oversee the selection of neutrals. In what respects does CPR's selection process differ from that of other dispute resolution providers?

Erickson: In selecting individuals to serve on CPR's Panels of Distinguished Neutrals, we conduct a rigorous review and vetting process whereby candidates are evaluated with respect to their ADR training and experience with complex commercial litigation. We also require that neutrals provide references from prior proceedings, which we check very carefully.

If the person is applying to serve on a specialty panel, his/her background is submitted to a review committee of individuals within that particular field of practice who determine whether the neutral does, in fact, have the necessary credentials in a given subject area. For example, for CPR's technology panel, we have a committee of neutrals, law firm users and corporate users with significant technology experience who determine whether a candidate has sufficient IP experience to handle sophisticated IP disputes as a neutral. We follow the same pattern for most of CPR's specialty panels.

With respect to CPR's selection process for choosing a neutral to serve on a particular case, that choice can occur in one of several different ways, some of which are unique to CPR. With the exception of our Franchise and Employment Panels, which we provide as a public service, our panels of neutrals are exclusively available to CPR's members via our website. As a result, our members may directly select a neutral, on their own, for any given case and do not need to utilize CPR's services. In this way, they can proceed in a completely non-administered way.

However, if they wish to use CPR's selection services, they can do so in several different ways. First, we have a procedure called the "screened selection process," which is unique to CPR. In this process, a party can appoint a "party-appointed" arbitrator without the arbitrator knowing that the party had a role in appointing him/her because CPR is used to contact the neutral. Second, the party may utilize CPR's standard selection process, whereby CPR convenes parties via a conference call to determine the timing for arbitrating or mediating the matter and any criteria for neutral selection. CPR, then, approaches panelists meeting these criteria and queries them regarding conflicts and disclosures prior to any appointment. Once completed, bios and disclosures are provided to the parties, and the parties are asked to rank their selections. The person(s) with the highest combined ranking is selected for the tribunal. If parties wish to vary this process, they may do so by agreement.

There are two additional ways that tribunals can be selected through CPR: 1) parties, who do not wish to go through a ranking process, can come to CPR for a direct appointment, or 2) parties can request a selection of up to 15 bios of neutrals who meet certain criteria.

Helena Tavares Erickson

Editor: Is there a fee for this service?

Erickson: Yes, there are fees for each of these different procedures. However, free access to our panels of neutrals is provided to CPR's members as part of their membership donation.

Editor: How much input on what they are seeking is provided by the parties in the selection of neutrals?

Erickson: Quite a bit. We convene the parties in a conference call to discuss the nature of the dispute and whether there is a need for a neutral with a particular background. About one-third of our annual case load requires some kind of technology background. We also get a high number of cases that involve sophisticated financial agreements requiring that we find neutrals having a high level of sophistication with certain types of financial matters. In order to best define parties' needs, we gather this information during the initial conference call before approaching our neutrals.

Editor: Please describe the "screened selection process" which allows parties to select party-appointed arbitrators who do not know who appointed them.

Erickson: Rule 5.4 of CPR's Non-Administered Arbitration Rules specifically provides for a procedure in which CPR furnishes bios to parties. During a conference call with the parties, CPR determines the criteria necessary for a neutral to qualify. Sometimes the parties have different criteria. In this case, we would honor the criteria of the individual parties. From the list compiled by CPR, parties would designate their top three choices. CPR would, then, approach their top choice to determine whether he/she is available at a given time, whether there are any conflicts, and, if there are no disqualifying conflicts, would provide any disclosures to the parties. If there is no objection, the person at the top of the list would be selected. If there is an objection, CPR would rule on the objection, and, if upheld, we would go to the second person on the list.

Editor: Why is it important that a neutral sitting on a complex case be well qualified in that given field?

Erickson: Most of the cases that come to CPR require a high level of sophistication – well beyond that of the general practitioner lawyer. For these matters, a complex commercial case litigation background, in addition to a strong ADR background, is required. It is necessary for the neutral to be able to understand technical and industry-specific terminology, as well as the underlying field of endeavor, in order to be able to process the case in an efficient and effective manner.

Editor: What are the advantages of the non-administered procedure as compared with arbitrations administered by tribunals?

Erickson: CPR's non-administered process allows sophisticated parties to proceed from beginning to end of a dispute without having to use an administering body.

This does not mean, however, that we are not available for challenges or for questions. CPR is often consulted by parties who are proceeding in a non-administered fashion. For instance, if a party is in a non-administered proceeding and his respondent is not responding, the party is able to seek our aid. CPR can, via certified mail, serve the respondent with papers regarding the selection of a neutral. We can also ensure that the selection procedure is neutral in the event that a respondent is not participating, i.e. CPR selects the neutral. If the arbitrators so desire, we can also provide fund-holding capability. We also remain available to decide challenges if there is a late-arising issue, such as a conflict with a witness in the proceeding or a challenge to an arbitrator for improper conduct.

