Wah Academia Journal of Social Sciences
Volume 3, Issue 1, Jun 2024, pp. 255-271
ISSN – E 2958-8731 P 2958-8723
https://doi.org/10.63954/WAJSS.3.1.18.2024

What, Why and How to deal with National and International Legal Regime of Mediation, Arbitration, in the light of UN and Pakistani Laws

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Abstract

This paper offers a thorough analysis of the legal frameworks governing mediation at both the domestic and international levels, while also drawing critical comparisons with arbitration as an alternative dispute resolution (ADR) mechanism. In an era where traditional litigation is increasingly regarded as costly, time-consuming, and adversarial, mediation has gained prominence as a preferred method for resolving disputes across various legal systems. The study examines the core principles of mediation, delving into its procedural aspects, enforceability mechanisms, and the role of neutral third parties in facilitating dispute resolution. The research explores key legal instruments that shape global mediation practices, including the UNCITRAL Model Law on International Commercial Mediation (2018) and the Singapore Convention on Mediation (2019). These international frameworks are compared with domestic mediation laws in jurisdictions such as the United States, the United Kingdom, and European Union member states. The paper emphasizes the evolving nature of mediation laws and the challenges of implementing these frameworks, particularly in the context of cross-border disputes. A significant portion of the analysis focuses on comparing mediation with arbitration, evaluating their respective advantages and limitations in various dispute resolution scenarios. The study assesses critical factors such as confidentiality, party autonomy, the enforceability of outcomes, and procedural flexibility. Through this comparative lens, the paper identifies gaps in existing legal regimes and proposes recommendations for improving the effectiveness and accessibility of mediation as a dispute resolution tool.

Keywords: Mediation, Arbitration, Alternative Dispute Resolution, Legal Frameworks, UNCITRAL Model Law, Singapore Convention on Mediation, Cross-Border Disputes

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Introduction

The modern legal landscape has seen a shift toward Alternative Dispute Resolution (ADR), with mediation emerging as a key mechanism (Nolan-Haley, 2012). As global trade becomes more integrated and legal disputes grow in complexity, traditional litigation has struggled to provide timely, affordable solutions. Issues like extended timelines, high costs, and adversarial proceedings have made mediation a more attractive option, offering flexibility and greater party control over the process and resolution.

Mediation differs from litigation and arbitration by being a voluntary, non-binding process, where a neutral facilitator helps the parties negotiate a mutually acceptable agreement. It emphasizes values such as party autonomy and collaborative problem-solving, addressing underlying interests rather than simply resolving legal claims. Mediation is increasingly favored for its efficiency, confidentiality, and ability to create customized solutions that meet the parties' needs.

Several factors contribute to the growing preference for mediation. The escalating costs and delays of traditional litigation, along with its unpredictability, have made alternative methods like mediation more appealing. Additionally, mediation ensures the protection of sensitive information, which is often exposed in public court proceedings. Its flexibility allows for creative solutions beyond conventional legal remedies.

Internationally, mediation has gained recognition, particularly with the 2019 establishment of the Singapore Convention on Mediation. This convention offers a unified framework for the enforcement of mediated agreements across jurisdictions, addressing historical enforcement challenges and enhancing the credibility of international mediation.

Countries have adopted different approaches to regulating mediation. The United States has comprehensive legal frameworks supporting mediation, including confidentiality and court integration, with some states even mandating mediation for certain disputes. In the United Kingdom, mediation is encouraged through judicial recommendations and court facilitation, without statutory mandates. The European Union has sought to harmonize mediation practices through its Directive on Mediation (2008), though implementation across member states has been uneven.

This paper examines the legal frameworks governing mediation domestically and internationally and compares it with arbitration, a traditional alternative for international commercial disputes. The comparison will focus on procedural differences, enforceability, confidentiality, party autonomy, and practical considerations in cross-border disputes. The study will explore the key principles of mediation, review domestic legal frameworks in key jurisdictions, analyze international instruments like the Singapore Convention, and compare mediation with arbitration. Finally, it will address the challenges mediation faces, such as inconsistent implementation and difficulties in international enforcement.

