

**A NEW MEDIATION REGIME FOR MEDIATION PROVIDERS
IN NIGERIA: AN OVERVIEW OF PART II OF THE
ARBITRATION & CONCILIATION ACT, 2023**

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Abstract

The Arbitration & Mediation Act, 2023 replaces the repealed Arbitration and Conciliation Act, Cap, A18, Laws of the federation of Nigeria. Prior to this new Act, mediation though recognized as a form of alternative dispute resolution mechanism, was not statutory recognized like Arbitration and conciliation. Consequently, most literature on alternative dispute resolution mechanism focuses on arbitration with dearth of literature on Mediation. Confidentiality which is one of the core advantages of mediation also contributes to the dearth of reported cases in respect of same. This notwithstanding, the use of mediation is fast growing in most jurisdictions with private and public mediators positioned with adequate training to explore the process for a faster, efficient and successful resolution of disputes without recourse to litigation. This article is an overview of the provisions of Part B of the Act, discussing the new regime of mediation in Nigeria under a legal framework. Its relevance, notable provisions and importance to private and public mediation providers in Nigeria was also discussed. The article concluded that the Act though very new brought a paradigm shift in the scope and legal nature of mediation as a means of alternative dispute resolution. Mediation in Nigeria is now statutory and upgraded within

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global and best practices. Successful and effective implementation of Part B of the Act in practice as provided will significantly enhance the culture of mediation within our legal boundaries.

Keywords: Mediation, Mediator, Dispute, Resolution

1.0 Introduction

The Arbitration and Mediation Act, 2023¹ provides a unified legal framework for the fair and efficient settlement of commercial disputes through arbitration and mediation. Before this Act came into existence, the Arbitration and Conciliation Act (ACA)² was the legal framework governing Arbitration and Conciliation as the statutory recognized alternative dispute resolution in Nigeria. The Act however brought tremendous opportunities for the enhancement of mediation practices in Nigeria, and is now the principal legal framework governing arbitration and mediation in Nigeria. The Act made the New York Convention on the Recognition and Enforcement of foreign Arbitral Award, applicable to any award in Nigeria or in any contracting state arising out of international commercial arbitration.

This article is an overview of the provisions of Part B of the Act on mediation discussing the new regime ushered in by the Act, its relevance and importance to mediation providers in Nigeria.

The Act is divided into three parts, parts 1, 11 & 111 including Arbitration, mediation and the miscellaneous provisions with two subdivisions. Part 11 of the Act which is Mediation comprises of 20 sections made up of general provisions and the commencement proceedings.

¹ Section 90 of The Arbitration and Mediation Act, 2023 (The Act) repealed the 35 year old Arbitration and conciliation, Act. Cap, A18, Laws of the federation of Nigeria, 2004

² *ibid*

2.0 The Mediation

The interpretation section³ of the Act defines a mediator as a third party neutral and includes a sole mediator or two or more mediators. A mediator could be picked by parties from public or private mediation providers. There are also court related mediation schemes which manages or administers a mediation process within the court system under different court rules and practice directly.

Mediation in itself is a process, whether refers to by the expression mediation, conciliation or an expression of similar impart, where parties request a third person (the mediator) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.

3.0 Specific Mediations handled in Nigeria

Generally, mediation is used to settle various cases named as follows:

- a) Commercial disputes, including contract disputes, partnership conflicts, and disputes related to the sale of goods and services
- b) Family disputes such as divorce, child custody disputes, family mediation relating to spousal support, child support, visitation and property division.
- c) Labor and employment disputes: Mediation can be used to settle labour issues by way of assisting parties to find acceptable grounds and solutions.
- d) Community land disputes including inheritance rights, intestate rights.
- e) Tenancy cases involving landlord and tenants disputes.

4.0 Scope of Application of Part II of the Act

³Section 91 (1)

Part 11 of the Act provides for scope of mediations recognized by it as follows:⁴

- a) International commercial mediation,
- b) Domestic commercial mediation,
- c) Domestic civil mediation,
- d) Domestic and international settlement agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute; and
- e) Where the parties agree in writing that this part should apply to the dispute.

Party driven mediation clauses can now be inserted into agreement from the onset, just like arbitration clauses. There are however exceptions in the following manner viz:⁵

- a) disputes emerging from rights and obligations settlement, which would be void under Nigerian law.
- b) cases where a judge or arbitrator in the course of judicial or arbitral proceedings, attempts to facilitate a settlement, unless the parties agree otherwise.
- c) Cases that have been recorded and are enforceable as in arbitral award unless the parties agree otherwise.
- d) Cases that have been approved by a court or concluded in the course of proceedings before a court, unless the parties agree otherwise; or
- e) Cases that are enforceable as a judgment of a court in the country, unless the parties agree otherwise.

