

## **A REVIEW OF THE SCOPE OF THE LAW AND PRACTICE OF MEDIATION UNDER THE ARBITRATION AND MEDIATION ACT 2023**

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### **Abstract**

*The Mediation Practice and Mediators in Nigeria suffered in silence under the repealed Arbitration and Conciliation Act of 1988 as the Act made little or no reference to mediation but instead referred to conciliation as one of the mechanisms of ADR. However, the 2023 Arbitration and Mediation Act provide twenty sections on Mediation, though we argue that the twenty sections are relatively small, considering the Law and Practice of Mediation in a country like Singapore that promulgated separate law on Mediation Practice, but as the AMA 2023 stands, it is an improvement on the 1988 Act that made no mention of Mediation at all. AMA 2023 formally provides the needed legal framework. There are supposed to be mediation institutions and bodies who will not only train mediators but they will also have the power to conduct mediation. It is our finding that though AMA is a*

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*better statute, provisions such as payment of adverse cost for failure to participate in mediation or consider mediation before proceeding to Court is absent in the law, hence the litigants can still jettison Mediation even where the Court and the Rules of Court provides for it. The procedure for enforcement and which court can enforce the settlement of agreement is not yet clearly stated in the law. The paper concludes that though AMA 2023 is a better law for mediation practice in Nigeria, there is still need to promulgate an encompassing separate law on Mediation practice in Nigeria.*

**Keywords:** Mediation Practice, Alternative Dispute Resolution, Adverse Cost

## **1.0 Introduction**

Mediation is one of the mechanisms of the Alternative Dispute Resolution. Alternative Dispute Resolution as another method of resolving dispute as against the conventional way of court proceedings. It must be noted that it was man's desperate attempt to find a way of decongesting the conventional court system, which for all intents and purposes, had become rather too slow for the dispensation of justice and it can also be said that, growing frustration among litigants birthed ADR.<sup>1</sup>

The term "Alternative Dispute Resolution" (abbreviated as "ADR") is generally used to describe the methods and procedures used to resolve disputes either as alternative to traditional disputes resolution mechanism of the court or in

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1 MM Stanley-Idum & JA Agaba *Civil Litigation in Nigeria* (Nelag & Company Limited, 2015)

some cases as supplementary to such mechanism.<sup>2</sup> The settlement reached by the parties can be made binding by reducing it into writing, signed by them and filed in court as consent judgment.<sup>3</sup>

Alternative Dispute Resolution may be Court-connected or non-court-connected. It is Court connected when the facilities for the dispute resolution enjoy court supervision or patronage.<sup>4</sup> On the other hand, it is non-court connected where the parties settle their disputes and enforce their settlement without any recourse whatsoever to the court.

The paper aims at review the scope of the law and practice of mediation under the Arbitration and Mediation Act, 2023. The first part of the paper shall examine the conceptual framework, history of mediation practice in Nigeria and the institutional frame work for mediation practice pre-Arbitration and Mediation Act, 2023. The Second part of the paper shall examine the Mediation Law and Practice in other jurisdictions, the scope of and Practice of Mediation under AMA 2023. The third part shall examine Comparative deductions from Mediation Law and Practice in Nigeria and selected Jurisdictions. The paper ends with recommendations ased on the new law.

## 2.0 Conceptual Framework

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2. JO Olakunle Orojo & MA Ayodele Ajomo *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates (Nigeria) Limited, 1999)

3. DI Efevwerhan *Principle of Civil Procedures in Nigeria* (3<sup>rd</sup> edition, Snap Press Nigeria Limited 2018)

4. For instance, the 2018 Abuja Rules provide copiously for ADR under Order 19

Mediation can be described as a consensual process of conflict regulation in which an impartial, independent third party without any decision-making power helps people or institutions to improve or set up relations through exchanges, as far as possible, to solve their conflicts<sup>5</sup>. It is

a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law<sup>6</sup>

Usually, mediation commences when the disputant parties are unable to resolve their differences or dispute by negotiation and, a third party neutral or mediator is called in to assist in finding common ground.<sup>7</sup> It helps the disputants resolve or better manage disputes by reaching agreements about what both will do differently in the future.<sup>8</sup> The neutral party, called the 'mediator' does not decide how the dispute should be settled he merely facilitates the arrival at an amicable settlement by keeping the communication between the parties open<sup>9</sup>.