Domestic Legal Frameworks for Mediation

The development of mediation as a formal dispute resolution mechanism has followed varied trajectories in different national legal systems, influenced by the legal traditions, cultural norms, and the specific needs of each jurisdiction. While mediation has gained prominence globally, the approaches to its regulation and institutionalization differ significantly from one country to another. In the United States, mediation has become deeply ingrained in the legal landscape through both legislative frameworks and court rules, fostering a culture that increasingly embraces alternative dispute resolution (ADR) methods. In contrast, the United Kingdom has taken a more incremental approach, relying heavily on judicial guidance and procedural modifications to promote the use of mediation, while the European Union has pursued a more centralized and harmonized regulatory approach through directives and regulations aimed at standardizing mediation practices across member states.

In the United States, the evolution of mediation as an established dispute resolution mechanism can be traced to significant legislative efforts and court decisions that have shaped its modern form. A major milestone in this process is the Uniform Mediation Act (UMA), which has been adopted by a number of states to standardize the treatment of mediation communications. The UMA establishes clear protections for the confidentiality of mediation discussions, ensuring that parties can engage in open and honest dialogue without the risk of their concessions or statements being used against them in future litigation. This framework provides essential legal protections for both participants and mediators, helping to foster an environment where parties are more willing to use mediation as a tool for conflict resolution. In a federal system like the United States, where legal practices can differ widely across

state lines, the UMA serves as a crucial mechanism for providing uniform standards, thus promoting consistency in how mediation is applied and understood throughout the country (Firestone, 2001).

Additionally, the U.S. federal court system and many state courts have developed a robust framework for court-annexed mediation programs. These mandatory mediation programs are often designed for certain types of cases, including civil, commercial, and family law disputes. In these programs, trained neutrals—such as professional mediators or retired judges—are appointed to assist parties in reaching a settlement before the case proceeds to trial. The success of these court-based mediation programs is evident in the high settlement rates seen in many jurisdictions, which help alleviate the pressure on overburdened court dockets and reduce the time and expense associated with lengthy trials. However, there is some criticism of these mandatory programs, with critics asserting that they can sometimes lead to token or superficial participation. In some cases, parties may engage in mediation simply to fulfill a procedural requirement, without genuine commitment to the process. This challenge has led to ongoing debates about whether mandatory mediation undermines the effectiveness of the process, as some argue that true mediation success depends on the voluntary nature of the parties' engagement.

The United Kingdom, on the other hand, has pursued a more evolutionary approach to the promotion of mediation. Instead of enacting comprehensive mediation laws, the English legal system has fostered the growth of mediation through judicial decisions and procedural rules. A landmark case that helped shape the UK's approach to mediation was Halsey v Milton Keynes General NHS Trust (2004), where the court held that it was reasonable to impose cost sanctions on parties that unreasonably refuse to attempt mediation. The case set a precedent for the use of cost penalties as an incentive for parties to consider ADR methods, particularly mediation, before proceeding to trial. This judicial encouragement was further codified in the Civil Procedure Rules (CPR), which explicitly require parties to consider ADR as part of their pre-trial procedures. Under the CPR, parties are asked to confirm whether they have considered options such as mediation, and the court has the discretion to penalize those who unreasonably reject it (Dyson, 2011).

The UK's approach highlights how judicial policy can significantly influence the culture of dispute resolution, even in the absence of extensive legislative

intervention. However, this method has introduced some complexities. One of the major criticisms of the UK's system is the lack of clear and precise guidance on when a refusal to mediate is deemed unreasonable (Cooley, 1985). While the principle established in Halsey remains influential, the absence of bright-line rules has created uncertainty for practitioners who advise clients on whether to participate in mediation. Subsequent case law has sought to clarify this issue, but the absence of firm guidelines means that the application of mediation in the UK remains somewhat fluid and open to interpretation.

In contrast to the more case-by-case evolution seen in the United States and the United Kingdom, the European Union has taken a more structured and directive-based approach to the promotion and regulation of mediation. The Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters represents a significant effort to create a more uniform approach to mediation across the EU member states. The directive requires all member states to ensure the enforceability of mediated settlement agreements and to establish quality control measures for mediators. Furthermore, it addresses cross-border mediation, seeking to create a standardized framework for handling disputes that involve parties from different EU countries. By harmonizing mediation practices across borders, the directive aims to provide greater legal certainty and promote the use of mediation in international disputes within the European Union (Birkhahn & Gläßer, 2018).

