Part 2

ARBITRATION: THE PRELIMINARY MEETING

INTRODUCTION

1. Just imagine you are piloting an aeroplane from Lagos to London. Before take off, there are some preliminary matters that you must settle and determine in advance. These include:

   (i) the route through the air-space of the various countries en-route.
   (ii) the right to use the air-space of the countries you over-fly, disclosing mission route and destination from start to finish.
   (iii) the speed and height at which you will fly the aircraft and the estimated time of arrival in London.
   (iv) the weather conditions en-route.
   (v) the towns and cities you intend to over-fly and whether their airports will take your aircraft in the event that an emergency landing becomes necessary.
   (vi) payment or agreement to pay over-flying rights and landing fees.
   (vii) sufficient fuel for the duration of the journey or arrangements for payment of re-fueling costs en-route.

With the advantage and help of modern technology and satellite communications, all these are easy to pre-determine with reasonable accuracy. Of course, changes in weather, mechanical problems or other unforeseen circumstances might make you to revise, adjust or alter your route plan.

Working out all the above while sitting in the cock-pit of your aircraft on the ground is not dissimilar to working out of an **Agenda at the Preliminary Meeting of an Arbitration Proceeding.**

2. I must sound a note of warning. **Counsel and parties underrate the importance of a Preliminary Meeting at their peril**. It is true that, like an aircraft journey, you may be able to alter your plans en-route: but certain concessions at the preliminary meeting may do damage to your case later or show you as ill-prepared. **It is necessary to take the Preliminary Meeting very seriously and prepare for it very carefully**. It is at the Preliminary Meeting that **mines are usually laid** for the other side or the **mines carefully laid by one side are uncovered and detonated by the intended victim**. In many major Arbitrations, **it is the leading Counsel and not the Junior** who should conduct the Preliminary Meeting. **It is the foundation. A badly laid foundation may make the super-structure shaky or fail.**

3. There is usually – and indeed there ought to be – an Agenda for the Preliminary Meeting. This is usually prepared and circulated by the Tribunal. But do not hesitate to suggest to the Tribunal things that you think should be included on the Agenda.

4. **The Agenda** for the Preliminary Meeting should have six objectives in view in the conduct of the Arbitration:

   (i) Each party should have **a full opportunity to present his case** to the Tribunal.
   (ii) Each party **must know his opponent's case.**
   (iii) Each party must have **full opportunity to test and rebut the case presented by the other side.**
   (iv) The **parties must be treated alike.**
   (v) The Tribunal, unless otherwise agreed by the parties, should adopt an **"adversarial"** rather than **"inquisitorial"** procedure.
   (vi) **Time and cost** must be of the essence – subject to the **demands of fairness and justice.**

5. **The following matters should be addressed at the commencement of the Preliminary Meeting:**

   (a) Confirmation and **identity of the parties.**
   (b) A copy of the **Notice of Arbitration** must be produced for the Tribunal and formally tendered and admitted.
   (c) Confirmation by the parties that the **Arbitrators have been validly appointed**. This is usually supported by tendering the **Notice of Appointment.**
   (d) **Original contract,** if any, and the arbitral contract must be produced and tendered.
   (e) Confirmation that the **Arbitrators may rule on their own substantive jurisdiction**.
   (f) Is there **any objection** to the **Arbitrators' jurisdiction**?
   (g) Can the Arbitrators rule on it in **an award on jurisdiction in limine**?
   (h) Deal with the objection on jurisdiction in the award on the merit?

6. **Seat and Applicable Law:**

   Confirmation that the seat of the Arbitration shall be Nigeria or any other place, and that the Applicable Law shall be the law of Nigeria or any other law as agreed.

7. **Commencement of the Arbitration:**

   The parties are free to agree when the arbitral proceedings are to be regarded as commenced, **unless** the appointment was made by court or it was pre-determined in the contract.

