JUNE 2021 | ISSUE NO. 1

mADR

BROADCAST

EXPERT'S VOICE

Ms. Ana Sambold

A discussion with Ms. Ana Sambold and her thoughts on future of the Industry.

EDITOR IN CHIEF'S COLUMN

By - Ms. Mallika Arora

Initiating Steps towards a Carbon Free Arbitration Community

By - Arijit Sanyal

UPDATES

Most Significant Update/ Development in the field of ADR

Scan the QR Code to Check out MediateGuru's Events

MED-ARB NEWSLETTER BROUGHT TO YOU BY MEDIATEGURU

EDITOR IN CHIEF'S COLUMN

By Mallika Arora

Greetings to the global ADR family!

At a time when the world is recovering from the wounds of a global pandemic, we at MediateGuru have come up with the inaugural edition of our Global ADR newsletter, "***The m-ADR Broadcas***t".

In our inaugural edition, we bring before you, global updates from the domain of ADR to keep you abreast of the global developments concerning ADR, especially at a time, when it may have been difficult for you to follow your routine. We then move on to.

"The Expert's Voice" where we interview, **Ms. Ana Sambold, Esq.**, an internationally recognised Mediator and Arbitrator who is associated with various prestigious institutions such as, the American Arbitration Association, Arbitral Women, Chartered Institute of Arbitrators etc.

Having contributed immensely to the field of ADR, Ms. Sambold shares a few insights for our readers to make an impact and build a successful career in the field of ADR both globally as well as within their own jurisdictions.

We then move on to discussing the prospects of the Green Arbitration Protocols for Arbitral Institutions where our Editor, Mr. Arijit S, reflects on the steps various Arbitral Institutions and stakeholders must take to reduce the carbon footprint of International Arbitrations. While walking our readers through the concerned protocols; primary considerations; security concerns, Mr. Arijit suggests a few additional measures which can ensure that International Arbitrations continues to be an environmentally sustainable method of dispute resolution.

Welcome to Inaugural Edition

By Ms. Mallika Arora

With the launch of "***The m-ADR Broadcast***", we hope that we will continue to make the domain of ADR simpler and more accessible for our readers, in order to enable more and more people out there to reap the fruits of a mechanism which, in spite of being technical and financially suitable has failed to reach the masses out there.

Happy Reading!

EXPERT'S VOICE

Ms. Ana Sambold Esq.

- *Leading U.S. Attorney and Dispute Resolution expert with over a decade of experience and 1,000+ cases.*
- *Internationally Certified mediator (IMI) and International ArbitralWomen.*
- *Appointed American Bar Association (ABA) Dispute Resolution Section Executive Council Member and Educational Programming officer*
- *ABA Mediation and Advocacy Skills Institute Co-Chair*
- *Former California Lawyers Association Co-chair of ADR Committee*
- *San Diego County Bar Association ADR Section Vice-Chair*

1) What do you think the most significant talents or characteristics of a civil rights mediator are? What do you consider your best strength to be?

"The most significant talents or characteristics of any type of mediator are trustworthiness, approachability, dedication, perceptiveness, objectivity, and self-control. Good mediators are also very patient, impartial, adaptable, respectful, optimist, creative, and good listeners. Since almost every dispute has an emotional component, a good mediator is empathetic and cares about identifying the underlying needs of the parties as much as understanding the legal issues in dispute. Good mediators know how to facilitate communication and promote problem solving.

Conflict takes a huge emotional, physical, and financial toll on people so as a mediator, I really care about helping them and I'm relentless in the pursuit of resolution. Those are probably my best strengths as a mediator."

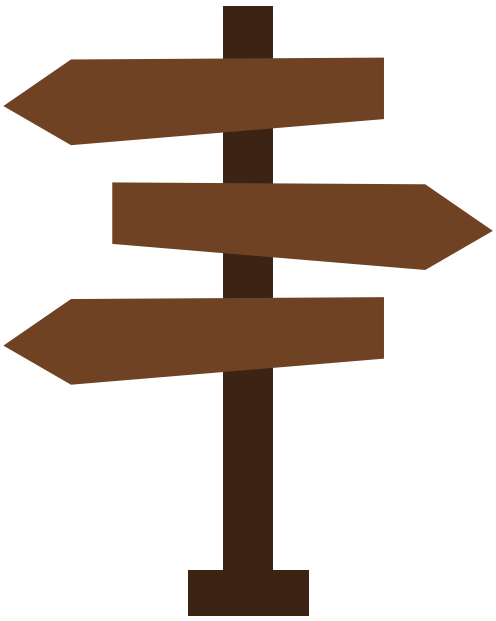
EXPERT'S VOICE

2) You have had an impressive career of over a decade as a California Attorney, Arbitrator and a Mediator. How has your experience been while managing different roles? What message would you like to send out for those who might not be sure about working in diverse roles in future?