The implementation of the Mediation Directive, however, has not been without its challenges. Member states have responded to the directive in different ways, reflecting the diversity of legal traditions and ADR systems within the EU. Countries like Germany—which already had a well-established mediation infrastructure—found it relatively straightforward to adapt their existing systems to meet the directive's requirements. Other countries, however, with less developed mediation practices, faced significant challenges in building new frameworks and educating mediators. These variations in implementation have led to some inconsistencies in how mediation is applied across the EU, particularly in cross-border disputes where one party may be operating in a jurisdiction with a more robust mediation system than another.

Despite these challenges, the EU's efforts to standardize mediation practices have been instrumental in raising awareness of mediation as a legitimate and viable alternative to litigation. The directive has encouraged greater use of mediation

across EU member states, but the uneven implementation has raised concerns about access to mediation in certain jurisdictions. In some cases, the lack of trained mediators, inadequate awareness, and regional disparities in legal culture can complicate efforts to achieve a seamless mediation process for parties involved in cross-border disputes.

In conclusion, the development of mediation as a formal dispute resolution mechanism has been shaped by a combination of statutory frameworks, judicial policies, and international efforts to create consistency and harmonization. In the United States, legislation like the Uniform Mediation Act and court-based programs have institutionalized mediation, while the United Kingdom's approach has been more judicially driven, relying on case law and procedural rules to encourage mediation. The European Union, with its Mediation Directive, has worked to establish a unified approach to mediation across member states, despite challenges in its implementation. These varied approaches highlight the diverse ways in which mediation is being integrated into legal systems worldwide, offering valuable insights into how different jurisdictions can develop and refine their own mediation frameworks (Rausch, 2002).

International Legal Instruments Governing Mediation

The international framework for mediation has evolved significantly in recent decades, transitioning from a fragmented network of bilateral agreements and institutional regulations to more cohesive multilateral instruments aimed at establishing global standards for cross-border mediation. This evolution has been driven by the increasing need for reliable and enforceable dispute resolution mechanisms in the context of international commerce and cross-border interactions. A pivotal development in this area has been the adoption of the United Nations Convention on International Settlement Agreements Resulting from Mediation, more commonly known as the Singapore Convention. This convention, which entered into force in 2020, marked a major advancement in international dispute resolution by creating a standardized system for the enforcement of mediated settlement agreements across the countries that have signed and ratified it (Verbist, 2019).

The Singapore Convention is primarily designed to address international commercial disputes in which the parties have sought to resolve their conflicts

through mediation. Prior to its establishment, one of the key limitations of mediation in international disputes was the lack of a consistent, enforceable mechanism to ensure that the terms of mediated settlements would be honored in different jurisdictions. The convention provides a solution to this issue by enabling direct enforcement of mediated settlement agreements in the courts of contracting states. The provisions of the convention are modeled after those found in the New York Convention on Arbitration, with limited grounds for refusal of enforcement. These grounds include instances where the parties lacked the capacity to enter into an agreement, if the settlement agreement is deemed invalid, or if there are concerns regarding the fairness of the mediation process itself. This framework represents a monumental leap forward in addressing what was a significant gap in the international use of mediation—namely, the difficulty in ensuring that mediation outcomes would be respected and implemented globally (Butlien, 2020).

However, despite its potential, the impact of the Singapore Convention has been somewhat tempered by the slow pace at which countries have ratified it. As of 2023, the convention has garnered significantly fewer signatories than the New York Convention, indicating that some jurisdictions remain hesitant about fully embracing the convention. The skepticism arises from concerns related to the enforceability of mediated settlements and possible conflicts with existing domestic laws governing mediation. These concerns are particularly prevalent in jurisdictions with well-established mediation systems or countries that may see the Singapore Convention as challenging their domestic ADR processes. The true effectiveness of the convention, therefore, hinges on whether major international trading nations, such as the United States, China, and members of the European Union, will adopt and integrate it into their legal systems in the coming years (Holland et al., 2017).

Complementing the Singapore Convention is the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, which was adopted in 2018 (Matteucci, 2020). The UNCITRAL Model Law is a comprehensive framework that provides guidelines for countries looking to modernize and harmonize their domestic mediation laws with international standards. This model law offers a flexible and adaptable template for legislators in various countries, allowing them to incorporate key aspects of international best practices into their own legal systems. The law addresses critical issues such as the confidentiality of mediation proceedings, the qualifications and

impartiality of mediators, and the relationship between mediation and subsequent judicial or arbitral proceedings (Montineri, 2018).