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5 Boulle, L *Mediation: Skills and Techniques*, NJ: LexisNexis Matthew Bender, 2008. PI: Noone, M. *Mediation*, London: Cavendish Pub. 1996, p.5

6 European Union, *Directive on Certain Aspects of Mediation in Civil and Commercial Matters*, Directive 2008 /52/EC. Article 3 (a) and (b)

7 K Aina "Alternative Dispute Resolution" *Nigerian Law and Practice Journal* Vol. 2 No. 1 p. 170

8 Sebok, T "Preparing for your Negotiation " in *Negotiation and Dispute Resolution Journal* Vol. 1 No.1 P.29

9 Gummi, L.H. "Alternative Dispute Resolution: The High Court of the FCT Abuja Experience" in Oyeyipo (ed), *Judicial Integrity Independence and Reforms (Essays in Honour of Hon. Justice M.L Uwais)*, Enugu Snap, 2006, P19 at 27

Mediation can be seen from the common sense idea that the intervention of an experienced, independent and trusted person can be expected to help the parties settle their quarrel by negotiating in a collaborative rather than adversarial.<sup>10</sup> Aina opined that Mediation can be seen as an “agent of reality” whose sole function is, to assist the disputing parties resolve their disputes consensually. Mediation referred to as “tour charged negotiator”<sup>11</sup>. A typical mediation session starts with the disputing parties agreeing on the choice of mediator and signing a Mediation Agreement which indicates the confidentiality and without prejudice nature of the process. Both parties then forward to the mediator a short summary of the dispute and reliefs sought. An initial joint session is thereafter held with the parties during which the mediator explains the procedure to be adopted while each party makes a brief oral presentation. After a period of questioning and some discussion chaired by the mediator, the mediator meets each party privately to explore case with them.<sup>12</sup> Once an agreement is reached by the parties, the draft terms of settlement are prepared and accordingly signed by all. If the parties disagree with the conclusion of the mediator, the mediation is called off and the parties are left with other remedies or to litigate.

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10 Noone, M Mediation: Essential Skills (London: Cavendish Publishing Limited, 1998) p.5

11 Ibid (n 7)

12 He shuffles back and forth between the parties to clarify issues and search for this kind may be held in order to ascertain common ground or settlement options, the parties are again brought together for a joint session either to continue negotiation directly or to conclude mediation.

According to Ajetumobi, the features of Mediation include Consensual, Neutrality, Confidentiality, Caucusing, Joint Conference, without prejudice and focus on the needs and interests, not right and liabilities.<sup>13</sup>

### **3.0 History of Mediation Practice in Nigeria**

The history of Mediation in Nigeria can be traced back to pre-colonial era. Pre-colonial African societies normally resolved disputes through four hierarchically related options<sup>14</sup>. First, the disputants tried to resolve the disputes by themselves; what is now known as negotiation. If that failed, they sought the assistance of kinsmen; what is now known as mediation. If this also failed, the dispute was taken to the Headman of the defendant's neighbourhood; what is now known as 'neutral evaluation'. If this also failed, the matter was then taken to the High Chief or King for a binding decision; what is now known as arbitration.<sup>15</sup> This hierarchical approach was also practiced by the three predominant tribes in Nigeria; Yoruba, Igbo and Hausa, prior to colonization.<sup>16</sup> This system was jettisoned with the advent of colonialization and traditional legal systems branded as "repugnant to natural justice. The growing demands for "modern justice" relegated the better understood traditional channels to the background.<sup>17</sup> However, in the case of

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13 Abdulsalam O. Ajetumobi "*Alternative Dispute Resolution & Arbitration in Nigeria Law, Theory and Practice*" (Princeton & Associate Publishing Co. Ltd 2017)

16 K. Aina: 'Commercial Mediation: Enhancing Economic Growth and the Courts in Africa', NCMG International and Aina Blankson LP, 2012, p. 11

17 Ibid

<sup>16</sup> Ibid

<sup>17</sup> Ibid

the court) from a panel of accredited mediators who have been appointed by the Minister of Justice and Correctional Services. In South Africa, Mediation is voluntary. In certain instances, however, mediations can be mandated by way of an agreement between the parties or legislation.<sup>53</sup> Confidentiality and Privacy are also observed in the mediation practice of South Africa and all mediations are conducted on a strictly "without prejudice" basis and, consequently, information that was provided during the course of the mediation proceedings may not be used against a party in subsequent court proceedings. Unlike the Singapore, failure to mediate in South Africa does not attract any adverse cost order, however in a court connect mediation unwilling to participate in mediation attracts an adverse cost. In South Africa, Settlement agreements must first be made an order of court in order to be enforced.<sup>54</sup>

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53 The Labour Relations Act (Act 66 of 1995) provides for compulsory conciliation for any disputes arising out of the Act referred to the CCMA. The Act requires conciliation to be completed before arbitration can be considered.

