

Interviews with Our Editors: The CPR Approach to Dispute Resolution with Olivier P. André, Senior Vice President, International at CPR

Kluwer Arbitration Blog

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Mr. André, welcome to the Kluwer Arbitration Blog. We were pleased to have Mr. Hanft join us recently and are thrilled to have the opportunity to also share your perspective with our readers.

1. To start, can you briefly introduce yourself and explain your role at CPR?

Thank you very much for the invitation Kiran. At CPR, I am responsible for our international activities, both in terms of thought-leadership initiatives and dispute resolution services. Our international activities currently primarily focus on Europe, Latin America and Canada. In each of these regions, we have advisory boards with representatives from our members who work collaboratively to carry out CPR's mission for efficiency and cost-effectiveness in their respective jurisdictions. I am also in charge of Y-ADR, a program for young international

dispute resolution practitioners, as well as the CPR International Mediation Competition which we launched three years ago out of Brazil.

Prior to my legal career, which I started at Shearman & Sterling, I led global projects at CA Technologies and Parametric Technology Corporation (PTC). I am a CPR and CEDR trained mediator, and studied law in France, Germany and in the U.S.

2. For readers who might be unfamiliar with CPR, can you explain the advantages CPR offers over the many other arbitration centers around the world?

CPR is unique because it was founded over 40 years ago by General Counsels at Fortune 100 companies who were concerned about efficiency and cost-effectiveness in commercial dispute resolution. As a result, we are user focused. The CPR Institute - the thought-leadership part of the organization - brings together all the stakeholders of the dispute resolution landscape, *i.e.* leading corporate counsel, outside attorneys, arbitrators, mediators, judges and academics, to collaboratively develop cutting-edge solutions in dispute prevention and resolution.

This 360° stakeholder engagement and dialogue informs CPR's dispute resolution services. Our rules, tools and protocols are responsive to the field's most pressing concerns. We offer the full spectrum of dispute resolution services a corporation may need to resolve its disputes, including mediation, arbitration, dispute resolution boards.

In terms of arbitration, CPR is the only institution to offer both administered and non-administered arbitration rules with an array of à la carte services, such as fundholding, which offers flexibility and enables the parties to customize their arbitration based on their needs. The CPR Panel of Distinguished Neutrals is comprised of around 550 rigorously vetted and highly respected arbitrators and mediators worldwide and includes over 30 specialty panels. Our New York based case management team is composed of highly experienced attorneys and has handled more than one trillion dollars in disputes over the years. The rules themselves are all about efficiency, avoiding any unnecessary steps. As a result, the average time for a CPR case is consistently below 12 months with tribunal

appointment typically taking place in less than 3 to 4 weeks from the initial filing.

3. *How can corporations and their counsel make use of CPR's services, and does this have to be decided at the time of entering their contract?*

We encourage companies and their lawyers to be pro-active and thoughtful when it comes to drafting their dispute resolution clauses rather than using boilerplate language that might not be adaptable. They should consider the full spectrum of dispute resolution processes that exist and utilize the most appropriate processes for the type of disputes they anticipate, the nature of the deal, the relationship history of the parties and other factors. For certain types of contracts, it might make sense to utilize multi-step clauses that combine several dispute resolution processes - negotiation, mediation, arbitration or litigation.

This also means that counsel should be mindful of the rules and procedures they use and the differences there might be in terms of default tribunal selection mechanism, confidentiality and other procedural aspects. CPR provides a variety of guidelines and tools - such as the CPR Dispute Resolution Clause Selection Tool - that can help develop a clause that is adapted to parties' specific needs. Everything does not have to be decided in the dispute resolution clause - although it is always easier to agree on a clause before a dispute arises - and parties to an existing dispute should also consider modifying their dispute resolution process post-dispute through a submission agreement if a better process or set of rules would make more sense under the specific circumstances of an existing dispute.

4. *Based on your experiences, do you have any "best practices" recommendations for parties consider when drafting an arbitration clause to include in their contract?*

It really all depends on the situation and my first recommendation would be for transactional lawyers to review the CPR Corporate Counsel Manual for Cross-Border Disputes. The manual was developed thanks to the collaborative work of our Arbitration Committee and is a great resource for in-house counsel. It provides practical tips on how to draft any kind of dispute resolution clauses - including

multi-step clauses, mediation clauses, commercial arbitration clauses, and investor-state arbitration clauses – and how to manage an arbitration efficiently with outside counsel. It is a great resource to avoid the pitfalls of the so called midnight dispute resolution clause, improve efficiency and obtain better results.

I would also recommend parties to think carefully about the default tribunal selection rules that are provided under the arbitration rules to make sure that they fully understand how much control they will retain on the selection of the arbitrators, a key benefit of arbitration.

Finally, parties using an institution's rules should remember to consult that institution's website to obtain the latest model clauses. These model clauses are carefully drafted to avoid many of the issues that can otherwise surface once the dispute has arisen.

5. *CPR released new Rules for Administered Arbitration of International Disputes at its Annual Meeting earlier this month - congratulations on both achievements! Can you tell us about the top three key improvements in the new rules?*

Thank you. The revised rules incorporate a number of new innovative features based on the feedback we received from the users' community. I will focus on three of the most interesting ones.