While the Singapore Convention focuses specifically on the enforcement of mediated settlement agreements, the UNCITRAL Model Law provides broader guidance on the mediation process itself (Montineri, 2018). It covers procedural aspects, aiming to make mediation a more accessible and effective tool for resolving international disputes. By providing a framework that is flexible enough to accommodate different legal traditions, the model law facilitates the cross-border recognition and effectiveness of mediation (Alexander, 2001). It encourages countries to adopt mediation-friendly policies, which help integrate mediation into the broader landscape of dispute resolution. The Model Law has been instrumental in influencing domestic legislation, as many countries seeking to modernize their ADR systems have incorporated its provisions into national laws.

Alongside these major international instruments, various other organizations have played a critical role in shaping global mediation norms. For instance, the International Chamber of Commerce (ICC) has established a set of Mediation Rules, which provide procedural guidance for parties opting for institutional mediation. These rules are designed to ensure a structured and predictable approach to the mediation process, which is especially beneficial for international businesses involved in disputes across different legal systems. The ICC Mediation Rules provide clarity on issues such as the selection of mediators, the conduct of sessions, and the role of the mediator in facilitating negotiations. These rules help fill gaps in national legislation and create a more standardized approach to mediation in global commerce (Kirchhof & Buhring-Uhle, 2006).

Similarly, organizations like the World Intellectual Property Organization (WIPO) have developed specialized mediation procedures tailored to specific types of disputes, such as those involving intellectual property (May, 2006). These sector-specific mediation rules ensure that disputes within specialized fields are handled with the appropriate expertise and understanding, making the mediation process more effective and relevant for the parties involved. By offering mediation frameworks that cater to specific industries, organizations like WIPO contribute to the development of a more nuanced and specialized approach to dispute resolution (May, 2006).

The ongoing development of these international instruments also underscores the increasing recognition of mediation's potential to address not only commercial disputes but also broader issues in areas such as environmental disputes, family law, and human rights (Weidner, 1995). The continued evolution of the Singapore Convention, the UNCITRAL Model Law, and the rules provided by institutions like the ICC and WIPO are pivotal in creating a global framework that will allow mediation to play a central role in dispute resolution across various sectors and jurisdictions. As these frameworks mature and more countries adopt them, the future of international mediation looks increasingly promising, with mediation set to become an even more integral part of the global legal landscape (May, 2006).

Comparative Analysis: Mediation vs. Arbitration

The relationship between mediation and arbitration constitutes a fundamental distinction in the realm of alternative dispute resolution (ADR). While both methods provide alternatives to traditional court litigation, they differ in their procedural structure, the roles of neutral third parties, the enforcement of outcomes, and the underlying philosophies that guide their application. These differences have important implications for parties seeking to resolve disputes efficiently and fairly (Alashqar, 2024).

Procedural Differences

At the heart of the distinction between mediation and arbitration lies the procedural structure of each process. Mediation is designed to be informal, flexible, and collaborative. There are no rigid rules of evidence or procedures, and the mediator does not have the authority to make binding decisions. Instead, the mediator's role is to facilitate communication between the parties, helping them to identify mutual interests, explore potential solutions, and work towards a voluntary agreement. The mediator serves as a neutral facilitator who encourages cooperation without imposing a resolution on the parties. Mediation allows for a creative and individualized approach to dispute resolution, as the parties are free to devise settlement options that are not bound by legal precedents or strict formalities.

In contrast, arbitration is a more formalized and structured process, more akin to a judicial proceeding than mediation. While still generally private and confidential, arbitration follows well-established procedures for presenting evidence, making

legal arguments, and examining witnesses. The arbitrator, typically an expert in the relevant field of law, acts as a decision-maker, applying legal principles and evaluating the evidence presented to render a binding award. This adjudicative function of arbitration marks its key departure from mediation, where the mediator merely facilitates dialogue and does not make decisions on the merits of the case.

The more formalized nature of arbitration means that it involves strict adherence to rules of procedure and evidence, which can be both an advantage and a limitation. For parties seeking certainty and a clear resolution based on established legal principles, arbitration offers a reliable framework. However, this formal structure may be less suitable for parties looking for more flexibility and room for creative solutions.