54 This can be affected in a number of ways, depending on the nature of the commercial dispute and the stage at which it is referred to mediation. If the dispute has already been referred to a court for determination and, prior to a hearing or judgment by the court, the parties agree to mediate (either by agreement between themselves or at the suggestion of the judge who is appointed as case manager) and reach a settlement at a subsequent mediation, they may apply to the court to have their settlement agreement made an order of court. Where, prior to referring the matter to court, the parties to a dispute have elected to mediate that dispute, either in compliance with a contractual obligation or by separate agreement, and an agreement is reached in an ensuing mediation which is subsequently breached by one of the parties, the agreement can be used as the basis for approaching the court to compel compliance. In these

National assembly also make room for parties to explore reconciliation, arbitration, negotiation and mediation before adjudication.<sup>21</sup> In the same vein, it is in the spirit of amicable settlement that prompted so many High Courts even before express provision for Alternative Dispute Resolution in the Rules of Court to introduce in their various Rules of Court a Pre-Trial Conference which promotes amicable settlement before proceeding to trial of the case and also surreptitiously introduced Alternative Dispute Resolution even at a time when the growth of the ADR is still at infant stage in Nigeria.<sup>22</sup>

In the recent time, there have been express provision for Alternative Dispute Resolution and in turn the Mediation in most of the Rules of Court, and the starting point is Rule 15 of Rules of Professional Conduct which is applicable to all lawyers across Nigeria.

Abuja and Lagos High Court Rules make provision for the promotion of amicable settlement of cases or adoption of Alternative Dispute Resolution.<sup>23</sup> One way of doing this is by reference of disputes by the court, to the ADR centre at the

obligations as well as seeking of settlement of international disputes by negotiation, conciliation arbitration and adjudication

21 See Section 2 (a) of the Consumer Protection Council Act, Section 17 of the Federal High Court Act, Section 11 of the Matrimonial Causes Act, Section 29, 31 and 33 of Environmental Impact Assessment Act

22 Order 25 of Abia State High Court Civil Procedure Rules, Order 25 of Osun State High Court (Amended Civil Procedure Rules 2008) Order 33 Kwara State High Court (Civil Procedure) Rules 2021 Order 28(2)(C ), Rivers State High Court (Civil Procedure) Rules 2023

25 O.19 r 1; O 27 r. 10(2) (c) (Abuja); O. 27 r.1 (2) (c ); O. 2 r. 1 9 ( c ) (i) (Lagos); See also, S. 24, High Court Law Cap H3 Laws of Lagos State 2003

Multi-Door Courthouse. If parties opt for Mediation at the multi-door courthouse, proceeding will be governed by the Multi-Door Court House Mediation Procedure Rules 2004. But, if they opt for Arbitration, the arbitration proceeding will be governed by the Multi-Door Courthouse Arbitration Procedure Rules 2004, both of which are contained in the LMDC Practice Direction<sup>24</sup>

In Lagos where a matter is deemed suitable for ADR, or by directive of court, referred to ADR in accordance with order 2 rule 1 (c) (i) of the Lagos Rules of court, the ADR Judge may make orders or give directives for the proper or just determination of the matter.<sup>25</sup>

The River State also follows the same procedure similar to that of Lagos State and they also expressly make provision for the application of ADR mechanisms in their Rules.<sup>26</sup>

In Abuja where a case is deemed suitable for ADR under O. 2 r 7 or referred by Court to ADR, under O. 19 r. 2 (2), the judge may give directions to parties on filing of statement of case and other necessary issues. In such circumstances, both parties shall file their respective statement of case within 14 days of the judge's order and service respectively.<sup>27</sup> Both parties shall within 20 days of the giving of the order file a notice of compliance with the foregoing.<sup>28</sup> Failure to comply with filing of the notice attracts penalty of 200 per day of default.<sup>29</sup> A party

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<sup>26</sup> Article 10.2 of the LMDC Practice Direction

<sup>25</sup> O. 28 r 2 (2) (Lagos)

<sup>26</sup> O 1 r 5 (e) (i) Rivers State High Court (Civil Procedure) Rules 2023

<sup>27</sup> O.19 r. 3 (1) Abuja

<sup>28</sup> O.19 r 3 (2) Abuja

<sup>29</sup> O. 19 r 3 (3) Abuja

applying for an extension of time which to file his statement of case shall attach evidence of payment of the penalty to the application.<sup>30</sup>The National Industrial Court Rules also expressly provides for Alternative Dispute Resolution and specifically mentioned mediation.<sup>31</sup>

Under Rule 16 of the 2021 Rule of the Court Appeal an omnibus provision was made on the Alternative Dispute Resolution and replaced Court of Appeal Mediation Program with Court of Appeal Alternative Dispute Resolution Program (CAADRP). The Rule further provides for Court of Appeal Alternative to Dispute Resolution Rule and this governs any application of ADR mechanism in Court of Appeal.<sup>32</sup>

## **5.0 Institutional Framework for Mediation Practice Pre-Arbitration and Mediation Act 2023**

### **5.1 Institute of Chartered Mediators and Conciliators (ICMC)**

The Institute of Chartered Mediators and Conciliators (ICMC) was established in 1999, is a body of dispute resolution practitioners with the mandate to regulate the practice of Mediation, train prospective Alternative Dispute Resolution (ADR) practitioners, and encourage the organizations and institution to adopt Mediation and conciliation as the primary mechanism for resolving disputes. Membership of the Institute remains open to all professionals including, but not limited to, lawyers, paralegals, jurists, bankers, the police, the armed forces and other paramilitary agencies, government regulatory agencies, civil and labour administrators, consultants, political