"I would recommend finding the role/profession you're most passionate about. If you find that there is too much to be an advocate, mediator and arbitrator at the same time, pick the role that you want to concentrate on and pursue it. My personal experience is that doing mediations and arbitrations at the same time gives me a good perspective and appreciation of each process and helps me to become better at my job."

3) What advise can you give to young practitioners and students who wish to specialise in ADR/Mediation?

"Pursuing and establishing a successful career in ADR as a new attorney is difficult but not impossible Litigators and parties normally select the mediators and arbitrators with extensive legal experience and established reputation. That's why retired judges and experienced litigators become mediators and arbitrators normally as a second time career. So, my first advise to new lawyers is to find their niche, gain some experience in that field, establish your reputation, and then, become an ADR professional.".



4) How do you predict the future of ADR post-pandemic?

"In the post-pandemic world, there will be a return to in-person mediations and arbitrations but virtual ADR will remain an effective and efficient way of resolving disputes. One of the silver linings of COVID- 19 is that parties and ADR professionals have acclimated to virtual ADR and realized that it's easy to use, a productive saver of time, money and resources."

AROUND THE GLOBE

EUROPE

Swiss Federal Tribunal confirms high threshold for appeals against arbitral awards for violation of public policy [A, B, C and D v Syrian Arab Republic, May 2021]

The Swiss Federal Tribunal (SFT) while dismissing appeals filed by several investors jointly, observed that the arbitral tribunal had not violated any substantive public policy by awarding the compensation sought under the applicable bilateral investment treaty in Syrian lira (SYP) instead of US dollars (USD). The Tribunal observed that the significant devaluation the investors had to go through owing to inflation, will not be a standalone ground for setting aside the award. Additionally, the SFT observed that for setting aside the award of the arbitral tribunal, the compensation awarded ought to be blatantly disproportionate against the value of lost investment.

Claims falling manifestly outside the discernable arbitration agreement cannot become a ground to stay Court proceedings [Manek & Ors. v. IIFL Wealth (UK), English Court of Appeal, May 2021].

The English Court of Appeal, while rejecting a challenge to the jurisdiction of the commercial court held that matters which fell manifestly outside the scope of the arbitration agreement, can be tried by the Commercial Court. Additionally, the Court of Appeal went on to observe that if the parties wish to extend the cover to claims against individuals, as was alleged in this case, only an express clause to that extend will substantiate such an allegation.

ECHR rules on a breach of the right to a fair trial due to doubts as to arbitrator's impartiality [BEG SpA v Italy, May 2021]

The European Court of Human Rights, found that an Italian power company's right to a fair trial was breached when an arbitral award favouring a subsidiary of Electricity and Gas provider, Enel SpA was issued by an Arbitration Chamber of the Rome Chamber of Commerce (ACR) tribunal that included an arbitrator who was concurrently acting as a counsel for Enel.

English court grants anti-suit injunction to enforce English arbitration agreement [ZHD v SQO, May 2021]

The court held that the Claimant ship owners were entitled to an interim anti-suit injunction pursuant to section 37(1) of the Senior Courts Act 1981 (SCA 1981) to restrain the Defendant ('SQO') from pursuing proceedings against the Owners in Vietnam (the 'Vietnamese action'), in breach of an arbitration agreement providing for an ad hoc arbitration in London, United Kingdom. Additionally, the Court granted a mandatory injunction, thereby directing the Defendant to take the necessary steps to stay the proceedings in Vietnam.

Arbitral tribunal's global rejection of 'fishing expedition' upheld by Swiss Federal Tribunal [SFT 4A_438/2020, May 2021]

The arbitral tribunal rejected several document production requests considering them a so-called 'fishing expedition' without any specific further explanations on the individual requests. The Swiss Federal Tribunal (SFT) dismissed an application to set aside the award for an alleged infringement of the right to be heard. Overly broad phrasing of requests in terms of 'any and all' documents without specific explanations on the relevance of these documents for the decision and no further reasoning is required. The Swiss Federal Tribunal also noted that both parties confirmed after the hearing that they had no objections on the manner in which the proceedings were conducted. For these reasons in particular, the setting aside application was dismissed.