5.0 Commencement of Mediation Proceedings

In Nigeria and in other jurisdictions like England & Wales, it is mandatory that most hundreds and thousands of cases must be mediated

⁴S. 67 (1)

⁵S.67 (2) viz

before litigation. It is called pre-action protocol, a dynamic and new introduction into the world of mediation and litigation.

A mediation proceeding can be commenced statutorily as provided by section 70(1) the Act as a condition precedent for the conduct of judicial proceedings or where parties have agreed to mediation as an ADR mechanisms before resorting to litigation. The initiation of a mediation procedure is now provided as a condition for the conduct of judicial proceeding,⁶ and parties must explore one form of ADR before approaching the court for litigation. The Rules though did not specify where or venue, but section 70(1) is instructive as to what to do in that circumstance. Section 70 of the Act is thus a statutory reinforcement of pre-action protocol already in existence and provided for by most state high court Rules, a procedure that is presently gaining grounds rapidly.⁷ Prior to the commencement of proceedings in court, the court will expect parties to have engaged in pre-trial correspondence sufficient to: consider a form of Alternative Dispute Resolution ADR to assist with settlement.⁸ Parties are encouraged to exchange further correspondence to delineate the issues in the said dispute and make genuine attempt to resolve the dispute including through convening parties.⁹

The Rule further stated that where the initiation of a mediation procedure is prescribed by a special statute as a condition for the conduct of judicial or other proceedings, or where the parties have agreed when concluding the agreement to try to resolve the dispute through mediation before resorting to judicial or other proceedings, the party concerned shall propose to the other party, in writing, the conclusion of a mediation agreement.

Rules of other High Court of other states in Nigeria and other superior courts apart from the one discussed above also provides for mediation preceding court proceedings.

⁶Oyo State (Civil Procedure Rules) 2023

⁷ Order 3 of the Oyo State High Court (Civil Procedure Rules) 2023

⁸Order 3 Rule 3

⁹Order 3 rule 8

The National Industrial Court (Civil Procedure) Rules, 2017¹⁰ provides that whenever any matter relating to any monetary or other claim other than matters specified under section 254(5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended by the Third Alteration Act, 2010) is filed in any Judicial division or registry of the court, the matter may be referred by the President or a Judge of the court hearing the matter to the ADR Centre of the court for resolution. Rule 3 gives a time frame for the mediation/ conciliation process which is initially 21 working days and later, 10 working days.¹¹

The President of the court or a Judge of the court may refer for amicable settlement through conciliation or mediation any matter filed in any of the Registries of the Court to the Alternative Dispute Resolution Centre established within the Court premises pursuant to Section 254c of the 1999 Constitution¹² and Article 4 (5) b(a)- (e) of the instrument of the Alternative Dispute Resolution Centre.¹³

The High Court of Lagos State (Civil Procedure) Rules, 2019 also provided for pre-action protocol meaning parties are required to take certain steps before initiating proceedings in court. Order 8 provided for all originating processes filed in the Registry to be screened to determine suitability for ADR and may be referred to the Lagos State Multi Door Court House or any appropriate ADR institution or practitioner in line with the practice directions issued by the Chief Judge.

In Lagos, some cases are classified under backlog cases by the Chief Judge and as part of what to respond to under case management conference and in order not to allow the case to be struck out for want of diligent prosecution, a claimant must respond. This is done in accordance to rule 6.3(iii) by filing a notice of intention to settle alongside the defendant's accession to such discussions setting out the offer from

¹⁰Order 2 Rule 16

¹¹ Order 24 Rules 1-15.