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<sup>30</sup> O.21 r. 3 (4) (Abuja)

<sup>31</sup> O. 24 r 1 of National Industrial Court Rules 2017

<sup>32</sup> O.16 r 1 & 2, Court of Appeal Rules 2021

and religious leaders, traditional rulers, union leaders and others who find themselves in leadership or mentorship positions. The Institute has three cadres of membership; Associate Member, Member and Fellow.<sup>33</sup>

## **5.2 Multi-Door Court House (MDC) Initiative**

MDC Initiative is the project of the Negotiation and Conflict Management Group (NCMG) International aimed at establishing, replicating and developing court-connected Multi-Door Courthouses anchored on Alternative Dispute Resolution.<sup>34</sup> Through its efforts, the NCMG has established Multi-Door Courthouses in Lagos, Abuja, Kano, Enugu and other State High Courts in Nigeria. Recently, the NCMG has also extended its concept to the Appellate Courts, hence the birth of the Supreme Court Mediation Centre and Court of Appeal Mediation Centre<sup>35</sup>. Examples of Multi Door Court House in Nigeria presently include Lagos Multi Door Court House, Abuja Multi Door Court House, Kano Multi-Door Court House and then Enugu State Multi-Door House.<sup>36</sup>

## **5.3 Citizens' Mediation Centre (CMC)**

The Citizens' Mediation Centre (CMC) is an initiative of the Lagos state government under the ministry of justice. It was first

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<sup>37</sup> <https://ng.linkedin.com/company/institute-of-chartered-mediators-and-conciliators> accessed 3/10/2023

<sup>38</sup> <https://ncmginternational.org/projects/multi-door-courthouse-mdc-initiative/> accessed 3 October 2023

<sup>35</sup> <http://ncmginternational.org/about-ncmg-international/> accessed 3 October 2023

<sup>40</sup> Established by the Enugu State Multi-Door Courthouse Law of 2019 available at <https://enugustatemultidoorcourthouse.org/wp-content/uploads/2019/03/2018-MULTI-DOOR-COURT-LAW.pdf>

established in 1999 as a unit of the directorate of citizens' right in the ministry of justice. With the enactment of the CMC law in 2007, it became a statutory agency of the state government.

The centre provides an alternative dispute resolution mechanism which residents of Lagos state can use to resolve their cases instead of litigation. Its main objective is to provide free and less cumbersome means of obtaining justice for all residents thereby discouraging self-help and impunity. Mediation and various other ADR available at CMC are confidential, free, voluntary, fast, and rendered in such a way as to ensure that disputes are resolved amicably without jeopardizing the relationship between the parties.<sup>37</sup>

#### **5.4 Office of the Public Defenders**

In Lagos State the Office of Public Defender was established in the year 2000 mainly with the responsibilities of offering free legal services to the citizenry.<sup>38</sup> The function of the Office of the Public Defender as highlighted in their law includes:

- i. Having responsibility for the provision of legal aid service and advice in accordance with OPD laws.
- ii. Receiving complaints directly from individuals or by referrals from government agencies, public institutions private institution.
- iii. Investigating complaints or referrals made to it.
- iv. Preparing necessary legal documents, negotiated settlements, or give legal advice necessary to fulfill the purposes of the Law;
- v. Resolving matters brought before it by way of alternative dispute resolution.

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<sup>37</sup><https://lagosstatemoj.org/cmc/> accessed on 3 October 2023

<sup>42</sup><https://www.google.com/search?client=firefox-d&q=When+was+Office+of+Public+Defender+Established+> accessed on 4 October 2023

- vi. Publicising its services by informing and sensitizing the public about its service.<sup>39</sup>

## 6.0 Mediation Law and Practice in Other Jurisdictions

### 6.1 Mediation Practice and Law in Singapore

In Singapore, Mediation is a recognised form of ADR. It can be court-based or private, the former being conducted by a judge or court official, and the latter being referred to either to the Singapore International Mediation Centre (SIMC) or the Singapore Mediation Centre.<sup>40</sup> The bulk of court-based mediation is handled under the Court Dispute Resolution mediation programme (“CDR”) at the State Courts’. Under the CDR programme, either the party or their lawyer can apply for mediation after all the pleadings have been filed and all parties involved consent to mediation.<sup>41</sup> While the parties who wish to pursue private mediation refer disputes to the SIMC.<sup>42</sup> The litigants are only obliged to mediate when mediation clauses have been incorporated in their contract this was the decision of the court. in the case of *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte*<sup>43</sup> and the case of *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another*<sup>44</sup>

