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BROADCAST

EXPERT'S VOICE

Ms. Svetlana Sergeyeva

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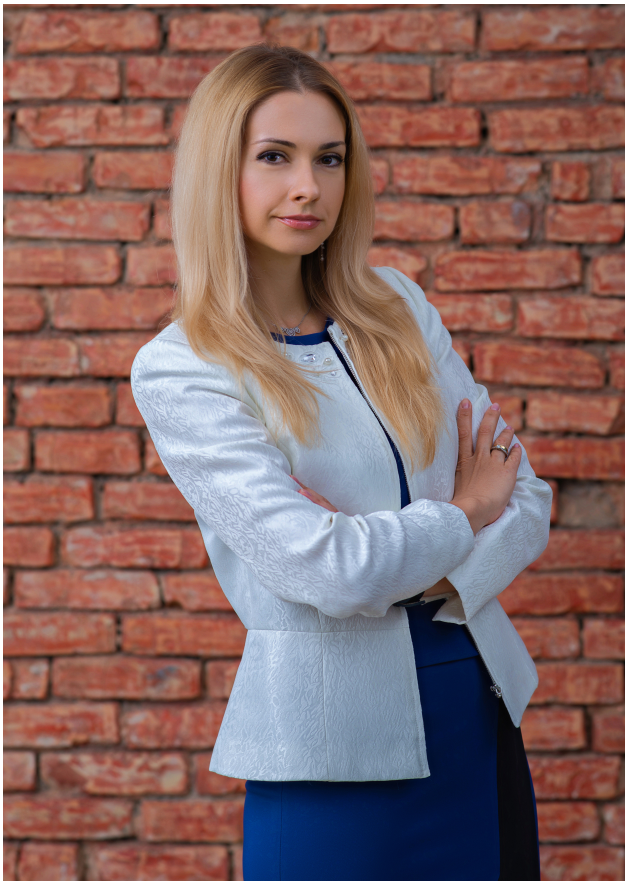


Ms. Svetlana Sergeyeva

- *Svetlana Sergeyeva, an Attorney with more than 12 years of experience, Mediator (Deutsche Anwalt Akademie, DAA)*
- *Partner and Head of the Attorneys' Partnership "Sergeyevs' Law Office"*
- *Head of the Branch of the Ukrainian Bar Association in Odesa Region*
- *Vice-President of the Ukrainian Academy of Mediation*
- *Vice-Head of the Committee on Mediation of the Council of Attorneys of Odesa Region*
- *Expert in field of mediation Project EU "Pravo-Justice"*
- *Coordinator of the Mediation Committee of the Ukrainian Bar Association*

1) As per the data of WIPO Center in 2020, mediation has a settlement rate of 78% whereas arbitration stands at 33%. (https://www.wipo.int/amc/en/center/caseload.html) What are the factors that makes mediation more favourable in terms of dispute resolution success?

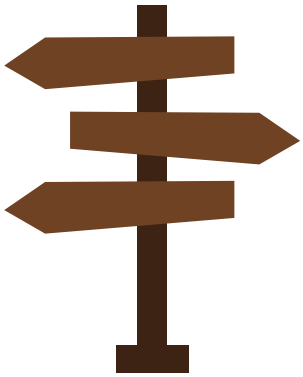
In my opinion, this results from several factors. Firstly, this is the character of disputes, considered by WIPO Center. Such categories of cases, as IP and technology disputes and domain name dispute resolution, may be emotionally "charged" due to their peculiarities, and namely mediation enables the parties to agree in the way, when the proposed decision satisfies interests and needs of each party of the dispute, in contrast to an arbitration award, which can satisfy only one party. The second factor is the following. As it can be seen, 30 % of WIPO Center's cases contained a clause, according to which the case shall be initially considered by means of mediation. In my point of view, this testifies that the parties of the contract are ready in advance to negotiate and settle the dispute amicably in case of its appearance. This is the result of their attorneys' good job, which witnesses about high level of understanding of mediation advantages, as the mean of amicable settlement of disputes, by attorneys (lawyers). Therefore, when parties start over mediation procedure, they desire to come to terms, and, in essence, they act as partners in finding a common solution which can satisfy each of them. With regard to arbitration process, the parties are in other position, they act as opponents, and it is more complicated to them to reach an agreement.