¹²as amended by the Third Alteration Act, 2010

¹³Order 24, Rule 1

settlement of the respective parties and agreed timelines for the resolution of the matter through the use of ADR mechanisms

There is a proviso to the section where the Defendant has not acceded to the claimant's settlement request; in that case, the claimant shall instead comply with paragraph (iv) and furnish proof of the defendant's objection to settlement.¹⁴

Before filing an application to set down a matter further, the claimant must show cause as to why the matter should not be referred to ADR by identifying explorable ADR forms and stating reasons for the non-suitability of each, particularly if the reason is based on the unwillingness of either party, same must be stated and admitted to by the parties so accused of unwillingness.¹⁵

Where the claimant(s) and defendant(s) agree to settle and express the intention by complying fully with paragraph 6.3(iii), they shall annex to such plan the form of the submission to mediation/arbitration annexed hereto and such settlement shall be subject to the expedited resolution process of the Lagos Court of Arbitration provided that parties may opt for a different settlement mechanism upon furnishing the Court with a valid mediation or arbitration agreement and a detailed plan to resolve the dispute within the 90-day period contemplated by the Practice Directions.¹⁶

Where parties opt for an amicable settlement in accordance with paragraph 6.4 as stated above, the parties shall report back for settlement within maximum period of 90 days of the referral to ADR by the Court.¹⁷

Where the claimant unjustifiably refuses to pursue a resolution of its claim by any ADR mechanism the court shall note same and paragraph 8.1(d) of the Directions shall apply to the claimant as it purports to the apply to a defendant who is unwilling to settle amicably.¹⁸

¹⁴ Order 6 R.6.3

¹⁵ Rule 6.4 iv

¹⁶ Order 6 Rule 5

¹⁷ Order 6 Rule 6

¹⁸ Order 6 Rule 7

The Federal High Court (Alternative Dispute Resolution) Rules, 2018 also made provisions for ADR remedies. Its objectives includes minimizing frustration and delays in justice delivery by providing a standard procedural framework for the fair and efficient settlement of dispute through alternative dispute resolution mechanisms;¹⁹ and promote the growth and effective functioning of the justice system through ADR mechanisms.²⁰ Order 2 Rule 1 of the said Rules provides for:

- (1) A Dispute Resolution Centre.
- (2) The Centre shall be a:
 - (a) Court – connected ADR venue, with the offices located within the premises of the Court and any other suitable locations as may be approved by the Chief Justice.
- (3) The Centre shall-
 - (a) Apply mediation, conciliation, arbitration, neutral evaluation and any other ADR mechanisms in the resolution of disputes, as may from time to time be referred to it, from the Court.
 - (b) encourage disputing parties to appear before it for the resolution of their disputes;
 - (c) act as an administrator in the conduct of ADR proceedings;
 - (d) publicize its activities by informing and sensitizing the public about its facilities,
 - (e) render assistance to disputing parties, in the conduct of ad-hoc arbitration or mediation proceedings;
 - (f) encourage disputing parties whose matters are already filed before the Court to explore ADR options at the Centre;
 - (g) maintain registers of suitably qualified persons who can act as mediators, arbitrators or neutral evaluators ; and
 - (h) promote or undertake projects or other activities including an “ADR Awareness Week” which will further assist in

¹⁹ Order 1(b)

²⁰ Order 1 (d)

decongesting the Court and help to achieve the purpose for which the Centre was established.

6.0 Recourse to Mediation during judicial or arbitral proceedings

By section 70 (3) of the Act, a party can propose to the other party a recourse to mediation regardless of judicial proceedings or arbitral proceedings, before, during or after the initiation of the judicial proceedings.

Section 70 (3) and (4) of the Act, in particular has further raised the bar of mediation very high with other ADR mechanism to be reckoned with. Mediation being an ADR mechanism is fast, low cost effective and now under the Act. It is on the same level with arbitration and other methods.

7.0 Other Notable Features of Part 11 of the Act on Mediation

Notable features of Part 11 of the Act includes the following:

- a) Commencement proceedings,
- b) Appointment of mediators,
- c) Suspension of limitation period during mediation proceedings.
Without prejudice to extant laws on limitation generally, cases under mediation is now clarified and further safeguarded under the Act, when mediation proceedings commenced, the running of the limitation period for the claim under mediation is suspended.²¹ It does means that if the mediation proceedings is inconclusive, time resumes running from the time or day the mediation ended without an agreement.
- d) Conduct of mediation,
- e) Fees, expenses, etc.
- f) Establishing the regime for the practice of mediation, the Act replaces conciliation as the statute – backed Alternative Dispute Resolution (‘ADR’) option inspired by the Convention on the International Settlement Agreement.