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<sup>39</sup> <https://opd.lagosstate.gov.ng/responsibilities-2/> accessed on 4 October 2023

<sup>44</sup> <https://www.linklaters.com/en/insights/publications/commercial-mediation-a-global-review/global-guide-commercial-mediation/Singapore>

<sup>41</sup> Ibid

<sup>42</sup> Ibid

<sup>43</sup> [2012] SGCA 48

<sup>44</sup> [2013] SGCA 55

Without mincing words, the Singapore Courts encourage Mediation and all other ADR mechanisms. The Practice Direction 35(9) imposes a “presumption of Alternative Dispute Resolution” for all civil cases, which encourages parties to consider ADR as a “first stop” for resolving a dispute, and it includes a duty that a party to any proceedings considers amicable resolution of the dispute and failure of which attracts adverse cost.<sup>45</sup> Mediations in Singapore are very confidential, and there are laws that back up the confidentiality and privacy of the proceedings of the Mediation.<sup>46</sup>

The enforceability of Mediation terms of agreement in Singapore depends on the intention of the parties, the context of mediation and the existence and nature of relevant statutory requirements. In addition, the Mediation Act 2017 considerably strengthened the framework for the enforcement of mediated settlements conducted in Singapore. The Mediation Act 2017 covers international commercial mediated settlements and includes provisions for a stay of court proceedings pending mediation and the enforceability of settlement agreements resulting from mediation. The Mediation Act 2017 allows parties to apply to the Singapore courts to record their mediated settlement agreement as an order of court, which allows the agreement to be directly and immediately enforceable as a court order in the event that there are subsequent breaches of the terms of agreement.<sup>47</sup> However, the Mediation Act 2020 implements Singapore’s obligations under the Singapore Convention and

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<sup>45</sup> See Order 5 Rule 2 & 3 of the 2021 Rules of Court

<sup>46</sup> See Sections 19 and 20 of the Community Mediation Centres Act and section 23 the Evidence Act.

<sup>47</sup> An *Act* to promote encourage and facilitate the resolution of disputes by *mediation* and for connected purposes. [1 November 2017:

provides for a party to apply to the Supreme Court to enforce an international settlement agreement or to invoke the settlement agreement to prove that a matter had already been resolved when defending court proceedings in Singapore concerning that matter. The Mediation Act 2020 also provides parties with different ways of making enforcement or invocation applications under the Singapore Convention, such as applying to the High Court to record the agreement as a court order. Existing contractual remedies are also preserved under the Mediation Act 2020.<sup>48</sup>

## **6.02 Mediation Practice and Law in South Africa**

There are two types of Mediation practice in South Africa namely private and court annexed Mediation. Mediation as a dispute resolution mechanism can be contractually agreed, and recently more emphasis has been placed on mediation as a dispute resolution mechanism in the South African High Courts with the introduction of Rule 41A of the Uniform Rules of Court, which compels a plaintiff or applicant to file a prescribed notice indicating either its agreement or opposition to referral of the dispute for mediation.<sup>49</sup> In South Africa, there is no specific law on Mediation, however, over 50 South Africa laws directly or indirectly makes provision for mediation, for instance

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48 The Singapore Convention on Mediation Act 2020 (“SCMA”) was passed by Parliament on 4 February 2020, and commenced on 12 September 2020, the same day the Singapore Convention on Mediation entered into force. The Act implements Singapore’s obligations under the Singapore Convention on Mediation.

49 As such, the parties must at least consider mediation at the start of the proceedings and the courts may occasionally suggest mediation to the parties. Mediations are confidential. To be enforceable, settlement agreements must be made by an order of the court.

mediation may be used for labour disputes relating to unfair dismissals.<sup>50</sup>

Court-annexed mediation only operates within the Magistrates' Courts of South Africa. The Court Annexed Rules of the Magistrates' Courts (as set out in the Rules Board for Courts of Law Act (Act 107 of 1985)) provides for the voluntary submission of civil disputes to mediation in selected courts. These rules facilitate court-annexed mediation. They set out the instances in which a matter may be referred to mediation and discuss the functions and powers of the clerks and registrars of the court in relation to mediation. The rules, ultimately, set out all the procedural aspects of mediation and further provide precedents and mediation forms.<sup>51</sup>

Mediation may be initiated by the parties by invoking a contractual obligation to mediate or by the parties themselves, prior to a dispute being the subject of litigation in the courts. It may also be initiated at the suggestion of the courts.<sup>52</sup> In court-annexed mediations, the mediator will be chosen by the parties with the assistance of the dispute resolution officer (a clerk of

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50 The Labour Relations Act (Act 66 of 1995), require parties in a dispute to refer the dispute to conciliation (a form of mediation) as an initial step, before referring it an arbitration.