2) You have been a member of the Singapore Chamber of Maritime Arbitration (SCMA) as well as in the German Maritime Arbitration Association (GMAA). What is the background and reasons for choosing such a specialized field?

I'm the Partner and Head of the "Sergeyevs' Law Office" Legal Partnership. Our

EXPERT'S VOICE

main specialization is maritime law. This choice was reasoned by the presence of the Clients, representatives of maritime business, interested in dispute resolutions by means of International Maritime Arbitrations, including Singapore Chamber of Maritime Arbitration (SCMA), German Maritime Arbitration Association (GMAA), as the world-wide leading maritime arbitration institutions.



3) You have a skill set of four languages, namely Russian, Ukrainian, English, and Italian. What impact can a person have in his/her professional career for possessing this multilingual expertise?

Frankly, currently I only learn Italian language, and it is not a question of language fluency. However, indeed, knowledge of foreign languages opens up new vistas and offers significant opportunities.

For example, all members of our office team speak at least Ukrainian and English languages. This is caused by the aspects of our activity and by the pool of overseas Clients.

In the case of an ADR expert, knowledge of languages makes him/her more demanded not only as a mediator, an arbitrator or a representative of a party of a dispute, but as a speaker on international events, an expert of international organizations, as well as an author of publications for international editions, etc.

Even today I tell my son, who is a pupil of the 6th class, about the importance of the study of foreign languages (he learns English and German) in addition to Ukrainian and Russian. In the future it will be his advantage.

4) What skills, attitudes, abilities, and behaviors do you believe are required for someone to be an effective civil rights mediator?

I believe that any mediator shall be empathic, i.e. shall support parties of mediation, understand their feelings and allow them to feel that. However, it is crucial not to "dive" into the conflict along with the parties of it. It is also important to be stress-resistant, to radiate confidence and evoke trust. Each mediator has own secret how to do it.

Successful mediator shall be organized, attentive, as well as react quickly and ask precise questions.

A mediator has a lot of "tools" which he/she applies depending on the situation, and it is impossible to identify, which of them are more important and which ones are less important. Each of them are unique tool, due to which parties of the dispute receive the result.

Moreover, a mediator shall "turn off" "a lawyer, a financier, a psychologist or any other specialist" (if he/she has respective education), i.e. here and now he/she is only mediator – neutral person, who does not give any advice to parties.

In conclusion, I want to emphasize the importance to trust a co-mediator, not to compete with him/her, and, in turn, to provide co-mediator with necessary support, if you work together (for instance, in family cases).

Such cases, as a rule, are very emotionally draining not only for parties, but also for mediators. Thus, it is crucially to feel mutual support, which will ensure effectiveness of the mediation process.

AROUND THE GLOBE

EUROPE

Judicial Committee of the Privy Council holds that a Supervisory Court does not have the power to reopen issues concerning meaning and effect of a contract [Betamax Ltd v. State Trading Corp. (Mauritius), Privy Council, United Kingdom, June 2021].

The Judicial Committee of the Privy Council held that the Mauritian Supreme Court, had incorrectly set aside an International Arbitration Award. The Privy Council observed that when an arbitral tribunal did not find a contract void or non-conforming to regulatory schemes, the Supervisory Courts did not have the powers to reopen the same issue from a public policy perspective. The Privy Council went on to clarify that instances where illegality was not established, it cannot be used as a ground to set aside an award.

English High Courts constructs two conflicting dispute resolution clauses harmoniously [Melford Capital Holdings LLP v. Digby, English High Court, England, June 2021].

The English High Court, was called upon to settle the dispute concerning two conflicting dispute resolution clauses, wherein one of the clauses provided exclusive jurisdiction to the English Courts while the other one provided for arbitration. A counterclaim having arisen concerning expulsion of the Defendant, the Court held that the arbitration clause was wide enough to include the settlement of counterclaim through arbitration. The Court went on to interpret the exclusive jurisdiction clause as one providing supervisory jurisdiction to English Courts, thereby harmoniously interpreting the conflicting clauses.

English High Court refuses to exercise discretion concerning powers to refuse anti-suit injunction [VTB Bank PJSC v. Valeri Mejlumyan, English High Court, England, June 2021].