8. **Identity of Issues in Dispute:**

   (a) Outline of Claimant's Case.
   (b) Outline of Respondent's Case.
   (c) Discuss the Issues – particularly their relative importance. Are some not worth pursuing? **You must keep this under constant review.**
   (d) Principal **areas of agreement and disagreement must be identified and recorded.**
   (e) **An agreed list of issues which remain to be determined** must be handed over to the Tribunal **not later than the close of the Preliminary Hearing**. This is very important.

9. **Arbitrators' General Powers:**

   The parties are free to confer on the Tribunal certain **extra general powers**. These could be done at the Preliminary Meeting, e.g:

   (a) **The extent** to which the **Tribunal shall take initiative** in ascertaining **the facts and the law.**
   (b) Whether and to what extent there should be oral or written evidence or submissions.
   (c) The award of interest.
   (d) Power to make a declaratory award.
   (e) If, without showing sufficient cause, a party fails to comply with any order or directions of the Tribunal, the Tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the Tribunal considers appropriate.
   (f) If a claimant fails to comply with a peremptory order of the Tribunal to provide security for costs, the Tribunal may make an award dismissing his claim.
   (g) Authority to record any agreement reached at the Preliminary Meeting on behalf of the parties.
   (h) Power to appoint experts, e.g. Accountants to analyse accounts submitted by the parties.
   (i) To take legal advice or appoint an assessor.

(j) The same power as the Court:
   - (i) To order a party to do or refrain from doing a thing.
   - (ii) To order specific performance of a contract (other than contract relating to land).
   - (iii) To order the ratification, setting aside or cancellation of a Deed or other document.

(k) Power to make provisional award.

10. **Joinder and Consolidation:**

(a) Is there any possibility of **joinder of parties?**
(b) Is there any agreement on **consolidation** with any other arbitral proceedings or alternatively, **concurrent hearings?**

11. **Preliminary Issues:**

(i) Can either party **identify one or more issues** which, if decided in a particular way, **could dispense with all, or a substantial element of the dispute?**
(ii) Consider **whether** specific **issues in the dispute can be split.** If so, parties to **expressly consent.**
(iii) Consider whether it would be appropriate to **make awards on different issues at different stages.**
(iv) Do the parties agree that the Arbitrator should have **power to order provisional relief?** If so, what directions are required – **separate hearing?**
(v) Is there a **third party interest** involved who, though not party to the Arbitration Agreement, **ought to have copies of the Arbitration proceedings?** If so, **consent** of all parties and the Tribunal **must be obtained and recorded.**

It is the duty of the Tribunal to **adopt procedures suitable to the circumstances and to avoid unnecessary delay and expenses.** And the parties should cooperate. They should do all things necessary for the proper and expeditious conduct of the proceedings.

12. "**Documents only" to Apply:**

This is **unsuitable** where **there is a serious dispute over relevant facts.** If **"Documents Only"** method is agreed, then **"issues"** need to be framed with more precision than when **attending oral hearing.**

13. **Short Procedure Hearing:**

This is only suitable for **"quality"** disputes requiring some **summary decision**, that is: **"look and sniff"** cases. Each party usually bears his own costs.

14. **Full Procedure with Hearing:**

This is for disputes that **require examination/cross-examination of witnesses of fact**. The evidence is usually **partly oral and partly documentary**. You must consider whether a **Scott Schedule** is desirable.

15. **Timetable:**

The following **timetable** should be followed, **unless otherwise directed**, viz:

15.1 The Claimant shall, within 28 days (sometimes a little more) of service of the order, serve a **Statement of Case.**

15.2 If the Claimant serves a Statement of Case within the 28 days directed, the Respondent **shall**, within 28 days after service of the Claimant's Statement of Case, serve a **Statement of Defence** to the Claimant's Statement of Case and a Statement of any **Counterclaim.**

15.3 If the Respondent serves a Statement of Defence within the 28 days directed, the Claimant **shall**, within 14 days after such service, serve a Statement of **Reply to the Defence.**

