ISSN: 2394-7659
IMPACT FACTOR- 2.789

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International Journal of Engineering Researches and Management Studies

# HIGHLIGHTS OF PRELIMINARIES MEETINGS IN ARBITRATION PROCEEDINGS

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## ABSTRACT
Preliminary meetings are bedrock for successful arbitration proceedings. It has taken on an added practical significance given the broad latitude; parties now enjoy structuring the arbitral proceedings according to their own views of what is convenient and cost-effective. Such meetings can contribute to the efficiency of the dispute resolution process as they allow parties to address factors that were unpredictable when the parties agreed to their arbitration clause. This paper reviews the basic highlights of such meetings and recommends among others that Quantity Surveyors and all other Construction Professionals involved in arbitrations to take preliminary meetings very important, because, it will afford them good background for speedy resolution of disputes among the parties, when arbitration proceedings finally start.

**Keywords:** Preliminary Meetings, Arbitrators, Parties in Disputes.

## 1. INTRODUCTION
The basic principle of arbitration is that the parties to a contract from which dispute arises elect to appoint a tribunal of their own choice to determine the dispute (Jackie & Farooq, 2002). Arbitration is especially relevant where construction technicalities are involved. Arbitration is a voluntary procedure, available as an alternative to litigation. It is not enforceable as a means of settling disputes except where the parties have entered into an arbitration agreement. The object of arbitration is to obtain a fair resolution of disputes by an impartial third party without unnecessary expense or delay. Arbitrators, or Tribunal members, are commonly appointed by one of these three means:

A. Directly by the disputing parties (by mutual agreement or each party appointing one arbitrator)
B. By existing tribunal members (For example, each side appoints one arbitrator and then the arbitrators appoint a third)
C. By an external party (For example, the court or an individual or arbitration institution nominated by the parties)

After an arbitral tribunal is chosen and properly appointed, the arbitrators will often organise preliminary meetings with the parties. Such meetings are useful opportunity for the arbitrators to meet the representative of the parties, who may not themselves have had a chance to meet since much of the early procedure will have been conducted by correspondence.

### Preliminary Meeting in Arbitration Proceedings
Preliminary meeting is a vital stage in the proper administration of the tribunal. It is often the first opportunity for members of the Arbitral Tribunal to meet face-to-face; for the parties to meet each other since the dispute took on its formal dispute resolution process. This gives room for counsel and the parties to meet each other and members of the Tribunal. The preliminary meeting associated with the conduct of arbitration in a domestic setting and probably the most important activity in the arbitration process. Its procedures "wean" the arbitral process for the impeding reality of the arbitration hearing (Kariuki, 2010).This is because for arbitration to work, it is essential that the parties and the arbitrator give consideration to the ways in which the process may achieve a just and cost effective resolution of the parties' dispute. This requires an understanding of how, either at the time of the preliminary meeting or prior to it, the parties and the arbitrator can modify procedures to tailor them to the dispute in question.

### Purposes Of Preliminary Meetings In Arbitration Proceedings
Rajoo (2005) explains that there is no legal requirement for a preliminary meeting, but the preliminary meeting is part of the reference and its main purpose is to discuss the format of the arbitration and also, set the parameters of the arbitration. It is not farfetched to say that this meeting forms the basis of most successful arbitrations. This preliminary meeting helps to establish a framework for the arbitration proceedings and what

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the parties have agreed by way of procedure for the arbitration. It may also enable the arbitrator to ascertain from the terms of appointment as to whether the dispute is to be determined by documents only. It is usual for the representatives of the parties to discuss beforehand and present an agreed position to the arbitrator on the question of his fees and expenses to avoid any possible embarrassment. Preliminary meetings have taken on added practical significance given the broad latitude parties now enjoy to structure the arbitral proceedings according to their own views of what is convenient and cost-effective and the arbitrator's duties under section 14 to 23 of the Arbitration and Conciliation Act 2004. Such meetings can contribute to the efficiency of the dispute resolution process as they allow parties to address factors that were unpredictable when the parties agreed to their arbitration clause.