51 Ibid

52 There are no requirements as to how a mediation should be run, but it will generally play out as follows. On the day of the mediation, the mediator will meet the parties to introduce himself/herself and will generally confirm signature of the agreement to mediate and that both parties have authority to negotiate. The mediator has the platform to conduct proceedings in whichever way he deems fit. However, most mediations begin with the mediator explaining the process and thereafter the parties are given an opportunity to explain the issues in dispute from their perspective and what they hope to achieve in the mediation

the court) from a panel of accredited mediators who have been appointed by the Minister of Justice and Correctional Services. In South Africa, Mediation is voluntary. In certain instances, however, mediations can be mandated by way of an agreement between the parties or legislation.<sup>53</sup> Confidentiality and Privacy are also observed in the mediation practice of South Africa and all mediations are conducted on a strictly "without prejudice" basis and, consequently, information that was provided during the course of the mediation proceedings may not be used against a party in subsequent court proceedings. Unlike the Singapore, failure to mediate in South Africa does not attract any adverse cost order, however in a court connect mediation unwilling to participate in mediation attracts an adverse cost. In South Africa, Settlement agreements must first be made an order of court in order to be enforced.<sup>54</sup>

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It must be noted finally, that there is currently no regulatory requirement that mediators accredit themselves, but there are a small number of accreditation bodies that offers professional mediation accreditation, examples are Dispute Settlement Accreditation Council ("DiSAC")<sup>55</sup> and South African Association of Mediators(SAAM)<sup>56</sup>

### **6.3 Mediation Practice and Law in United Kingdom**

The practice of mediation in United Kingdom is relatively slow. A study of the mediation pilot at the Central London County Court indicated that in only five percent of cases did the parties agree to mediate.<sup>57</sup> Lack of experience in mediation by lawyers fear of showing weakness by accepting mediation, and resistance to the idea of compromise were cited as the main reasons for the low take up.<sup>58</sup> In United Kingdom, Mediation is voluntary and the Court only has an obligation to encourage

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circumstances, the aggrieved party may use the settlement agreement itself and the obligations therein as the basis of an application for a default judgment (where the breaching party fails to enter an appearance to defend) or summary judgment (where the defendant enters an appearance to defend for dilatory purposes only), rather than having to litigate the original dispute.

55 DiSAC was established in 2010 through a consultative process facilitated by the Africa Centre for Dispute Settlement

56 SAAM, is a registered organisation that acts as a professional regulatory body for its members. SAAM is a founding member of the National Accreditation Board for Family Mediators (NABFAM). SAAM accreditation aims at supporting standards consistent with that of the IMI.

57 H Genn, Central London County Court Mediation Pilot: Evaluation Report, LCD Research Series, Number 5/98

58 Ibid

ADR at the early stage of the proceedings.<sup>59</sup> The court also has powers to encourage mediation, for example it may stay proceedings to allow parties time to mediate.<sup>60</sup> In conducting mediation, a mediator may be appointed by the parties or mediation institution, such as Centre for Effective Dispute Resolution or the ADR Group. Parties do not need to be legally represented, although lawyers<sup>61</sup> usually attend on commercial disputes to advise and assist with the presentation of their client's case.<sup>62</sup>

In United Kingdom, as voluntary as mediation is, in certain types of proceedings, mainly arising in disputes of a personal nature, such as family and employment disputes and low value personal injuries claims arising from road traffic accidents, parties are compelled to use ADR processes which include mediation. In the same vein, the courts and court rules are placing increasing emphasis on mediation.

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<sup>59</sup> CPR 1.4 also explicitly states that the courts should engage in active case management which includes “encouraging parties to use an alternative dispute procedure if the court considers that appropriate...”, whilst CPR 26.4 allows parties, when completing the Directions Questionnaire, to request a stay of proceedings to attempt to settle their dispute by ADR.

<sup>60</sup> <https://www.linklaters.com/en/insights/publications/commercial-mediation-a-global-review/global-guide-commercial-mediation/uk>

<sup>61</sup> Survey of 500 top companies in the West Midlands in June 1999 revealed that more than 60% had not received any advice from solicitors on mediation and eight percent had ever had discussions with their lawyers about resolving a dispute through mediation (J Duckers, ‘Woolf at door over mediation reform: Lawyers in fear of losing fees’, Birmingham Post, 17 September 1999; and Centre for Dispute Resolution, Press Release: New Survey warns clients want better mediation advice, 9 June 1999.

<sup>62</sup> Ibid

The Mediation practice in United Kingdom is very confidential and it is conducted without prejudice basis, meaning that submissions made in an attempt to reach settlement will not usually be admissible in later court proceedings relating to the same subject matter, subject to some limited exceptions (such as agreement between all the parties or a legal obligation to disclose the information) Any express confidentiality provisions in essence reinforce the “without prejudice” nature of the mediation. Failure to sufficiently consider Mediation in United Kingdom may result in Court imposing an adverse cost order on one or more parties to litigation.