15.4 If the Respondent serves a Statement of Counterclaim within the 28 days directed, the Claimant **shall**, within 28 days after such service, serve a **Statement of Defence** to the Respondent's **Counterclaim.**

15.5 If the Claimant serves a Statement of Defence to the Respondent's Statement of Counterclaim within the 28 days directed, the Respondent **shall**, within 14 days after such service, serve a **Statement of Reply to the Defence.**

15.6 The Statements listed above shall be exchanged in accordance with the following guidelines:

a) Each Statement should contain the facts and matters of opinion which are intended to be established by evidence and may include a Statement of any relevant point of law which will be contended for;

b) A Statement should contain sufficient particulars to enable the other party to answer each allegation without recourse to general denials;

c) A Statement may refer to evidence to be adduced if this will assist in defining the issues to be determined;

d) **The reliefs or remedies sought**, for instance, specific monetary losses, **must be stated in such a way that they can be answered or admitted;**

e) All Statements should adopt a common system of numbering or identification of sections to facilitate analysis of issues. **Particulars given in schedule form should anticipate the need to incorporate replies.**

15.7 The Tribunal may permit or direct the parties at any stage to amend, expand, summarise or reproduce in some other format any of the Statements of Claim or Defence or Reply **so** as to **identify the matters essentially in dispute**, including preparing **a list of the matters in issue.**

16. **Experts:**

16.1 If **Experts** are engaged, parties should attempt to agree on **joint instructions such agreement/non-agreement to be notified to the Tribunal.**

16.2 Date for exchange of their reports/rebuttals.

16.3 Inspection access for experts – if necessary?

16.4 Experts will meet `open'/ `without prejudice' to endeavour to narrow the issues. What authority do they have? Privilege shall be waived for any matter **agreed** at these meetings.

16.5 **The Experts** to meet **not later than 28 days after the close of "Pleadings".**

They shall endeavour to **narrow the issues and to agree facts as facts, figures as figures etc., as far as possible.**

The Experts shall prepare, date and **sign a note of the facts and opinions upon which they are agreed**, and of the issues upon which they cannot agree. A copy of such note to be exchanged and delivered to the Arbitrator within (14) days of their last meeting but, in any event, not later than (21) days before the Hearing.

16.6 **Not later than (30) days before the hearing**, each party **may address written questions to the opposing expert** on the content of **that expert's report** to which that expert will be **required to** give **written responses not later than (7) days after receipt of those questions.**

Not later than (7) days after receipt of these written responses , the party who posed the questions **may serve a further written comment.**

All of the above to be copied to the Tribunal, who may, not later than (14) days before the hearing, send written questions to the parties to which their experts should respond. **These Replies to be sent to the Tribunal not** later than (7) days thereafter and rebuttals or comments on these responses may be sent to the Tribunal, copied to the other side, **not later than (7) days before the hearing.**

The intention is either to avoid, if possible, oral examination of experts, or restrict it to the major issues in difference between them.

17. **Additionally:**

17.1 Consider a Tribunal appointed expert for appropriate issues.

In which case the parties are:

1. To agree on who the Tribunal's Expert should be, in consultation with the Tribunal.

2. To agree on the wording of the issue(s) to be submitted to the Tribunal's Expert **and in the absence of agreement,** the Tribunal will decide on the wording.

3. To define the scope of the Tribunal's Expert's enquiries and, in the absence of agreement, this matter is to be decided by the Tribunal taking into account the parties' submissions.

Not later than (21) days of the close of Pleadings, the Tribunal appointed expert is to **deliver a Draft Report to each party.**

Within (14) days of the delivery of this Report, a representative of the parties is to meet with the **Tribunal's Expert** to discuss his **Draft Report. The discretion as to whether to amend this Draft Report, following submissions from the parties' representatives, to be entirely at the discretion of the Tribunal's Expert.**

Not later than (14) days after the meeting between the Tribunal's Expert and the parties' representatives, the Tribunal's Expert shall deliver a copy of his Final Report to the Tribunal, copied to the parties.