UNCITRAL — Casino operator prevails in arbitration over Ukraine gambling ban [Olympic Entertainment Group v Ukraine, May 2021]

An Estonian casino operator has prevailed in an investment treaty arbitration brought against Ukraine after the state hastily passed a gambling ban just over a month after a deadly fire in a gambling hall, obtaining €7.5m after a tribunal appointed under the United Nations Commission on International Trade Law Arbitration Rules found the ban to be a disproportionate response. The Permanent Court of Arbitration (PCA) acted as registry in the case.

Express allegation, consideration or finding of substantial injustice not required for establishing 'serious irregularity' under Section 90, Bahamas Arbitration Act, 2009 [RAV Bahamas Ltd. v. Therapy Beach Club, Privy Council, UK May 2021].

Allowing the Appellant's appeal, the Privy Council stated that, while it was a good and desirable practice to establish express allegation, consideration or finding under Sec. 90, Bahamas Arbitration Act, 2009, it is not a mandatory requirement under the section.

Civil Justice Reform proposal (Italy, April 2021)

Within the frame of Next Generation EU, the European Union's recovery and resilience plan, the Italian Council of Ministers approved the National Recovery and Rehabilitation Plan and is under review for final approval by Parliament. It appears to be a game changer with regard to ADR, which will be implemented in a variety of additional legal subject matters, with new fiscal benefits for the parties. The use of mediation and assisted negotiation is expected, together with digitization of the judicial process, to change for good judicial efficiency and cultural awareness of these complementary instruments in the administration of justice.

ASIA

Anti-arbitration injunction possible when there is a conflict between exclusive jurisdiction clause and arbitration clause with a foreign seat [MISC Berhad v. Cockett Marine Oil (Asia) Pte Ltd., High Court of Malaysia, Malaysia, May 2021].

While considering a matter involving a conflict between the exclusive jurisdiction clause, which vested exclusive jurisdiction in Courts of Malaysia and an arbitration agreement providing for a foreign seat, the High Court of Malaysia issued an anti-arbitration injunction to stay the arbitration proceedings in London, United Kingdom holding that the Courts in Malaysia have jurisdiction over the dispute due to the jurisdiction clause.

Ministry of Justice, Russian Federation approves Permanent Arbitral Institution status to SIAC [Ministry of Justice, Russian Federation]

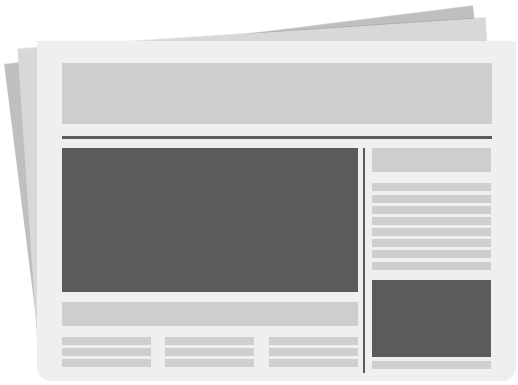
The Ministry of Justice of the Russian Federation has granted approval for ICC and SIAC to be registered as a permanent arbitral institution ('PAI'), thereby authorising them to administer international commercial arbitrations when the seat is Russia. With this step, Arbitration tribunals under ICC and SIAC will be able to fortify their presence in the Russian dispute resolution ecosystem, apart from presiding over international commercial arbitrations & corporate disputes concerning Russian companies.

The Madras High Court admits petition challenging the validity of the Madras High Court Arbitration Rules, 2020 [Sivakumar v. Registrar General, High Court of Judicature at Madras and Ors., Madras High Court]

A bench comprising of Chief Justice Banerjee and justice Senthilkumar admitted a Writ Petition challenging the validity of the Madras High Court Arbitration Rules, 2021 for being inconsistent with the provisions of the Arbitration and Conciliation Act, 1996 and the Commercial Courts Act, 2015. Additional grounds for the challenge include claims of the rules being bereft of a procedure in consonance with Art. 14 of the Constitution of India; Lack of parliamentary assent for the impugned rules; provision transferring the proceedings before a Court which isn't a Principal Court of original jurisdiction

Presence of Arbitration Clause does not bar Writ Jurisdiction under Article 226, Constitution of India [UP Power Transmission Corp. Ltd. v. CG Power, Supreme Court of India].

