



Jackson, Etti & Edu

# A REVIEW OF THE **ARBITRATION AND MEDIATION ACT, 2023**

[WWW.JEE.AFRICA](http://WWW.JEE.AFRICA)

**H**istory was made on Friday, 26<sup>th</sup> May 2023, as the then President of the Federal of Republic of Nigeria, Muhammadu Buhari signed into law the Arbitration and Mediation Act, 2023 (“The Act”) repealing the Arbitration and Conciliation Act Chapter A.18, Laws of the Federation of Nigeria, 2004 which has been in force for over 35 years now.

The Act, while embracing international best practices in Arbitration took precedence from the repealed legislation, its oversight, shortcomings and inadequacies and birthed a well and improved set of provisions and further provided a unified legal framework for the fair and efficient settlement of commercial disputes via Arbitration and Mediation channels in Nigeria.

This work examines the novel provisions and a holistic review of the new Arbitration and Mediation Act, 2023.



## **NOVEL PROVISIONS**

1. **OBJECTIVE OF THE 2023 ACT:** Section 1 of the Arbitration and Mediation Act of 2023 provides for the objective of the Act, which is to promote fair resolution of disputes by an impartial tribunal without necessary delay or expense. This provision was not provided for in the Defunct Arbitration and Conciliation Act LFN 2004 (the “ACA”). This provision mirrors the current style of legislation in Nigeria which usually commences with the Objective of such Legislation.

2. **ELECTRONIC COMMUNICATION:** The Arbitration and Mediation Act in **Section 2 (4) (a)** took cognizance of the modern realities of communication, thereby permitting the conduct of Electronic Arbitration and Mediation within Nigeria. Furthermore, the Act recognizes a written Arbitration Agreement to include electronic communications. Electronic communication, as defined by **Section 91**, means any communication that the parties make by means of data messages, that is, any information generated, sent, received or stored by electronic, magnetic, optical or similar means, including electronic data interchange, electronic mail, telegram, telex or telecopy.
3. **ENFORCEMENT OF ARBITRATION AGREEMENTS:** The Arbitration and Mediation Act in Section 5 (1), mandates the court to stay proceedings and refer parties to Arbitration for matters commenced in breach of the Arbitration Agreement unless the court finds that the agreement is “void, inoperative or incapable of being performed.”

This is an improvement on the Previous Arbitration Act, which made the decision to stay proceedings subject to the court’s discretion and required the applicant to demonstrate its willingness to proceed with the arbitration.

4. **NUMBER OF ARBITRATORS: Section 6 (2) of the new Arbitration and Mediation Act:** provides that if there is no express agreement on the number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator. The Act further provides that such arbitrator shall not be precluded by reason of his nationality unless agreed upon by the parties. This brilliant provision is aimed at creating a standard and default number of arbitrators (where unspecified) for Arbitral proceedings.
5. **EMERGENCY ARBITRATOR PROCEEDINGS:** Another laudable provision of the Act is the Emergency Arbitrator proceedings provided under **Section 16 of the Act**, which allows parties to apply to their designated arbitral institution or the court for the appointment of an emergency arbitrator when seeking interim relief prior to constitution of the arbitral tribunal’s. If granted, the arbitral institution or court shall appoint the emergency arbitrator within two business days after the receipt of the application. The decisions from such emergency proceedings are binding and enforceable by parties pending the final decision from the arbitral tribunal. The goal of this provision is to ease and expedite arbitration proceedings in Nigeria.
6. **STATUTE OF LIMITATION FOR ARBITRAL PROCEEDINGS:** The new Arbitration and Mediation Act is seen as a welcome development as it laid to rest certain issues, particularly with respect to the computation of time in Arbitral proceedings. **Section 34** of the Act provides that the Limitation Act applies to arbitral proceedings as they apply to judicial proceedings. This novel provision excludes the commencement of the arbitration and the date of the order for disputes where the subject matter is an award. It specifies the period

to enforce an arbitral award and excludes the commencement of the arbitration and the date of the award. This provides an extra layer of protection for arbitral and mediation proceedings.

7. **THIRD-PARTY FUNDING:** With the enactment of the Arbitration and Mediation Act, Nigeria joins Singapore and Hong Kong in expressly providing for third-party funding, contributing to its attractiveness as a seat for dispute resolution in Africa. **Section 91** of the Act defines a Third-Party funder as:

*“any natural or legal person who is not a party to the dispute but who enters into an agreement either with a disputing party, an affiliate of that party, or a law firm representing that party to finance part or all of the cost of the proceedings, either individually or as part of a selected range of cases, and such financing is provided either through a donation or grant or in return for reimbursement depends on the outcome of the dispute or in return for a premium payment.”*

The Arbitration and Mediation Act abolishes the torts of maintenance and champerty in relation to arbitration and arbitration-related court proceedings. These torts were considered prohibitive of third-party funding, and their abolition invariably allows parties to enter these arrangements. It expressly permits third-party funding of arbitration proceedings and introduces provisions for the disclosure of third-party funding and security for costs against third-party funders. This may signal the beginning of a broader trend of adopting legislation to facilitate third-party funding in Africa. The Act further requires the funded party to disclose the name and address of the funder to its counterparties, the arbitral tribunal and, where applicable, the arbitral institution.