Should either party wish to cross-examine the Tribunal's Expert on any matter contained in his Final Report (on any issue within the Tribunal's Expert's terms of reference, whether or not covered by his Final Report) then, not later than (7) days before the hearing, notices must be given in writing of the matters on which the cross-examination is desired, to be delivered to the Tribunal's Expert, copied to the Arbitrator and the other side.

At the hearing, any cross-examination of the Tribunal's Expert may be conducted by a party appointed expert rather than the party's Advocate, if that is the party's preference.

18. **Tribunal's Expert:**

A word on this. There are new developments in England in the jurisprudence concerning the calling of **expert witness**. It is in the case of **Abbey National Mortgages Plc v Key Surveyors Nationwide Ltd & Others (1996) 1 WLR 1534 to 1542**. It was a very powerful **Court of Appeal** presided over by the **Master of the Rolls** (Sir Thomas Bingham) and Lords Justices Peter Gibson and Schiemann. On page 1542, the **Master of the Rolls** said in the unanimous judgement:

"It was argued that appointment of a court expert was pointless, since it merely meant the instruction of an additional expert whose opinion would carry no more weight than any other. We feel bound to say that in our opinion this argument ignores the experience of the courts over many years. For whatever reason, and whether consciously or unconcsciouly, the fact is that expert witnesses instructed on behalf of parties to litigation often tend, if called as witnesses at all, to expouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties. There must be at least a reasonable chance that an expert appointed by the court, with no axe to grind but a clear obligation to make a careful and objective valuation, may prove a reliable source of expert opinion. If so, there must be a reasonable chance at least that such an opinion may lead to settlement of a number of valuation issues."

Earlier on p.1539F of the judgement the **Master of the Rolls** said: **"Times change and procedure develops."**
Nigeria deserves nothing less. We must wake up.

19. **Pre-Hearing Review:**

This is to consider all outstanding issues which need to be narrowed and clarified. Are some issues not worth pursuing?

20. **Hearing:**

20.1 **Sitting**
Each sitting day will be from 9.00a.m. to 4.00 p.m. with one hour's recess for luncheon.

20.2 **Estimated Duration**
Provisional Date? Total length in days?

20.3 **Venue/Accommodation**
These are for the Tribunal, not for the parties.

20.4 **Hearing Bundle**
Parties to deliver to the Tribunal, not less than (7) days before the Hearing, a **Hearing Bundle of documents properly paginated, properly and fully indexed with relevant passages of text upon which reliance will be placed, suitably highlighted.**

After delivery of this **bundle,** the Tribunal will wait 24 hours before reading it in order to give the parties the opportunity to check if, inadvertently, any 'without prejudice' material has found its way into the bundle. In which case, on being informed of this, the Tribunal's secretary will locate the document and return it unread by the Arbitrator to the parties.

A core bundle of principal documents?

What do the parties want the Arbitrator to read prior to the Hearing?

Nothing in the bundle is to be taken as read by the Tribunal until adduced as evidence at the Hearing.

20.5 **Evidence on Oath**
All evidence shall be on Oath or Affirmation.

20.6 **Limitation on Orality**
Time allowed for examination-in-chief and cross-examination of witness or, **alternatively, the length of the hearing.**

The issues on which the Arbitrator **needs to be addressed.**

Reading aloud from documents or authorities.

20.7 **Text Books/Law Reports**
The Arbitrator to be notified if **text books** and/or **Law Reports** are to be referred to **at the Hearing** then, 7 days before the Hearing, the party wishing to refer to such shall send the Tribunal a copy of **the complete Report or extract from the text book**, with the passage on which that party wishes to place reliance, **suitably highlighted.**

Advocates should liaise with each other so as to ensure, so far as possible, that the authorities provided are not duplicated.

21. **Representation:**

Form of Representation?
Parties briefing Counsel? Consider limiting Counsel's role to that of legal expert? If so, should there be oral or written submissions?