The Supreme Court of India, while considering a contract between a state instrumentality and a private party held that the mere presence of an Arbitration Clause in the contract will not bar the party from availing remedies available under Article 226, Constitution of India. The Court held that the concerned High Court may entertain the writ after satisfying that the writ has been filed for enforcement of fundamental right; where there has been violation of principles of natural justice; where the impugned orders are ultra vires etc.



AFRICA

Libya's corruption challenge to treaty award fails before Paris cour d' appel [Cour d' Appel, Paris].

While upholding an investment treaty award worth US $ 51 million against Libya, the Paris cour d' appel rejected Libya's allegations of corruption. Additionally, the Court observed that the legality of the investments made by the claimants was to be decided by the arbitrators.

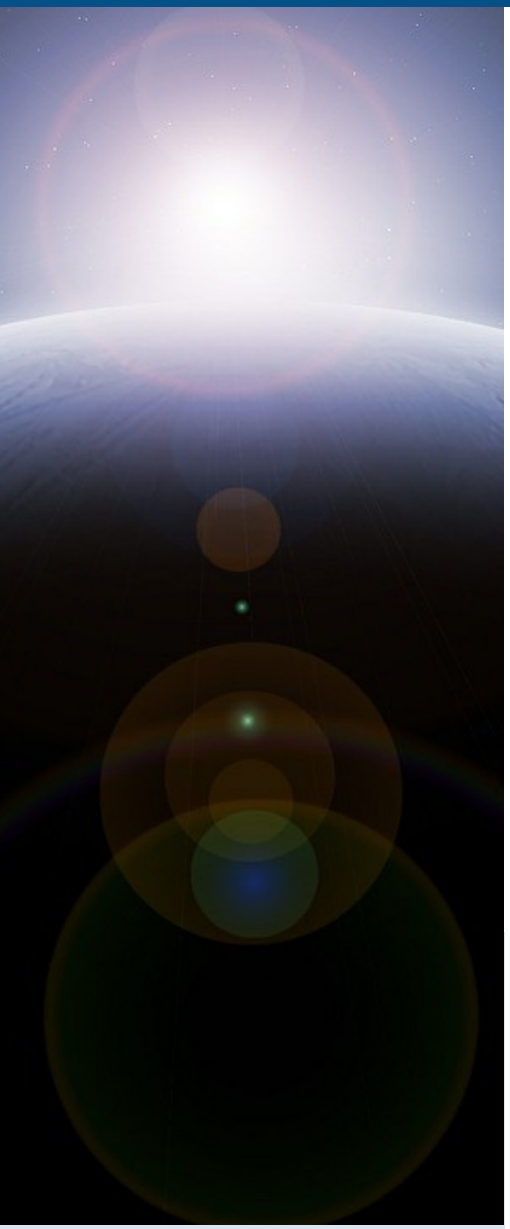
AUSTRALIA

Arbitration agreements, even if too wide, will nonetheless require parties to settle disputes through arbitration under the Commercial Arbitration Act, 2013 [Cheshire Contractors Pty Ltd v. Civil Mining & Construction Pty Ltd, Supreme Court of Queensland, Australia].

The Supreme Court of Queensland reiterated the commitment of Australian Courts to enforce an arbitration clause without letting it get affected by its broad terms. The Court observed that if an agreement was drafted too broadly, that will not be a standalone ground to render it unenforceable.

An application which may be filed for setting aside an arbitral award should not be used in a way, so as to "manufacture a pathway" to an appeal which would not stand otherwise [Venetian Nominees Pvt. Ltd. v. Weatherford Australia Pty Ltd., Supreme Court of Western Australia, Australia].

The Supreme Court observed that the Claimant's application to set aside an arbitral award against it on the grounds that the Claimant was not given a fair opportunity to present their case, was rather an attempt to, "manufacture a pathway" to appeal when there was none. Denying the Claimant's application, the Court held that such applications cannot be allowed for them being bereft of merits which would satisfy the Courts otherwise.