8. **CONSOLIDATION AND CONCURRENT HEARINGS:** The Arbitration and Mediation Act in **Section 39** recognises the agreement of parties to consolidate arbitral proceedings or hold concurrent hearings, with the parties’ consent, an arbitral tribunal may consolidate proceedings or hold concurrent hearings. It is imperative to state that the tribunal may not consolidate arbitral proceedings if not expressly agreed to by the parties.
9. **JOINDER OF PARTIES:** Section 40 of the Arbitration and Mediation Act also allows the joinder of additional parties provided that the additional party is, *prima facie*, bound by the underlying arbitration agreement giving rise to the Arbitration.
10. **AWARD REVIEW TRIBUNAL (“ART”):** One notable novel provision of the Act in **Section 56**, which provides that Parties to an Arbitration may provide in their Arbitration agreement to apply to the Award Review Tribunal whenever they are not satisfied with the Arbitral award granted by the Tribunal. It allows parties to seek the annulment of an arbitral award before a second arbitral tribunal is constituted in the same manner as the initial tribunal. The Act in section 56 (6) mandates the ART to render its decision within 60 days of its constitution. If

the ART annuls an award, either in whole or part, the court may reinstate the award (or part thereof) upon a party's application if it considers that the ART's decision is "*unsupportable*". However, if the ART upholds the validity of an award, the court can only annul the award on grounds of non-arbitrability and public policy.

11. **DEFAULT APPOINTING AUTHORITY:** Under Article 6 of the Arbitration Rules, which are annexed as a Schedule to the Act, the default Director of the Regional Centre for International Commercial Arbitration in Lagos (RCICAL) would be the appointing authority, in the absence of agreement between the parties. Such designation as appointing authority keeps in when either party has proposed an appointing authority, but the other party had not acceded to this after 30 days.
12. **MEDIATION:** The major significant improvement from the repealed Act was the introduction of the Laws that govern mediation in Nigeria. Part II of the New Arbitration Act contains detailed provisions that govern domestic and international mediations and the resultant settlement agreements. The Act in **Section 76** of the Act provides that all Mediation proceedings are confidential. However, it affords certain exceptions, where disclosure is required, such as in preventing and revealing crime.

Another milestone achievement is evident in **Section 77 of the Act**, which precludes the admissibility of statements made during the mediation as evidence in subsequent arbitral or judicial proceedings.

**Section 82 (1) and (2)** provide that the mediator shall participate in the preparation and drafting of the settlement agreement, and the settlement agreements resulting from mediation are binding on parties and enforceable in court as a contract, consent judgment, or consent award.

By virtue of **Section 79 of the Act**, the mediator is barred from acting as the arbitrator in respect of a dispute that was subject to Mediation proceedings unless agreed by the parties.

The Act safeguards the mediator by introducing the immunity clause in **Section 81 of the Act**, which protects the mediators from any liability whatsoever from any act done or omitted in the discharge of their functions.

The Act seeks to enforce International Mediation Settlement Agreement. **Section 87 of the Act** provides that where the enforcement of any international settlement agreement made in a other than the Federal Republic of Nigeria is sought, the Singapore Convention shall apply to such international settlement agreement, provided that the-

*(a) the State is a party to the Singapore Convention; and*

*(b) that the differences that arise out of a legal relationship, whether contractual or not, are considered commercial under the laws of Nigeria.*

This Act on Mediation shall apply where parties have agreed so in writing, in international commercial mediation, in domestic, commercial mediation, in domestic civil mediation, and in domestic and international settlement agreements resulting from mediation.

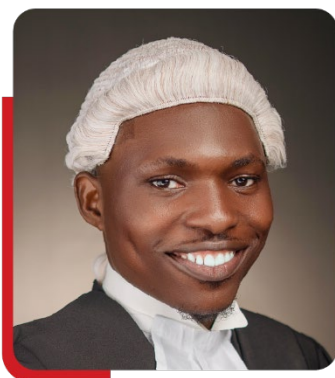
## **CONCLUSION**

The Arbitration and Mediation Act 2023 has brought forth a comprehensive framework that bolsters the transparency, speed, autonomy and enforceability of arbitral awards. These key aspects are essential for a robust and efficient arbitration framework that would meet the evolving needs of businesses and individuals seeking fair and effective dispute resolution by an impartial tribunal without undue delay or expense.

The Arbitration and Mediation Act has equally demonstrated the country's commitment to strengthening its reputation and further promoting the use of Arbitration within its borders as the Act begins to shape the landscape of Arbitration to reflect global best practices in International Arbitration.

Ultimately, while the Arbitration Act 2023 presents significant advancements, it is crucial to acknowledge that no legislation is perfect. Challenges may arise in the implementation and interpretation of the Act, requiring continuous evaluation and potential amendments to address any issues that may arise in the course of implementation.

## **Author**



### **Toheeb Kawojue**

Litigation & Dispute Resolution  
Department.

## Key Contacts

For further information, kindly reach the key contacts below:



### **OBAFEMI AGABA**

Partner, Head of Litigation  
& Dispute Resolution  
Department.

(234) 1 4626841/3

E: obafemi.agaba@jee.africa



### **TOYOSI ODUNBAKU**

Partner, Litigation & Dispute  
Resolution Department.

(234) 1 4626841/3

E: toyosi.odunmbaku@jee.africa

#### **Victoria Island**

RCO Court,  
3-5 Sinarì Daranìjo Street,  
Victoria Island,  
Lagos, Nigeria  
island.

#### **Tel**

+234-1-4626841/3,  
+234-1-2806989

#### **Email**

jee@jee.africa

#### **Abuja**

42, Moses Majekodunmi Crescent,  
Utako, FCT, Abuja

#### **Ikeja**

1st floor, ereke house,  
Plot 15, CIPM Avenue  
CBD Alausa Ikeja  
Lagos Nigeria

#### **Accra**

3 Emmause, 2nd Close  
Akosombo House  
Labone, Accra, Ghana  
P.O. Box 14951  
Accra, Ghana

#### **Yaoundé**

3rd Floor, Viccui Building  
Apt. 15-16, Carr Street  
New Town, Yaoundé  
Cameroon

#### **Harare**

38 Clairwood Road,  
Alexandra Park,  
Harare,  
Zimbabwe.