22. **Reasoned Award:**

Does either party not require **a reasoned award?**

23. **Tribunal's Terms and Conditions on Finance:**

Have the Terms been signed and returned by both parties? Or has their agreement been recorded in the proceedings?

24. **Interim fee and disbursements to be paid by the parties and when and how?** Payment on Account.

25. **Any other business.**

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AKINJIDE & CO

BARRISTERS, SOLICITORS
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Part 1: PRELIMINARY MEETINGS AND INTERLOCUTORIES

Part 2: ARBITRATION THE PRELIMINARY MEETING

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Part 1
PRELIMINARY MEETINGS AND INTERLOCUTORIES

INTRODUCTION

1. There are no hard and fast rules as to what has to be discussed at a Preliminary Meeting. The real purpose of a Preliminary Meeting is to plan the expeditious and efficient conduct of the arbitration. Arbitration is a broad church where innovations and variety are not only encouraged but lauded: **Vide Bremer Vulkan Schirffbau and Maschinenfabrik V South India Shipping Corp Ltd (1981) A.C.909 per Lord Diplock at P. 985**. See also **Arbitration Act 1996, S. 34(1)** which states categorically:

   "It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree on any matter"

The overriding procedural obligations of an arbitrational tribunal in conducting a reference are:

(i) To comply with the express mandate, if any, laid down by the parties
(ii) To conduct the process fairly and even handedly and
(iii) To use all reasonable despatch in entering on and proceeding with the reference and making an award.

There is no "White Book" for Arbitration

2. A preliminary meeting cannot be held until:

   (a) The tribunal has been appointed;
   (b) The tribunal has been provided with the information as to the principal issues between the parties, though sometimes it could be dealt with at the Preliminary Meeting;
   (c) Administrative fees, where applicable, must be paid;
   (d) The impartiality of the arbitrators checked, where necessary, and the result made available to the arbitration:

See **AT & T Corp V Saudi Cable Co (2000) 1 All. ER (Comm) 201.**

3. The Arbitrators, the parties and their Advisers must ensure adequate preparations for the Preliminary Meeting e.g.

(i) The venue
(ii) The time
(iii) Transport for the Arbitrators to the venue, where and when needed,
(iv) Agenda for the Preliminary Meeting.

4. **Agenda**

UNCITRAL has published helpful guidelines called **"Notes On Organising Arbitral Proceedings"**. Though this is not binding, but it may be used as a **checklist** of matters which may be considered at a Preliminary Meeting. Nor are the guidelines comprehensive.

For certain Arbitration Proceedings, Section 15 of the Arbitration and **Conciliation Act CAP 19 Laws of Nigeria 1990**, must be taken into account. It reads:

> *"15 (1) The arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule to this Act.*
>
> *(2) Where the rules referred to in subsection (1) of this section contain no provision in respect of any matter related to or connected with a particular arbitral proceedings, the arbitral tribunal may, subject to this Act, conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure fair hearing,*
>
> *(3) The power conferred on the arbitral tribunal under subsection (2) of this `section shall include the power to determine the admissibility, relevance, materiality and weight of any evidence placed before it".*

5. **Agenda for Preliminary Meeting:**

(i) Confirmation of the identity of the parties.
(ii) A copy of the Notice of Arbitration must be formally tendered and admitted.
(iii) Confirmation that the Arbitrators have been validly appointed. Notice of appointment should be tendered.

(iv) The original contract, if any, and the arbitral contract must be tendered as Exhibits.
(v) To confirm the Arbitrator's jurisdiction.
(vi) To confirm the seat of Arbitration.
(vii) To confirm the law applicable to the arbitration.

6. The Arbitrator's Terms of Appointment and Schedule of charges and possible expenses must be confirmed. Methods of payments where necessary must be agreed.

7. The issues should be identified. This could be done by asking each side to make **Opening Address** on the **issues**, the **Claim** or **Counter-Claim**. This must be kept under constant review.