Generally speaking, the biggest advantage of proceeding in the non-administered fashion is that the parties can agree to their own procedures in a flexible manner. They are not required to file all of their papers with us as the administering organization, but instead they file directly with the neutrals. More importantly, unlike other providers, there is no administration fee paid to CPR unless we are called upon to perform services.

Editor: What types of disputes is this procedure best suited for?

Erickson: CPR's rules and procedures are designed for complex commercial disputes involving sophisticated parties represented by counsel. These disputes can include an employment dispute between an executive with his employer, partnership disputes, all sorts of technology, financial agreement or construction disputes – basically any type of complex business dispute. The type of dispute not suited to non-administered arbitration is a consumer dispute, which is better handled in an administered setting where there is someone acting as the "go-to" person at all times.

Editor: Your duties also comprehend counseling and research for CPR members, providing them with publications and education along with CLE training. Describe your work in establishing CPR membership-based committees which design industry or practice-focused ADR protocols.

Erickson: CPR's primary function is as an educational organization. We provide resources to the ADR community, including our members, in the form of our panels of neutrals. But, this is only one small aspect of the resources that we provide. CPR has an award-winning ADR magazine – *Alternatives* – numerous publications and tools, and DVDs containing mock mediation proceedings, which are translated into various languages. We routinely review ADR case law and post summaries and legislative developments on our website.

Most of our think-tank work is done through CPR's standing committees. As members bring to our attention new ideas, we establish committees to explore these trends. Participants on CPR's committees are drawn primarily from our corporate and law firm members, but not exclusively. We also invite leading academics and industry experts to join the discussion.

One of the most active is our Arbitration Committee, which recently promulgated a *Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration*. This tool provides model clauses for parties to include in their arbitration agreements regarding modes of disclosure, ranging from "discovery light" to in-depth discovery. There are specific provisions regarding electronic disclosure and how to present witnesses in a commercial arbitration, all of which are intended to streamline the process and make it efficient and cost effective.

CPR currently offers a number of user-driven, industry-focused tools and protocols for managing business disputes. Most notably, our Construction Committee recently released three new tools, including a guide for using standing neutrals for mediating issues as they arise so parties never get to the point where an actual litigation is necessary. Similarly, last year, our users asked if we could develop an accelerated process that would have a "selection to final award" time frame of no more then six months. The result was CPR's Global Rules for Accelerated Commercial Arbitration, which require front-loading the pleadings and streamlining discovery and witness presentation. In addition, the Arbitration Committee is currently working on a damages protocol that will provide guidelines to arbitrators and parties about how damages should be considered in arbitration.

Editor: CPR has been on the cutting edge of developing the Economical Litigation Agreement (ELA), the "civil litigation prenup." Explain how this process has reduced markedly the cost of eDiscovery.

Erickson: The Economical Litigation Agreement (or "litigation prenup") is CPR's newest project and was spearheaded by Dan Winslow from Proskauer Rose LLP. The final document is now available on CPR's website. The intent of the ELA is for parties to agree within their contract that any disputes will be settled by economical litigation before a judge and that any discovery issues will be referred to an ELA arbitrator.

CPR will be providing training to individuals eligible to be ELA arbitrators so they are familiar with how the discovery process under the ELA should proceed and how to streamline e-Discovery. The goal is that by having a knowledgeable ELA arbitrator, the parties will be able to significantly reduce the costs of e-Discovery, and discovery in general, and proceed more efficiently through litigation. Our view is that arbitration is a streamlined procedure that does not normally encompass discovery in the way contemplated by the Federal Rules of Civil Procedure, but the ELA, on the other hand, takes as its basis the Federal Rules of Civil Procedure and uses them more efficiently.

Editor: Why have corporate counsel embraced so many of the innovative measures proposed by CPR, such as ELA, and early dispute resolution? Do you see even greater demand for their use in this period of belt-tightening?

Erickson: Because corporate counsel must pay close attention to the bottom line, they have always been interested in how to resolve disputes more cost effectively and efficiently. Companies generally are in the business of either making widgets or providing some sort of service. Litigation is a costly distraction from this core business. So, corporate counsel seek and willingly embrace tools that can assist them in managing or even preventing disputes. Early dispute resolution is one of these tools. CPR's Early Dispute Resolution Committee recently devised a model process that can be used by companies internally to determine what types of disputes are good candidates for early resolution.

CPR offers a broad range of ADR solutions for companies whether they prefer commercial arbitration, non-administered arbitration or, even, companies that require litigation, like the ELA. In all of these tools, CPR offers streamlined procedures that help minimize costs to the company.

Please email the interviewee at herickson@cpradr.org with questions about this interview.