The English High Court while hearing a matter involving court proceedings in Armenia, refused to exercise its discretionary power to refuse anti-suit injunction. While doing so, the Court held that even if there was some delay while seeking anti-suit injunction, it will not become a standalone ground to refuse anti-suit injunction. The, Court clarified that any proceedings in breach of an arbitration agreement was a sufficient ground to issue anti-suit injunction.

Brussels Court rules on a tribunal secretary's power to draft an award [Belgium, 2021]

While hearing an opposition to an enforcement application, a Brussels Court allowed an award partially drafted by the tribunal secretary to be enforced. The Court held that an award which was drafted by a tribunal secretary cannot be set aside as long it can be shown that the same was duly reviewed by the arbitrators.

Foreign Arbitrator can be sued in France for non-disclosure [Paris Cour d' Appel, France, June 2021].

The Paris Cour d' Appel (Court of Appeal) has held that a foreign arbitrator whose failure to disclose conflict of interest led to annulment of an award can be sued in French Court. Holding that, the Court allowed a German arbitrator to be sued who had failed to disclose crucial information concerning conflict of interest, which paved the way for annulment of an ICC award.

Swiss Arbitration Association (ASA) announces the launch of Arbitration Toolbox [ASA, Switzerland, June 2021].

The ASA launched its arbitration toolbox, an electronic platform aimed at providing practical advice at every stage of an arbitration. Additionally, the toolbox has been curated to help new entrants into the field of arbitration explore the domain and get a basic understanding of the same.

ASIA

Arbitral Tribunal competent to decide issues concerning escalation clauses in an arbitration agreement [C v. D, High Court of Hong Kong SAR, Hong Kong, June 2021.

The High Court of Hong King SAR has ruled that failure to comply with "Escalation Clauses" prior to initiating arbitration proceedings, will now fall within the jurisdiction of Arbitral Tribunals. Resultantly, arbitration agreements will be upheld despite the party's failure to satisfy preconditions such as "Escalation Clauses" and cooling-off periods.

Leave to enforce arbitral award against non-existent entity set aside by Singaporean Court [National Oilwell Varco Norway v. Keppel FELS, High Court of Singapore, Singapore, June 2021].

The High Court of Singapore, set aside a leave granted under the Singapore International Arbitration Act, 1974. The leave granted in the Plaintiff's favour was set aside, as the company against which the award was to be claimed had ceased to exist when arbitration proceedings were underway.

A Foreign state cannot claim sovereign immunity against enforcement of arbitral award, when the dispute concerned a commercial transaction [KLA Const Technologies v. Embassy, Islamic Republic of Iran, Delhi High Court, India, June 2021].

The Delhi High Court held that a Foreign State (Afghanistan in this case) cannot claim sovereign immunity against enforcement of an arbitral award arising out of a commercial transaction. Holding that the Court observed enforcement of an arbitral award against a Foreign State does not require consent of the Central Government of India as per S. 86(3), Code of Civil Procedure, 1908.

Arbitral Award requiring BCCI to pay INR. 4,800 crores to Deccan Chronicle Holding Limited set aside [Board of Control for Cricket in India v. Deccan Chronicle Holding Ltd., Bombay High Court, India, June 2021].

The Bombay High Court, India, set aside an arbitral award while considering a dispute concerning termination of a franchise contract of Deccan Chargers. The award which required BCCI to pay INR. 4,800 crores, was set aside as the arbitrator had ignored crucial evidence, apart from granting reliefs which was not prayed for. However, BCCI was asked to pay INR. 34 crores with interest to Deccan Chronicle, as it was due to them.

Singapore extends third party funding framework to domestic arbitrations and SICC proceedings [Ministry of Law, Singapore, June 2021].

The Ministry of Law, Singapore has announced that third party funding framework will now be allowed for domestic arbitrations, allied court proceedings and mediations. Prior to the Ministry's approval, third party funding was exclusively reserved for international arbitration and allied court and mediation proceedings.

AFRICA

Algerian National Energy Company takes steps to seize a gas asset owned by a UK energy company, and faces a claim of over $1 billion [Algeria, June 2021].

Sunny Hill Energy has sold its stake in the Ain Tsila gas field in Algeria's southeast. Sonatrach has made no compensation offer in connection with the interest seizure. Sunny Hill Energy contests the contract termination's legality and intends to pursue all legal remedies available to compensate it for the loss of its investment, which they estimate to be worth well over $1 billion.