8. There must be agreement as to the quantum of the Arbitrator's powers. The parties are free to confer extra powers on the Arbitrators.

9. **Commencement of Arbitration:**

The parties are free to agree on the commencement date unless the date was pre-determined in the contract or by Court.

10. **Applicable Law:**

This will usually be stipulated in the contract. But if you are involved as Counsel or as Arbitrator in an International Arbitration, you may wish to take note the current thinking in England. It is the case of **Omnium de Traitement et de Valorisation V Hilmarton (1999) 2 All. E.R (Comm) 146, where Timothy Walker, J**. held:

"An arbitration award, made under a foreign proper and curial law, which had specifically found that there was no corrupt practice should be enforced in England even if English law would have arrived at a different result on the ground that the underlying contract breached public policy because its performance involved a breach of statutory regulation in the place of performance. Accordingly, a Swiss arbitral award which determined that there had been no attempt at bribery or corruption in Algeria but merely a breach of a statute aimed at protecting Algerian suppliers from foreign competition, and hence that the contract concerned was not unenforceable as contrary to Swiss public policy, would be enforced even though an English tribunal might have come to a different conclusion".

11. **Types of Arbitration:**

Documents only
Rules
Short Procedure
Full Hearing

With the sole exception of the **"Look** and **Sniff"** arbitration, all employ the adversary system: See **Bremer Vulkan V South India Shipping (1981) AC. 909 at P. 919 for Donaldon J** in the High Court and at **P. 977 per Lord Diplock** in the House of Lords.

12. **Preliminary Issues:**

Consider whether there are any issues which could be treated as preliminary issues which if decided one way or the other could dispense with a substantial element of the dispute. If there are such issues, then the consent of both parties must be obtained and recorded. Such procedure could save time and costs. But what is the nature of order or orders that the Arbitrators should make when deciding a preliminary issue? It has to be a partial award or a provisional award. **Partial award may determine the rights of the parties on the issue finally whereas a provisional award would be the subject of revision or rescission later.** It must be appropriate to make award on different issues at different stages.

13. **Time Table for Submission:**

This will depend on the type of Arbitration as agreed. Flexibility is necessary. Amendments to submissions, request for and provision of Further and Better Particulars should be expected.

14. **Scott Schedule:**

The **Scott Schedule** is a useful procedural device which achieves a considerable saving in time and money. Where there are several items in issue between the parties, as to liability or amount or both, it is of great convenience to the parties and to the Court/Arbitrators for the respective contentions of the parties to be stated against such item. "The Scott Schedule" is named after a former Official Referee. The Scott Schedule is divided into columns, providing in separate columns for the consecutive numbering of items, the full description of each,

the contentions of each party against each item as to liability or amount or both, and finally a column for the use of the Court. The parties are required in Scott Schedule to give full particulars of their respective cases in respect of each item in issue.

15. **Disclosure of Documents:**

Is it limited or full? With submission? It could be after close of pleadings. Parties should be able to take copies or inspect them. There should be bundle for hearing. These include figures, plans, photographs and correspondence.

16. Communication with Arbitrator:

Communication by the parties with the Arbitrators should be avoided and discouraged. It is recommended **that a Registrar should be appointed to act as Post Office between the parties and the Arbitrators.** Where a Registrar is considered unnecessary either for reasons of cost or the nature of the Arbitration, **the Third Arbitrator or Umpire should act as Co-ordinator/Post office.**

17. **Pre-hearing Review:**

Here, the venue, duration of the hearing, other arrangements, date of hearing and representation should be discussed and settled.

18. **Expert Witness:**

The number of experts, discipline, exchange of expert reports, meeting of experts before or after their Reports, access to the experts by the parties. It could be agreed that the written witness statements and their Expert Reports be used as Evidence in Chief by both parties.