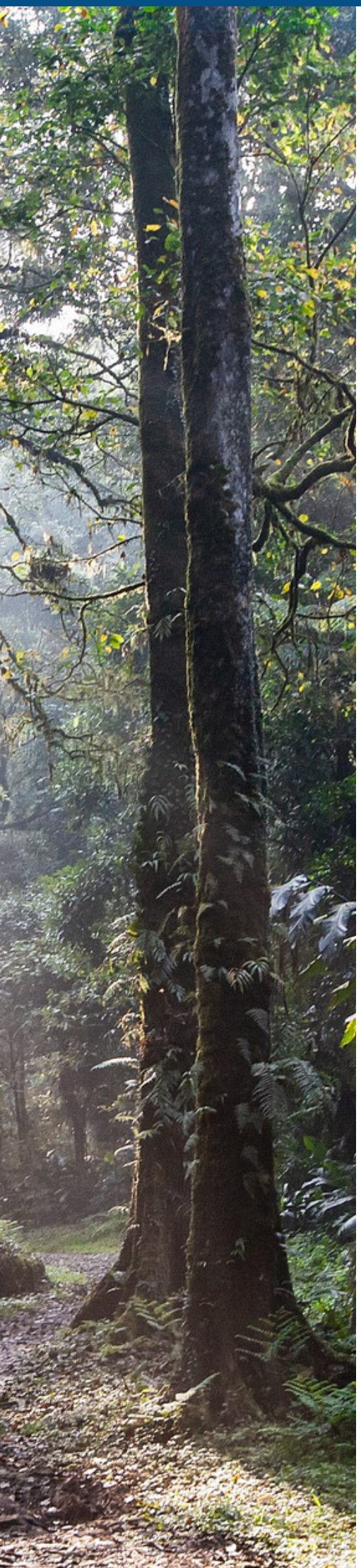
ADOPTING THE GREEN ARBITRATION PROTOCOLS INTO PRACTICE: INITIATING STEPS TOWARDS ENVIRONMENTALLY SUSTAINABLE ARBITRATIONS

- Mr. Arijit Sanyal

Technical and functional suitability of international arbitration has led to its wider acceptance as an effective mode of dispute resolution. However, this achievement has come at the cost of underestimating the environmental impact of the proceedings, which has become a grave concern for the global arbitration community ('community'). With the global climate change discourse gaining momentum, the recently published Green Protocols ('protocols') may have provided the perfect backdrop to practitioners, arbitral institutions, law firms and parties alike to do their bit in minimising the environmental impact of arbitration proceedings. Initiated by Lucy Greenwood, the Campaign for Greener Arbitration ('campaign') envisions a detailed framework for furthering its core tenets through a set of non-obligatory protocols. Though non-obligatory, the protocols present different but similar set of measures to be adopted by arbitral institutions, arbitrators, law firms and parties during proceedings to minimise the carbon footprint at their own level. Based on the premise, that by introspecting the conduct of arbitration proceedings and allied activities such as the need for long-haul flights; use of hard-copies and bundles; using disposable cups, and acting on it, the community can substantially reduce the environmental impact thereby making arbitrations more sustainable. The community stands at a juncture where the environmental impact of proceedings and conferences in particular cannot be disregarded anymore. While party autonomy has enabled parties to flock to global arbitration hubs such as Singapore, Paris, London etc., their choice for experienced non-resident arbitrators has unknowingly amplified the environmental impact of the proceedings. While the choice of an arbitrator has a nexus with the requirements of the dispute, technical expertise and experience, arbitrators, unlike judges of national courts may not be habitual residents of the seat, which may require them to take long-haul flights on regular intervals. Additionally, preliminary hearings too may contribute to the already severe environmental impact, when representatives of parties may fly in to the seat to agree on a procedural framework. As stated by the steering committee, long-haul flights alone are responsible for 75% of the total carbon footprint of a medium sized arbitration,

"THE GREATEST THREAT TO OUR PLANET IS THE BELIEF THAT SOMEONE ELSE WILL SAVE IT."