First, the default tribunal selection mechanism has changed in an effort to further improve efficiency and cost-effectiveness. It now provides for a sole arbitrator for disputes below US\$3 million unless the parties agree otherwise. For disputes above US\$3 million, the default is now a three-arbitrator tribunal selected pursuant to the unique screened selection process for which CPR won the GAR Innovation Award in 2016. With this process, CPR screens the candidates for conflicts, rates and availability up front and then appoints the party-designated arbitrators without telling them which party has designated them. This allows parties to select the best arbitrator for their dispute while avoiding some of the issues surrounding the role of the party-appointed arbitrator.

Second, while the CPR arbitration rules have always had a provision expressly allowing the parties or the tribunal to suggest settlement or mediation at any point

during the arbitration proceeding, the new rules go one step further. They allow CPR to invite the parties to mediate at any point during the proceeding. This is important as the parties might not be in a position to mediate at the beginning of an arbitration proceeding, but might be inclined to do so later on in the proceeding once their case develops.

Finally, we have introduced two innovations previously added to our non-administered arbitration rules: The “Young Lawyers” rule, which encourages the active participation of less experienced lawyers in the arbitration hearing under the supervision of more experienced lawyers to encourage the development of future generations of arbitration practitioners, and a cybersecurity provision, which encourages the tribunal and the parties to discuss cybersecurity at the pre-hearing conference.

6. *I understand that you are among the leaders of the ICCA-NYC Bar-CPR Working Group on Cybersecurity in International Arbitration, which recently hosted a consultation period for its Draft Cybersecurity Protocol. Can you tell our readers more about the impetus for this innovative task force, its goals for the draft Protocol, and how CPR intends to draw upon this work?*

Cybersecurity – and the protection of data in general – has become a growing concern in international arbitration considering the quantity and potential sensitivity of data exchanged in proceedings. Every day, we hear about new hacks or breaches, and some of them have affected some of the largest law firms in the world.

The Working Group was created to raise awareness about cyber risks within the arbitration community and to provide guidance to parties, counsel and arbitrators to mitigate these risks. We released a draft protocol in April 2018 and we collected feedback from the arbitration community during a public consultation that lasted until the end of 2018. We anticipate to release the final document within the next few months.

The Protocol will provide arbitration participants guidance to assess the cyber risks pertaining to a particular arbitration at the beginning of a proceeding, determine whether specific cybersecurity measures should be adopted for that particular

arbitration, and adopt reasonable and appropriate cybersecurity measures, if necessary. CPR has been leading the way in terms of cybersecurity with the creation, a few months ago, of a panel of arbitrators and mediators specialized in resolving all aspects of cyber disputes.

CPR has introduced a cybersecurity provision in its arbitration rules on March 1, 2018. Pursuant to this new provision, the tribunal should discuss with the parties the possibility of implementing steps to address issues of cybersecurity and to protect the security of information in the arbitration at the pre-hearing conference that needs to take place shortly after the appointment of the tribunal.

CPR has also just announced a cybersecurity training in collaboration with FTI Consulting for the arbitrators and mediators on its Panel of Distinguished Neutrals. This training, offered on an annual basis via webinar, will provide practical information about current and emerging cyber threats and ways to mitigate the risks.

7. This year's Vis Moot problem includes a question regarding a cyber-attack and a related admissibility question. Given your expertise in this area, do you have any guidance on the strongest available arguments for students mooting the problem?

First, let me say that this is extremely interesting and I am glad it is part of this year's Vis Moot problem. Without having reviewed the problem, I would advise to start by looking at the applicable arbitration rules. Most rules, including CPR's rules, provide the tribunal with the discretion to determine whether or not to admit evidence, and this discretion could prevent a tribunal from permitting unlawfully obtained information. Article 9(1) of the IBA Rules, which operates as soft law, also gives the authority to the tribunal to determine the admissibility of evidence and Article 9(2) expressly permits a tribunal to exclude evidence based on a number of considerations, including "fairness or equality of the parties" that the Arbitral Tribunal determines to be compelling. There have also been some interesting cases lately addressing these very issues in different context which should be helpful to students. On this topic, the students may want to consult an excellent chapter on "Safeguarding the Process, 11 Exclusionary Rules of Evidence" in *Evidence in International Investment Arbitration* by Frédéric Gilles Sourgens, Kabir

Duggal and Ian A. Laird.

8. You are the organizer of the CPR International Mediation Competition. As we all know, the dispute resolution process requires a lot of judgment, and so does selecting the right ADR mechanism. In your view, how does Moot participation help students develop this judgment and navigate the ADR options available once a dispute arises?

The CPR International Mediation Competition was launched three years ago to further our efforts to promote commercial mediation in Brazil and beyond, and it is the only international mediation competition based in Latin America. This year's competition will take place in just a few days – from April 4-6, 2019 – and will be hosted by CAM-CCBC in São Paulo. The competition is an important initiative to develop mediation capacity internationally and to train the younger generations of lawyers and business people about the potential benefits of mediation to find business – rather than legal – solutions to disputes. Participation in the various negotiation, mediation and arbitration moot competitions plays a critical role in increasing the practical knowledge of students as to the various dispute resolution processes and to build a strong network of sophisticated dispute resolution practitioners.

Mr. André, thank you for sharing your time and unique perspective. We wish you and CPR continued success!

This is the second of two interviews that cover CPR's innovative approach to aiding corporate legal departments with global dispute resolution. [Click here](#) to access the interview with Noah J. Hanft, President and CEO of CPR.