²¹ Section 71 (1&2) of the Act

- g) Settlement agreement resulting from mediation is now binding on parties and enforceable in court as a contract.
- h) Consent judgment or consent award.
- i) Statements made during mediation are inadmissible in arbitration or judicial proceedings.²²
- j) The Singapore Convention becomes applicable to international settlement provided the latter is sought to be forced by a state party to the Convention and the difference arises out of a legal relationship whether contractual or not, considered under the laws of Nigeria.²³
- k) Reinforcement of the stability, speed and efficiency that has made mediation a preferred dispute resolution mechanism in domestic and international commerce.
- l) Express provisions in the statute applies to business disputes and enjoin courts to settle such controversies in conformity with the general principles on which the Act is based; having regards to its international origin and the need to promote uniformity in its application.
- m) Nigeria is now firmly in step with global trend in international mediation, arbitration and reaffirms its status as a prime destination for cross border dispute settlement in Africa.
- n) 30 days provision for acceptance of mediation invitation or within any other time specified in the invitation, and where party do not respond within that time, parties can elect to treat this as a rejection of the invitation to mediate.²⁴
- o) Mediation sessions can now take place electronically in what is referred to as online mediation.²⁵ Settlements agreements reached

²² Section 77

²³ Section 87

²⁴ Section 70 (3)

²⁵ A. Adedoyin et al. 'An overview of the newly enacted Arbitration and Mediation Act' 2023 [2023] <https://mondaq.com/nigeria/arbitration-dispute-resolution/1330842/> accessed 5th September, 2023.

through mediation hold legal weight and can be enforced in court either as a contract, consent judgment or consent award.

8.0 The Mediators and Conduct of Mediation Proceedings.

By section 72 (1) of the Act, there shall be one mediator, unless the parties agree to have two or more mediators. By this provision, the default is one mediator, which is mostly affordable as the cost of paying one mediator is quite easy than paying two or more.

Parties shall endeavor to reach agreement by a mediator or mediators unless a different procedure for their appointment has been agreed upon.²⁶

Parties are free to agree, by reference to a set of rules or otherwise on the manner in which the mediation is to be conducted, and the parties shall attend and participate in the mediation in good faith.²⁷

Where no agreement is reached on the manner in which the mediation is to be conducted, the mediator may conduct the mediation proceedings in a manner as the mediator considers appropriate, taking into account the circumstances of the case, any wish that the parties may jointly express and the need for a speedy settlement of the dispute.²⁸

In any case, in conducting the proceedings, the mediator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case and the mediator's obligations shall be equal with regards to all parties.²⁹

The mediator shall:

- (a) promote communication between parties; and
- (b) ensure that the parties are integrated into the mediation process in an appropriate and fair manner.³⁰

²⁶Section 72 (2)

²⁷Section 73 (1)

²⁸ Section 73 (2)

²⁹ Section 73 (3)

³⁰section 73 (4)

Parties and the mediator may agree that all or any of the mediation session are to be carried out by electronic means, by video conference or other similar means of transmission of the voice or image, provided that the identity of the parties concerned are ensured and comply with the principles of mediation laid down in this part.³¹ In essence, there is room under the Act for online mediation,

The mediator may, with the agreement of the parties, at any stage of the mediation proceedings, make proposals for a settlement of the dispute but does not have the right to impose a settlement on the parties and the proposal may be based on what the mediator deems appropriate in view of what the parties have brought forward in the mediation.³² This section resonates with the spirit of mediation of which main goal is to facilitate communication between parties and not to impose an opinion on the parties. This is because fairness, good faith and communication is necessary for parties to resume communication between themselves.

Payment and Fees of the Mediator

A mediator is entitled to a fee and reimbursement of expenses incurred in connection with mediation unless the mediator agreed to mediate without a fee and the parties bear their own costs, and unless the parties agree otherwise, the fee and expenses of the mediator as well as the fee of the mediation provider shall be borne by the parties in equal shares.³³

9.0 Confidentiality of the Mediation Proceedings

Section 76 provides that unless otherwise agreed to by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required-

- (a) under the law;
- (b) for the purpose of implementation or enforcement of a settlement agreement.

³¹ Section 73 (5)

³² Section 73 (6)

³³Section 73(7)

- (c) necessary in the interest of preventing or revealing –
 - (i) the commission of a crime (including an attempt or conspiracy to commit a crime),
 - (ii) concealment of a crime, or
 - (iii) a threat to a party; or
- (d) Necessary to protect public order, but only under the conditions and in the scope prescribed by law.

There is an emphasis on confidentiality by the Act which is one of the key features of mediation.

10.0 Mediation Providers

There are many mediation providers that offer service for various disputes and expert areas both locally and globally, though not stated in the Act but worth mentioning here.