- ROBERT SWAN



which requires planting of 20,000 trees for offsetting the impact. The protocols aim to address the concern engulfing flights by encouraging tribunals and parties to avoid taking long-haul flights, unless absolutely necessary, apart from finalising the procedural framework by way of video conferencing [IX A, Protocols for Arbitral Institutions], which apart from lessening the environmental impact, would end up saving considerable time and capital of the concerned parties. Moving forward, considerable institutions do not have their own arbitration centers as a result of which arrangements have to be made at hotels or conference centers in the vicinity of the seat. In pursuit of making multiple arrangements for a proceeding, the organisers often overlook energy usage of the concerned facility. To tackle this efficiently, the protocols encourage the organisers to deliberate on reducing the consumption of non-renewable energy and work with the representatives of the facility to introduce environmentally sustainable measures such as discerning the source of energy, setting up of solar cells for the purpose of the proceedings, stressing on the use of LED lights, having adequate recycling facilities [VI C, Protocols for Arbitral Institutions] and so on. Additionally, the protocols envision a Green Ambassador, responsible for framing policies concerning green measures to be taken during a proceeding. However, the protocols being silent on the powers of the ambassadors, institutions should move a step ahead and consider appointing a high-ranking official vested with wide discretionary powers in order to make prompt sustainable arrangements apart from adopting necessary measures either at the institution's own facility or with the property manages of the external facility where the proceedings are to be conducted. Additionally, if these facilities are hotels, the ambassador should stress on arranging reusable cutlery [VII, Protocols for Arbitral Institutions], coffee cups and plates in order to minimize non-biodegradable . waste coming through the proceedings such as plastic cups, recyclable cutlery, soft-drink cans etc. Whatever institutions, firms and parties may do collectively, lack of consensus and individual efforts will most likely jeopardize the campaign at a nascent stage itself. Which is why the institutions need to approach protocols concerning incentivisation and social responsibility pragmatically. In furtherance of the concerned protocols [X, Protocols for Arbitral Institutions], the institutions should bring in workplace policies which requires the staff to commute via public/ non-motorized transport, which would reduce carbon footprint on their individual levels. Additionally, institutions should consider parting ways with desktops and asking their staff to being their own notebooks and tablets, considering the latter's energy consumption being 1/4th of desktops. Furthermore, instead of getting their itinerary and work-related documents on a daily basis, institutions should step in to encourage and incentivize employees to communicate digitally through dedicated workspace chat boxes, apart from preferring e-mails over print-outs of the relevant documents. However, the perils surrounding cyberspace can jeopardize the virtual path recommended by the protocols, which is where the institutions should step in to collaborate with the tech giants, something which the protocols have not considered, for the purpose of creating dedicated workspace repositories which are safer than those accessible to the general public.

Considering the varying nature and size of arbitration proceedings, the steering committee has left it to the institutions and concerned parties, to ponder upon the measures best suitable to them. However, the non-obligatory and flexible nature of the protocols should not be the reason for institutions to undermine the directions envisioned by the steering committee, rather, the intended flexibility should be capitalised by the concerned parties to further the agenda of sustainable arbitrations individually and collectively.

Events

Upcoming events by MediateGuru

8th International Workshop on ADR (18-20 June 2021)

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

INTERNSHIP OPPORTUNITIES

OPPORTUNITY 1

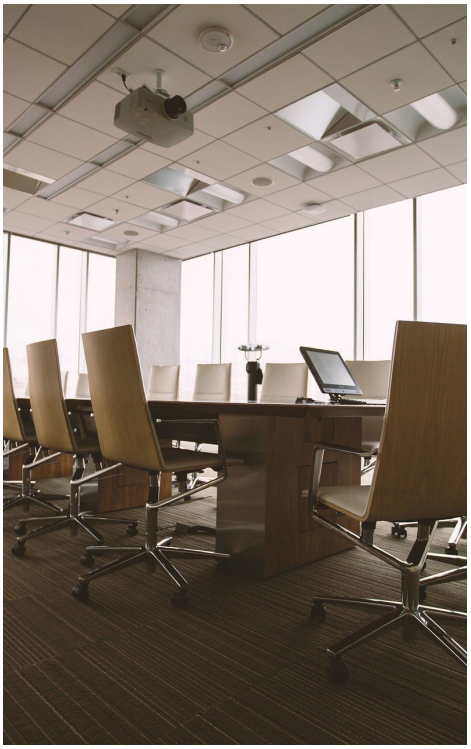
INTERNATIONAL CHAMBER OF COMMERCE

Apply at -
https://iccwbo.org/careers/internship-opportunities/

OPPORTUNITY 2

INDIAN INSTITUTE OF ARBITRATION AND MEDIATION

Apply at -
dir@arbitrationindia.com



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.

PHILANTHROPISTS

MR. PARAM BHAMRA
(Founding Partner, MediateGuru)

MR. ADITYA MATHUR
(Founding Partner, MediateGuru)

NEWSLETTER TEAM

Ms. Mallika Arora
(Editor-in-Chief)

Mr. Arijit Sanyal
(Managing Editor)

Ms. Federica Simonelli
(Technical Editor)

Mr. Gerald Musengi
(Associate Editor)

Ms. Nujhat Tashnim
(Associate Editor)