Foreign corporations face a quandary as a result of a Ugandan court order [Uganda, June, 2021]

Foreign corporations now have the ability to operate in Uganda without being established or registered, according to a ruling by Uganda's Commercial Court. This has caused legal uncertainty and raised concerns among some in the business sector. A court decision has allowed international corporations to conduct business in Uganda without being incorporated or registered in the country.

AUSTRALIA

Award Debtor's failure to attend enforcement proceedings does not hamper the enforcement of an arbitral award [Neptune Wellness Solutions Inc. v. Azpa Pharmaceuticals Pty Ltd.; Federal Court of Australia, Australia, June 2021].

Reiterating that enforcement was almost a matter of administrative procedure and the role of Courts was mechanistic, the Federal Court of Australia enforced an award passed in a Montreal Seated Arbitration. Even though the award debtor did not appear in the proceedings, the Court held that the award was still enforceable against them. Thus, the Court established that absence of a party in enforcement proceedings will not hamper the rights of the other party.

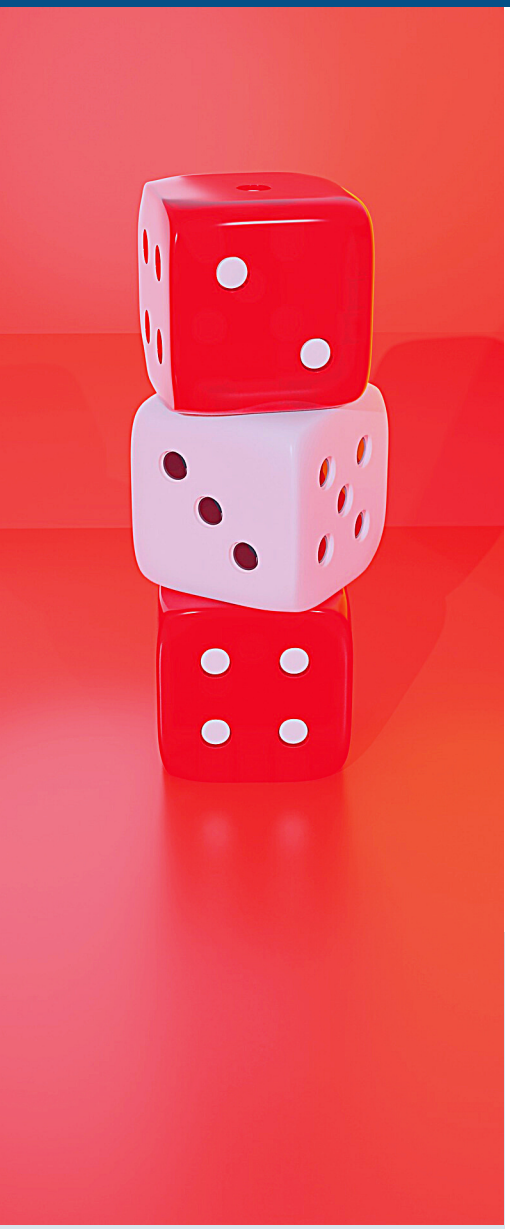
AMERICA

IMPACT Justice model arbitration bill for CARICOM countries approved [June 2021].

At the 29th meeting of the Legal Affairs Committee, CARICOM, the Model Arbitration Bill, funded by the Government of Canada, received a resounding endorsement from regional attorneys. The Bill has now been approved as the CARICOM Model Bill. Based on the UNCITRAL Model Law on International Commercial Arbitration, the IMPACT Justice Model Arbitration Bill has been proposed to modernise and harmonise the arbitration laws in the Caribbean region as a part of the Project's mandate to increase access to justice through the use of alternative dispute resolution mechanisms such as arbitration, mediation and restorative practices.

Ecuador becomes the latest signatory of the ICSID Convention [Ecuador, June 2021]

On 21st June 2021, the Republic of Ecuador's Ambassador to the United States, Ivonne Juez Abuchacra de Baki signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). With this Ecuador becomes the latest signatory to the convention, taking the number of signatories to 156.



PREDICTABILITY IN ARBITRAL DECISION MAKING

Could an artificially intelligent system render an arbitral award?