I must invite attention to the case of **Clough V Tameside & Glossop H.A (1998) 1 WLR 1478 at P. 1485** where the Court laid the law as follows:

> *"The Commercial Court and the Family Division have been in the forefront of developing procedures whereby experts give unbiased opinions based on instructions and on information disclosed and known to all parties. This is, in my judgement,*

essential if experts are to be of any assistance to the Court. The report of Lord Woolf M.R., Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (July 1996), chapter 13, section III specifically commends this approach to expert evidence, and the trend in the Queen's Bench Division is developing to require candour, particularly in professional negligence cases. In ***Naylor v. Preston Area Health Authority [1987] 1 W.L.R. 958, Sir John Donaldson M.R. stated, at p. 967:***

"whilst a party is entitled to privacy in seeking out the 'cards' for his hand, once he has put his hand together, the litigation is to be conducted with all the cards face up on the table. Furthermore, most of the cards have to be put down well before the hearing… I personally think that in professional negligence cases, and in particular in medical negligence cases, there is a duty of candour resting on the professional man."

Some of the duties and responsibilities of an expert were laid down by the Commercial Court/Queens Bench Division in:

National Justice Compania NAVIERA S.A v. Prudential Assurance Co. Ltd. (1993) 2 Llyods Law Report 68 at P. 69:

"I will refer to some of the duties and responsibilities of experts in civil cases because I consider that a misunderstanding on the part of certain expert witnesses … as to their duties and responsibilities contributed to the length of the trial…

"The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation…

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise… An expert witness in the High Court should never assume the role of advocate.

3. An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion…

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert's opinion is not properly researched because he consider that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one…

6. If after exchange of reports, an expert witness changes his view on a material matter… such change of view should be communicated… to the other side without delay and when appropriate to the Court.

7. Where expert evidence refers to photographs, plans, calculations… survey reports or other similar documents there must be provided to the opposite party at the same time as the exchange of reports…"

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(a) Outline of Claimant's Case
(b) Outline of Respondent's Case
(c) Discuss the Issues – particularly their relative importance. Are some not worth pursuing? **You must keep this under constant review.**
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(a) **The extent** to which the **Tribunal shall take initiative** in ascertaining **the facts and the law.**

(b) Whether and to what extent there should be oral or written evidence or submissions.
(c) On the award of interest.
(d) Power to make a declaratory award.
(e) If without showing sufficient cause a party fails to comply with any order or directions of the Tribunal, the Tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the Tribunal considers appropriate.
(f) If a claimant fails to comply with a peremptory order of the Tribunal to provide security for costs, the Tribunal may make an award dismissing his claim.
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This is **unsuitable** where **there is a serious dispute over relevant facts.** If **"Documents Only"** method is agreed, then the **"issues"** need to be framed with more precision than when **attended hearing.**

24. **Short Procedure Hearing:**

This is only suitable for **"quality"** dispute requiring some **summary decision,** that is: **"look and sniff"** cases. Each party, usually, bears his own costs.

25. **Full Procedure with Hearing:**

This is for disputes that **require examination/cross-examination of witnesses of fact.** This evidence is usually **partly oral and partly documentary.** You must consider whether a **Scott Schedule** is desirable.

26. **Timetable:**

This should be discussed with the parties and agreed.

27. **Pre-Hearing Review:**

This should deal with:
(a) Sitting
(b) Estimate duration
(c) Venue/Accommodation
(d) Hearing Bundle
(e) A core bundle?

28. **Representation:**

Form of Representation
Parties briefing Advocates?

29. **Reasoned Award:**

Does either party not require reasoned award?

30. **Interlocutories:**

These will include all steps taken for the purpose of assisting either or both parties with prosecuting their case or protecting or in any other way dealing with the subject matter of Arbitration. An interlocutory application will usually commence an interlocutory proceeding. It will be decided either by way of oral hearing or documents only. The Preliminary Meeting is the first interlocutory stage in arbitration proceedings. The meeting is convened by the Tribunal by issuing directives to both parties. The baton has passed to the Arbitrators.