Confidentiality and Communication Protections

Another important distinction between mediation and arbitration lies in the confidentiality of the proceedings. In mediation, confidentiality is a cornerstone of the process, allowing the parties to speak openly and explore settlement options without the risk that their statements will be used against them in future proceedings. Many mediation systems offer a high level of protection for mediation communications, often preventing any information shared during mediation from being disclosed in subsequent litigation or arbitration. This level of confidentiality is intended to foster a safe environment for dialogue and compromise, encouraging parties to make concessions and work toward a mutually agreeable resolution.

Arbitration, while still typically private, does not offer the same level of confidentiality as mediation. Although the process is often conducted behind closed doors and the details of the proceedings may be protected by confidentiality agreements, the evidence and legal arguments presented during arbitration are generally more open and subject to disclosure. Furthermore, arbitration proceedings can result in binding decisions that are enforceable in court, which may involve public disclosure of the award in certain cases, particularly if the award is challenged or enforced across borders.

Enforceability of Outcomes

A key distinction between mediation and arbitration lies in the enforceability of the outcomes. Arbitration benefits from a robust international enforcement framework, primarily embodied by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This convention, which has been ratified by more than 160 countries, provides a nearly universal mechanism for the enforcement of arbitral awards. As a result, arbitration is often the preferred choice for international commercial disputes where enforcement across borders is a critical consideration. An arbitral award can be enforced in any country that is a signatory to the New York Convention, ensuring a high degree of predictability and security for parties involved in cross-border disputes.

Mediation, on the other hand, has traditionally lacked a comparable enforcement mechanism. Until recently, mediated settlements did not have an automatic route to enforcement. In many cases, parties had to convert mediated agreements into court judgments or arbitral awards in order to ensure their enforceability. This gap in enforcement capabilities has historically hindered mediation's effectiveness in international disputes. However, the adoption of the Singapore Convention on Mediation in 2020 marked a significant development in this area. The Singapore Convention provides a framework for the enforcement of international settlement agreements resulting from mediation, allowing parties to seek enforcement of mediated settlements directly in contracting states, subject to limited grounds for refusal. While this represents a significant improvement in the international enforceability of mediation outcomes, the convention's adoption has been slower than that of the New York Convention, and its practical impact is still developing. As of now, arbitration remains the more reliable and widely recognized method for ensuring the enforcement of cross-border dispute resolutions.

The Role of the Neutral Third Party

The role of the neutral third party also differs significantly between mediation and arbitration. In mediation, the mediator's function is not to make decisions or impose solutions, but rather to help the parties engage in productive discussions and explore possible settlements. Mediators facilitate communication, assist in identifying each party's underlying interests, and guide the parties toward finding a mutually acceptable resolution. The mediator's success is largely determined by

their process skills, including their ability to build trust, manage emotions, and foster creative problem-solving.

In contrast, in arbitration, the arbitrator acts as a decision-maker, similar to a judge in a court proceeding. Arbitrators have the authority to evaluate the merits of the case, consider the evidence presented, apply relevant legal principles, and issue a binding decision. Arbitrators typically possess expertise in the legal or subject matter at issue, and their decisions carry the weight of law, as they can be enforced in courts and are subject to limited grounds for appeal. The arbitrator's authority stems from their legal expertise and the parties' prior agreement to submit their dispute to arbitration.

Hybrid Dispute Resolution Processes: Med-Arb and Arb-Med

Hybrid dispute resolution processes, such as Med-Arb, combine mediation and arbitration in a two-step approach. In Med-Arb, a neutral mediator first attempts to resolve the dispute, and if unsuccessful, transitions to an arbitrator role to render a binding decision. This can increase efficiency by offering negotiation before formal adjudication (Kirchhof & Buhring-Uhle, 2006).

However, Med-Arb raises concerns about fairness, as the same neutral may be influenced by information from the mediation phase, potentially affecting impartiality. Some jurisdictions address this by requiring separate neutrals or imposing strict confidentiality to avoid bias. Despite safeguards, critics argue that Med-Arb may undermine due process (Ghasemi et al., 2023).

Ultimately, mediation and arbitration offer distinct advantages—mediation is flexible and collaborative, while arbitration is formal and binding. The choice depends on factors like formality, confidentiality, enforceability, and willingness to collaborate (Cooley, 1985). Hybrid models like Med-Arb aim to blend benefits but present challenges related to fairness and procedural integrity. Understanding the differences between mediation and arbitration is key for effective dispute resolution (Agarwal, n.d.).