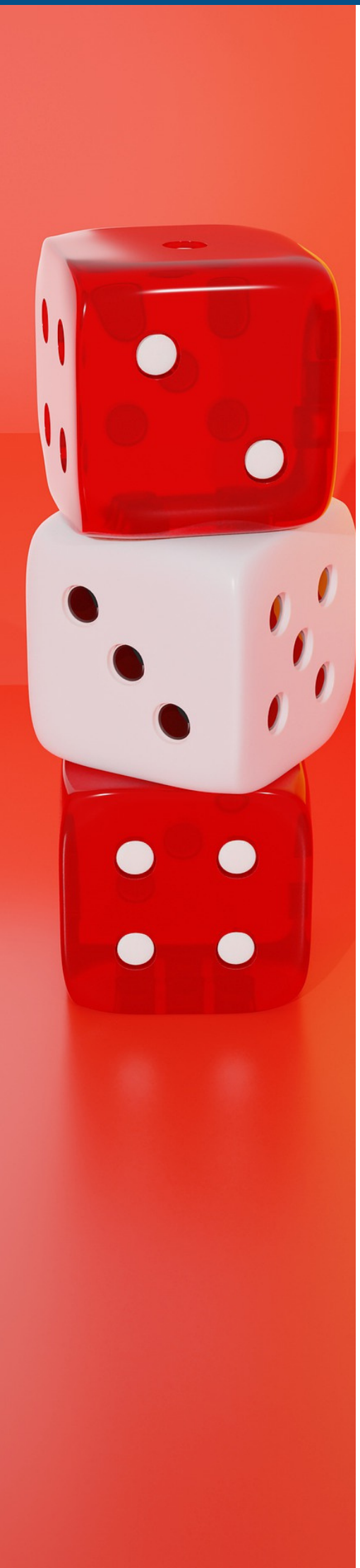
Could artificial intelligence (AI) carry out decision-making? Is it just a matter of time? Is an artificial intelligence-rendered-decision more predictable and desirable? Is there a possible future with AI replacing human arbitrators? These questions tend to engulf the Global Arbitration Community, whenever a discourse concerning the interplay of AI and Arbitration comes up.

In the recent past, the pervasive use of AI has completely altered the legal arena. The private sector in particular, has been increasingly trying to embrace the potential offered by AI driven technology with massive investments that aim at keeping up with the AI revolution. Legal tech start-ups are proliferating, offering services like legal practice management, e-discovery, lawyers' marketplace and dispute resolution platforms, to improve, automate and speed up performance at law firms. In the public sector, at the same time, the AI revolution has also taken steps forward in the direction of predictive justice.

Legal practitioners know that the systemic overload in the judiciary is an old plague in many countries.

Particularly in civil dockets, the judicial system leads oftentimes to delayed justice and reduced access to courthouses: arbitration traditionally addresses these issues, offering more time-efficient and confidential decision-making. Just like for the public sector point-of-view, there is increasing debate with regard to the implementation of AI in the judicial sector, both public and private.

While alternative dispute resolution methods have gained major importance in facilitating courthouses' management, both in common law and civil law jurisdictions, could technology ease decision-makers to deliver effective, cost-efficient, on-time results? Predictive justice and artificial intelligence are at the forefront of the debates on the reform of judiciary.
The processing of judicial data by so-called artificial intelligence systems or methods derived from statistics aim at improving transparency of the functioning of justice, focusing in particular on predictability of the application of the law and the consistency of case law. In fact, predictive justice operates under the assumption that predictable outcomes in judicial adjudication will foster certainty of decision-making, reducing uncertainty.



AI tools could play a significant role throughout the entire arbitration process. Drafting arbitration clauses, identifying interests, conducting discovery, reducing traditionally high costs of arbitration, better case management through diagnosing inefficiencies and automating management tasks. Clients could also pre-screen the likely success of their case. Furthermore, AI could also help with the appointment of arbitrators, the preparation of the award, and the simulation of judicial review, and perhaps, one day, with the merits of an arbitration.

There are some interesting applications of AI in the judiciary that are suitable for arbitration as well: e.g. the creation of Jurisays, a prediction algorithm that is able to predict outcomes of judgments of the European Court of Human Rights with an overall accuracy of 70.7%. Jurisays receives inputs from published documents from previous years and decisions of the cases judged by the European Court of Human Rights (ECHR) and predicts future court decisions. Every month it learns from its mistakes, using a particular family of algorithms, known as supervised learning algorithms. Why wouldn't this be possible for arbitral decisions?