On the enforceability of mediation, a settlement entered into at mediation governs the contractual relationship between the parties and is therefore enforced as a contract. Similarly, on 3 May 2023, the UK became the 56th state to sign the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the Singapore Convention and by this signing automatically gives for enforcement of international mediation term of settlement agreement.<sup>63</sup> Presently, there is no regulating body for mediation, and neither are there any statutory qualifications necessary to act as a mediator. However, in practice most mediators have some form of accreditation following assessed training by regulated bodies. When appointing a mediator, membership of a respected mediation organisation is often taken into account, as well as the mediator’s experience in the field of the relevant dispute.<sup>64</sup>

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63 <https://www.linklaters.com/en/insights/publications/commercial-mediation-a-global-review/global-guide-commercial-mediation/uk>

64 Ibid

## **7.0 The Scope of the Law and Practice of Mediation under Arbitration and Mediation Act 2023**

The Arbitration and Mediation Act 2023 was assented to by the former President of Nigeria on 26<sup>th</sup> of May 2023.<sup>65</sup> The AMA replaced and repealed the Arbitration and Conciliation Act of 1988 but contained in the Law of Federation 2004 and it became the unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation.<sup>66</sup> We shall briefly highlight and explain some of the sections on Mediation.

- **Scope of Application:** The Act makes it clear that it shall be applicable and limited to international commercial mediation, domestic commercial mediation, domestic mediation domestic and international settlement agreements resulting from mediation, and concluded in writing by parties to resolve a commercial dispute and where parties agree in writing that this part should apply to the dispute<sup>67</sup>. The provision is very important and has settled and made in clear terms the type of Mediation that are covered under the Act leaving no one wondering as to the extent of application of the Act.<sup>68</sup>

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65 President Muhammadu Buhari signed into law the Arbitration and Mediation Act 2023 on 26<sup>th</sup> of May 2023.

66 Adewale Atoke, Godwin Omoaka, & Igonikan Adekunle Nigerian Arbitration and Mediation Act 2023- Key Innovations (2023) [Mediation Templas.pdf](#) accessed on 6 October 2023

67 See Section 67 AMA 2023

68 Babayemi Olaniyan & Ebunoluwa Yoloye, Overview and Analysis of Part II of the Arbitration and Mediation Act 2023 Law Pavilion (2023) <https://lawpavilion.com/blog/overview-and-analysis-of-part-ii-of-the-arbitration-and-mediation-act-2023/> accessed on 6 October 2023

**Commencement:** A mediation proceeding can be commenced either as prescribed by a special statute as a condition for the conduct of a judicial proceeding or when parties have agreed to resolve a dispute with mediation before resorting to judicial or other proceedings. An invitation to mediate must be accepted by the other party within thirty (30) days from the day the invitation was sent, or within any time specified by the invitation. Where acceptance is not received within the prescribed number of days, it may be deemed rejected.<sup>69</sup>

- i. **Suspension of Limitation Period:** The AMA also provides that the running of the limitation period regarding the claim that is the subject matter of mediation is suspended until the mediation proceedings have terminated without a settlement agreement.<sup>70</sup>
- ii. **Number of Mediators:** There shall be one mediator unless the parties agree otherwise.<sup>71</sup> By this provision, parties have a sole Mediator save they decide otherwise. The Act is clearly a very updated document that has taken into account current realities<sup>72</sup>
- iii. **Mediation sessions can be conducted using electronic means, such as video conferencing or other similar methods of digitally transmitting voice and/or image. However, it is crucial to ensure the identification of the involved parties and adhere to the principles of mediation that have been established<sup>73</sup>**

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<sup>69</sup> See Section 70 of AMA 2023

<sup>70</sup> Section 71 of the AMA.

<sup>71</sup> Section 72(1) of the AMA, 2023

<sup>72</sup> Ibid ( n 71)

<sup>73</sup> See section 73 , 75, & 76 of AMA

- iv. Admissibility of evidence – The provision regarding the admissibility of evidence states that certain statements and admissions made by a party, as well as proposals made by the mediator during mediation proceedings, cannot be used as evidence in other arbitral or judicial proceedings<sup>74</sup>
- v. Immunity for mediators and mediation providers- Under the new Act, mediators and mediation providers are not liable for any act done or omitted in the discharge or purported discharge of their functions, unless the act or omission is shown to have been done in bad faith<sup>75</sup>
- vi. The court or arbitral tribunal will enforce the commitment of the parties to engage in mediation and refrain from initiating any other arbitration or judicial proceedings during the specified period. This ensures that the parties actively participate in the mediation process and explore the potential for amicable resolution before resorting to formal legal proceedings.
- vii. Finality of Settlement Agreements: When Parties conclude on an agreement, the Mediator shall participate in the drafting of the settlement agreement and such settlement agreement shall be binding on the parties and enforceable in Court as a contract, consent judgment or consent award.<sup>76</sup>
- viii. This Arbitration and Mediation Act aims to enforce international mediation settlement agreements. It states that the Singapore Convention will be applicable to international settlement agreements made in states other