10.1 International Mediation Providers

- a) These include American Arbitration Association. (AAA). The Association offers a wide range of alternative dispute resolution services.
- b) Judicial Arbitration and Mediation Services,(JAMS) with roasters of experienced mediators and Mediators
- c) National Academy of distinguished Neutrals (NADN) with highly experienced mediators and Arbitrators, selected for complex or high – stakes disputes
- d) The International Mediation Institute (IMI), a global organisation that promotes high quality mediation services. It has a directory of certified mediators worldwide.

11.0 State Court and Local Mediation Programs in Nigeria

Many states, court systems have their mediation programs and providers stated as follows:

- a. National industrial Court.

- b. Lagos Multi-door Courthouse established in June, 2002; other Multi door houses including Kano, Ogun, Edo, Enugu, Ondo, Akwa Ibom, Katsina and FCT.
- c. ADR Society,
- d. Oyo State Mediation Centre.
- e. Lagos State Citizens Mediation Centre and other citizen mediation Centres of other states.³⁴
- f. Institute of Chartered Mediators and Conciliators in Nigeria.
- g. International Centre for Arbitration & Mediation Abuja.
- h. Private Mediation Firms.

Private mediation services are offered by mediation firms, and individual mediators for various disputes cutting across family, commercial, workplace, tenancy issues, etc.

Section 72 (3) of the Act provides for the role of a Mediation provider who keeps a list of qualified Mediators for recommendation and appointment of parties. By this Act, a Mediation Provider has a lot of responsibilities in the appointment of a mediator or mediators.³⁵ With the inclusion of the role of mediators in the Act, parties can draw from a pool of competent mediators, making the process more reachable to parties that want to explore it.³⁶

Mediators shall:

- (a) promote communication between the parties; and
- (b) ensure that the parties are integrated into the mediation process in an appropriate and fair manner.³⁷
- (c) Other roles include the role of Neutral third parties mediators acting on the ground of neutrality without taking sides in disputes, they remain fair and impartial throughout the mediation process.

³⁴Oyo State Mediation Centre, Osun State Citizens Mediation Centre.

³⁵ Section 72 (3,4, 5,&6) of the Act

³⁶ B. Olaniyan & E. Yoloje, 'Overview and Analysis of part 11 of the Arbitration and mediation Act, [2023]' < [https:// simply law.com.ng/overview-and-analysis -of -part ii of the Arbitration and Mediation Act 2023](https://simplylaw.com.ng/overview-and-analysis-of-part-ii-of-the-arbitration-and-mediation-act-2023) accessed 21 June, 2023

³⁷Section 4 (a&b)

(d) Communication facilitation by way of mediators providing a safe and conducive environment for parties to freely talk about their disputes, expresses concerns and perspectives.

(e) Conflict resolution framework whereby mediators establish a framework for the mediation process, settling ground rules and guidelines for the mediation process. Mediators also guide parties to maintain a productive and focused discussion.

(f) Problem identification by mediators who works out underlying issues causing the problem and help parties to work out a solution.

(g) Solution generation through brainstorming and facilitation of communication thereby encouraging problem solving and brainstorming.

(h) Agreement drafting, once an agreement is reached, mediators help to draft a formal document reflecting parties' views and agreement. This agreement is typically binding and serves as a reference for future actions. Confidentiality of information is ensured about parties' information.

Follow up by mediators who ensure follow up sessions to ensure the agreed upon solutions are implemented and followed.

Cultural sensitivity is usually considered as different cultures may have unique communication styles and expectations.

Professional training: Mediation providers undergo specific training and certification to develop necessary skills and knowledge to effectively mediate conflicts.

12.0 Suggestions

Section 70 (3) of the Act provides that a party can propose to the other party a recourse to mediation regardless of judicial proceedings or arbitral proceedings, before, during or after the initiation of the judicial proceedings. An amendment to include "without prejudice" to the rights of parties in court will further give parties more confidence in the process. This is however subject to whether the judicial proceeding will accommodate same without prejudices.

13.0 Conclusion

In conclusion, the Act is full of ground breaking innovations and has brought a shift in the scope and legal nature of mediation as a means of alternative dispute resolution. The Act provides for uniformity in mediation process towards fair resolution of disputes by an impartial umpire without unnecessary delay or expense common to litigation. It also gives mediation a comprehensive and international approach within best practices. Effective implementation by stakeholders of the ADR industry will lead to good results and resolution of disputes amicably with little or minimal recourse to the law court.