31. **Interim Measures:**

During the course of an arbitration, it may be necessary for the arbitral tribunal to issue orders to preserve evidence, to protect assets, or some other way to maintain the status quo pending the outcome of the arbitral proceedings. Such orders in domestic or international arbitration take different forms and go under different names:

(a) In the Model Law and in the Uncitral Rules, they are known as **"interim measures of protection".**
(b) In the English version of the ICC Rules, they are known as **"interim or conservatory measures"** (Art 23 ICC Arbitration Rules)
(c) In the French version, they are known as: **"measures provisoires ou conservatoires"**
(d) In the Swiss law governing international arbitration, they are referred to as **"provisional or protective measures"** (Swiss PIL Act 1987, C. 12 Art 183).

No matter by whatever name they are called, or designated, they are intended to operate as holding orders, pending the outcome of the arbitral proceeding.

Other interlocutory applications include:
Adjournments,
Contested Further and Better Particulars
Contested amendment to Statements of Cases
Contested interlocutories
Extension of time for particular matter
Security for costs
Sanctions for a party's default
Variation of any directions previously made.

32. **Commercial Contracts and Commercial Purposes:**

Right from the interlocutory stage of the arbitral proceedings, the Arbitrator and Counsel should know and always remember the **commercial purpose** of the contract. The governing norms were referred to in two recent decided cases, namely:

(a) **In the House of Lords decision in Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co [1976] 3 All ER 570 at 574, Lord Wilberforce said:**

'No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the courts should know the commercial purposes of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating'

'It is often said that, in order to be admissible in aid of construction, these extrinsic facts must be within the knowledge of both parties to the contract, but this requirement should not be stated in too narrow a sense. When one speaks of the intention of the parties to the contract, one is speaking objectively- the parties cannot themselves give direct evidence of what their intention was-and what must be ascertained is what is to be

taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.'

See also the recent judgement of **Moore-Bick J in Kingscroft Insurance Co Ltd and Others v Nissan Fire and Marine Insurance Co Ltd [2000] 1 All ER (Comm) 272 at page 278 – 9** where the learned judge observed that –

"The task of the court in construing any contract is to ascertain the intention of the parties from the words they have used. The particular word which the parties have chosen to express their intention are therefore of the first importance, but it has long been recognised that language is a flexible tool and that few words have so precise and limited a meaning as to render them incapable of bearing a variety of related, though different, meanings. In recognition of that fact the courts have for many years insisted that when construing any contract it is necessary to have regard to the background to the transaction in order properly to understand the language which the parties have chosen to express their intention."

33. **Interlocutory Applications and Costs:**

Where the arbitral tribunal departs from the general principle that costs follows the event, the award must be made with proper judicial discretion. To deprive a successful party of this discretion is an exceptional measure which must be justified:

(i) **The Erich Schroeder (1974) 1 Lloyd's Reports 192**
(ii) **Matheson & Co Ltd v. A. Taboh & Son (1963) 2 Lloyd's Reports 270**
(iii) **The Rozel (1994) @ Lloyd's Reports, 161 at P. 162**

It is appropriate to make cost orders in relation to specific meetings, hearing or application as the arbitration proceeding. The tribunal may make such orders, for instances:

(a) at the conclusion of preliminary meeting.

(b) at the conclusion of a hearing dealing with a preliminary point
(c) at the conclusion of an application to the arbitrator dealing with security for costs; or
(d) upon an application to amend a pleading or statement of a case.

An order for cost is not enforceable unless and until it is incorporated in an award; however, once made, it should not be changed unless there are exceptional circumstances – such as concealment of relevant documents or information at the time the order was originally made.

The general principles upon which an arbitrator may award costs following the hearing of preliminary or interlocutory issues were laid down in:

Surrey Health Borough Council v Lovell Construction Ltd (1990) 48 BUILD. L.R. 108

The Tribunal must deal with the costs of each separate interlocutory order by referring to the disposition of the costs in each separate orders.

34. Any other business.

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