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<sup>74</sup> Section 77(1) *AMA 2023*

<sup>75</sup> Section 81 *AMA 2023*

<sup>76</sup> Section 82 *AMA 2023*

than Nigeria, under certain conditions.<sup>77</sup> The Act applies when parties have agreed in writing, and it covers various types of mediation, including international and domestic commercial mediation, domestic civil mediation, and both domestic and international settlement agreements resulting from mediation.<sup>78</sup>

## **8.0 Comparative Deductions of Mediation Law and Practice in Nigeria and Selected Jurisdictions**

- i. Court Connected and Private Mediation: Singapore, South Africa, and Nigeria recognizes two types of Mediation practice, which are Court Connected and Private Mediation, however, Singapore went ahead to provide for Singapore International Mediation Centre that cannot only train or accredit mediator but they can also conduct mediation. However, in Nigeria, South Africa and United Kingdom there is no body or organization that is made especially for mediation. while in Singapore you can even enforce Mediation Settlement Agreement in their Supreme Court by the virtue of Mediation Act 2020. The Court connected Mediation in Nigeria is fused together under the Multi-Door Court Rules on Alternative Dispute Resolution which is available in some states. The Civil Procedure Rules of Almost all the countries under study stylishly and surreptitiously makes provision for ADR as a recognized method for resolution of disputes, however, Singapore provision is more elaborate than the rest of the countries and it makes provision for adverse cost

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<sup>77</sup> Section 87(a & b) of the AMA, 2023

<sup>78</sup> Section 67(1) of the AMA 2023

- ii. Domestication of United Nation Mediation Convention: Three Countries out which include Singapore, Nigeria and United Kingdom are parties to the Convention; it is not clear whether South Africa is a party to the Convention. The three countries which are party have domesticated the convention and make it the part of the law of their countries.
- iii. Confidentiality: One of characteristics of Mediation is Confidentiality, all the four countries under study also ensure privacy and protect information garner during the Mediation section, however other countries except Singapore enshrine in their law a provision that protect and guarantee privacy, they even included it in their evidence Act and Community Mediation Centre Act.<sup>79</sup>
- iv. Separate Mediation Act: Similarly of all the four countries under study, only the Singapore has a separate Act or law promulgated for Mediation Practice.
- v. Institutional Framework and Regulatory Body for Mediation: Singapore is only country that have bodies and institutions that train mediators and also conduct mediation. Other countries only have institutions that can train mediators but cannot conduct mediation.
- vi. Enforcement of Settlement of Agreement: All the countries under study makes provision for enforcement of settlement of agreement in Court, but the court with jurisdiction to enforce it varies from country to country. For instance, a settlement of agreement can be enforced even at the Supreme Court in Singapore, South Africa

only makes provision for enforcement in the Magistrate Court, while Nigeria enforcement in Nigeria is presumed to be limited to the High Court since only High Court is presently operating Multi-Door Courts across the country

- vii. Adverse Cost: Failure to participate in mediation after the matter has been referred to mediation or total failure to consider the option of mediation before litigation attracts adverse cost in Singapore and United Kingdom even the successful party can even pay adverse cost.

## **9.0 Recommendations**

Below is our recommendation for an improved Mediation Law and Practice in Nigeria

- i. Though AMA 2023 is an improved Law on Practice Mediation in Nigeria, this paper recommends that the twenty sections allotted to Mediation under the extant law is too meager, compared to Singapore that has a separate Law.
- ii. The Confidentiality of Mediation Practice should be further guaranteed by enacting a separate law or further enshrine or inculcate in evidence Act a section that will protect all the information garner during Mediation session and the privacy of parties.
- iii. Enforcement of Settlement of Agreement should not be limited to High Court, the law should provide specifically that other superior Courts of Record in Nigeria should enforce the settlement.
- iv. There should be Private bodies or Institutions that will not only trained mediators but same will be able to conduct mediation such as we have SIMI in Singapore

- v. Mediation can still be made voluntary but the failure to participate or consider where necessary should attract adverse cost or penalties as the case may be.

## **10. Conclusion**

It is our finding and conclusion from the research that having considered the past law and practice of mediation in Nigeria, especially the repealed Arbitration and Conciliation Act of 1988 which literally provides for little or no law on Mediation but substituted same with conciliation, the current AMA 2023 is a better and an improved law on mediation in Nigeria and same has now provided room for mediation practice to thrive and expand in Nigeria. However, deduction from other jurisdiction still shows that though the AMA 2023 is a better law on mediation, there is still room for improvement on the law especially on the mandatory participation of litigants in mediation, need for private body and institution to train mediator and also conduct mediation proceedings in Nigeria, these and many more are our expectations in any other separate law that will be promulgated on mediation practice in Nigeria.