These innovations will ultimately depend on the parties' willingness to allow arbitral institutions to use their data to inform future predictions. The parties' data and information of previous cases would be used aggregated, as training data (size of arbitration, number of parties, duration, type of dispute etc.) and anonymized for algorithms to generate desired outputs.

Undeniably, AI systems capable of providing support for legal advice, decision-making assistance or guidance for litigants must operate under conditions of transparency and fair processing. Failure in accurately monitoring transparency and fairness may pose ethical threats to adjudication. n light of its powerful transformative force, AI has sparkled ample debate in the legal community about the principles and values that should guide its development and use.

Processing of data must be carried out in compliance with fundamental human rights and ethical principles embedded in constitutional and international human rights charts.

We should not forget that AI applied to decision-making is still at an embryonic state, and therefore some obstacles may appear in the way of recognition or enforcement of an award rendered by those systems. In fact, arbitration practitioners could raise ethical reasons because of the absence of human qualities or due process defenses based on the impossibility of directly explaining the results or predictions of the AI system.

Applicable rules do not expressly prohibit AI systems to act as arbitrators, and parties may agree to it, but is there a guarantee that a judicial body will recognize and enforce it?

Most recently, on April 21, 2021, the European Commission (EU) has published a proposal for the Artificial Intelligence Act. This proposal aims at shaping AI in a way that is human-centric, respectful of the EU core values and it gives specific attention to the protection of human rights. In particular, with regard to the judiciary, in order to avoid biased AI-assisted decision-making. The draft proposal highlights how certain AI systems intended for the administration of justice and democratic processes must be classified as high-risk, considering their potentially significant impact on democracy, rule of law, individual freedoms as well as the right to an effective remedy and to a fair trial. In particular, to address the risks of potential biases, errors and opacity, the draft qualifies as high-risk those AI systems intended to assist judicial authorities in researching and interpreting facts and the law and in applying the law to a concrete set of facts.

A fair and unbiased decision-making system, able to assist judges in their decision-making, or even replace them in courts is certainly a fascinating idea. Having judges, both public and private, operating faster and in a more transparent way is appealing and something worth working on. Nevertheless, there is no full picture so far, and full consequences of using these kinds of algorithms as they continue to evolve and may pose significant challenges if deployed.

Author: Federica Simonelli, LL.M.

Events

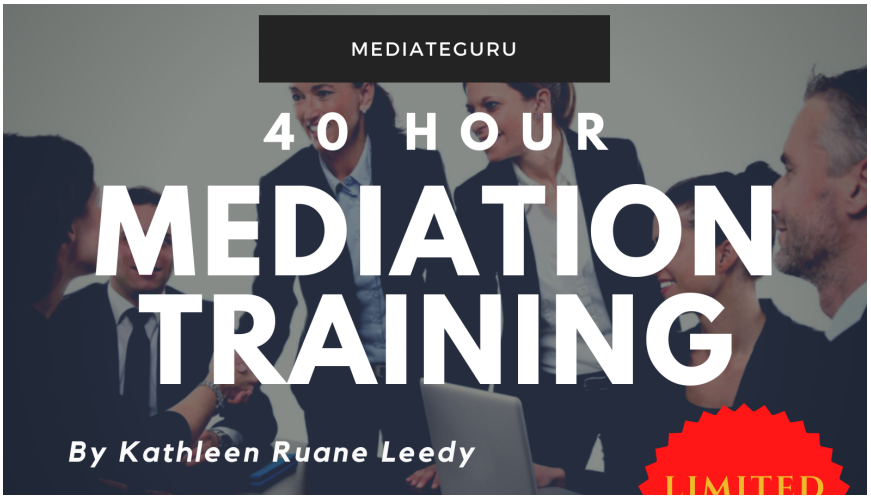
Upcoming events by MediateGuru

Certificate Course on Fundamentals of Arbitration (Enrollment on Rolling Basis)

Scan QR to register

1st International Investment Arbitration Moot (10-14 Sept 2021)

Scan QR for more details



About the Program

The 40 hour training program on mediation will be provided to mediation enthusiasts by Ms. Kathleen Ruane Leedy. This course introduces participants to a range of issues surrounding the dynamics of disputes and to the advanced models of mediation, designed to aid in their resolution. This course will also attempt to capture the lessons that can be drawn from existing experiences globally. This 5 day program expanding over the duration of 3 weekends, will equip the participants, to understand the specifics of conflict management and mediation.