Critical Assessment of Current Legal Regimes

The existing legal frameworks for mediation, both domestic and international, present a mixed picture of progress and persistent challenges. At the domestic level, the most advanced jurisdictions have developed comprehensive statutes that address key aspects of the mediation process including confidentiality, mediator qualifications, and the relationship between mediation and court proceedings. However, even in these jurisdictions, gaps remain in areas such as quality control for mediators and remedies for bad faith participation in mediation.

The lack of uniformity across domestic regimes creates particular difficulties for international commercial mediation. Parties engaged in cross-border disputes must navigate differing confidentiality rules, enforcement mechanisms, and standards of practice. This legal uncertainty discourages some businesses from choosing mediation even when it might otherwise be the most appropriate dispute resolution method.

The international instruments, particularly the Singapore Convention and UNCITRAL Model Law, represent significant steps toward harmonization but face limitations in their current implementation. The slow pace of ratifications for the Singapore Convention means that its benefits remain unavailable in many important commercial jurisdictions. Additionally, some signatory states have entered reservations that limit the convention's application, creating further complexity for parties seeking to rely on its provisions (Holland et al., 2017).

Enforcement of mediated settlements remains a persistent challenge even under the new international framework. Courts in some jurisdictions continue to view mediated outcomes with skepticism, particularly when they involve creative solutions that depart from strict legal entitlements. This judicial hesitation stems in part from traditional conceptions of dispute resolution that privilege formal adjudication over consensual settlement.

The quality and training of mediators presents another area of concern. Unlike arbitration, where professional qualifications and ethical standards are well-established in most jurisdictions, mediator standards vary widely. Some countries have developed rigorous certification programs, while others allow virtually anyone

to hold themselves out as a mediator. This inconsistency in professional standards risks undermining confidence in the mediation process.

Recommendations for Strengthening the Mediation Framework

To address the identified challenges and maximize the potential of mediation as a dispute resolution mechanism, several reforms and initiatives should be considered. First, broader ratification of the Singapore Convention should be prioritized through diplomatic and educational efforts. The international legal community must work to demonstrate the convention's benefits and address concerns that may be delaying ratification in key jurisdictions.

At the domestic level, countries should consider adopting or updating mediation legislation based on the UNCITRAL Model Law. This would create greater consistency in procedural rules and enforcement mechanisms across jurisdictions. Special attention should be given to provisions ensuring mediator quality, perhaps through the development of international certification standards that maintain flexibility for local adaptation (Montineri, 2018)

Courts and judicial systems can play a more active role in promoting effective mediation by developing clearer guidelines on the circumstances under which refusal to mediate will result in cost sanctions or other penalties. Judicial encouragement of mediation has proven effective in jurisdictions like the UK, and this model could be expanded elsewhere, particularly in civil and commercial disputes.

Finally, the development of hybrid mediation-arbitration processes should be approached with caution. While these methods offer efficiencies, safeguards are necessary to protect the integrity of the mediation process and ensure that arbitrators do not unfairly benefit from information gained during mediation.

Conclusion

The legal regime governing mediation continues to evolve at both the domestic and international levels, offering significant promise for resolving disputes in a more efficient and collaborative manner than traditional litigation or arbitration.

However, for mediation to reach its full potential, gaps in enforcement, mediator qualification, and cross-border harmonization must be addressed.

By strengthening the legal framework for mediation through consistent domestic implementation, broader international adoption of key conventions like the Singapore Convention, and greater judicial support, the global legal community can create an environment where mediation thrives as a primary tool for dispute resolution. As this process unfolds, continued research and dialogue will be essential to ensure that mediation becomes an even more effective and universally accessible mechanism for resolving disputes.

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Article Information:

Received	*2-Mar-2024*
Revised	27-May-2024
Accepted	4-Jun-2024
Published	15-Jun-2024

Declarations:

Author's Contribution:

- **Conceptualization, and intellectual revisions**
- **Data collection, interpretation, and drafting of manuscript**
- The author agrees to take responsibility for every facet of the work, making sure that any concerns about its integrity or veracity are thoroughly examined and addressed

- **Conflict of Interest**: NIL
- **Funding Sources**: NIL

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