Scan QR for more details

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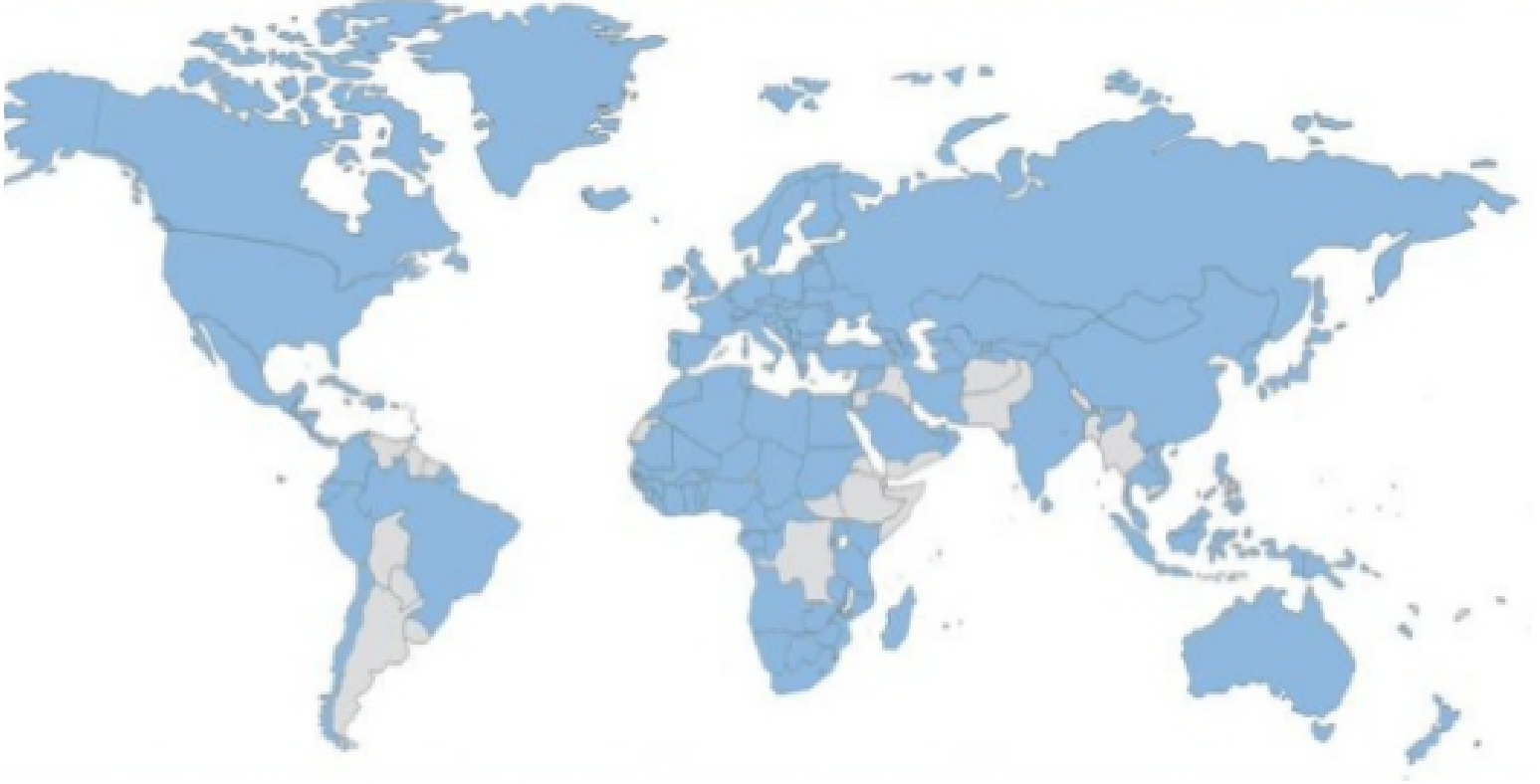

ABOUT MEDIATEGURU

MediateGuru is a social initiative led by members across the globe. The aim of the organization is to build a bridge using which more law students can be encouraged to opt for ADR methods. MediateGuru is creating a social awareness campaign for showcasing mediation as a future of alternative dispute resolution to provide ease to the judiciary as well as to the pockets of general litigants.

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