Preliminary meetings also provides an opportunity for the parties and the tribunal to focus on the main issues of the dispute and more importantly, to discuss procedure and evidence. They can be useful even where the parties have opted for institutional arbitration since most sets of rules, designed for adaptability to a variety of disputes and universal acceptance across legal systems, only set out general principles, not detailed regulation of the actual procedural questions parties will face during arbitration. Preliminary meetings may also be an opportunity to reinforce the parties' agreement to arbitrate their disputes by making important choices the parties may have left undecided: place (section 16) and language (section 18)of the Arbitration and Conciliation Act 2004. They may also help to resolve disputes about the appointment of the arbitrators (section 7) of Arbitration and Conciliation Act 2004, to reveal and repair any defects in the arbitration agreement or to clarify questions of identity and proper names for the parties. Questions as to who the proper parties to the dispute are and whether any others might be joined may also be resolved. According to Gerald (2013), preliminary meeting may facilitate agreement or at least understanding of key procedural steps, such as possible bifurcation of issues, document production, the use of experts, overall appraise of the strengths and weaknesses of its case in comparison with that of the opposing party. Finally, a preliminary meeting is also to satisfy the arbitrator that he is properly appointed and consider submissions from the parties as to the procedures required to be completed before he can make his award and the timetable for those procedures. Shilston (1987) opines that preliminary meeting should not take place until the arbitrator has accepted the nomination as arbitrator. Otherwise, his appointment is not complete and he would have no jurisdiction to convene the preliminary meeting.

## 2. HIGHLIGHTS OF PRELIMINARY MEETINGS IN ARBITRATION PROCEEDINGS

The arbitrator has to follow a variety of procedures in conducting the arbitration and the principle of party autonomy governs the procedures to be followed. The parties are given the widest discretion to agree on any procedure that they prefer as long it is consistent with public policy in consideration of what procedure to be adopted for the preliminary meeting. The procedures the parties will like to consider will vary greatly depending on the nature of the transaction giving rise to the dispute. However, the following points should, in general, be addressed at the outset as the highlights of the preliminary meetings (UNCITRAL Yearbook, 1996; Levy, 1996; .Act, 2007.and Carver&Vondra, 1994).

1. Introduction
2. Confirm arbitration agreement
3. Confirm arbitration appointment
4. Confirm arbitration jurisdiction
5. Establish the issues
6. Establish arbitration rules
    a. Institutional rules
    b. Arbitration procedures
        - Document only
        - Fast track
        - Full procedure
7. Establish time table
    a. Pleadings and amendments
    b. Discovery
    c. Exchange of submissions
    d. Interlocutory applications

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8. Establish witness and also expert witness
9. Date, place and duration of oral hearing and manner of communication of document to each other.
10. Cost
11. Confidentiality
12. Administrative services
13. Conduct of hearing
14. Settlement negotiation
15. Awards
16. Others
    a. Language to use
    b. Interpreter/ Translator
    c. Extension of time
    d. Adjournments

**a) Introduction**

At the opening of the meeting, the first thing to do is for the arbitrator(s) to carry out introduction of themselves and the parties to the dispute as well as their representative, the important of this level is to enable the parties to see each other since the dispute has started and also to enable the representative to know each order.

**b) Confirm Arbitration Agreement**

The Arbitration and conciliation Act 2004, section 1(1), (a),(b), (c) requires an arbitration agreement as a condition precedent for commencement of arbitration under it. The arbitrators at the preliminary meetings must ensure that, there is an agreement between the parties that established the creation of an arbitration in the contract because, arbitration agreement by reference will be sufficient as a basis for reference to arbitration

(**Baron-v-Sunderland Corp [1966] 1 All ER 349 at 351).** In some situations it will suit one party to a dispute to contend that the dispute ought not to be subject to arbitration. That party may wish to litigate. So it is necessary to ascertain in the preliminary meetings if there are such agreement. In the unreported decision of

**Multiplex Constructions Pty Ltd v Trans Australian Construction Pty Ltd (Thomas J Northern Territory Supreme Court 3/2/95)**, the court concluded that it was not able to say that there was a contract in existence between the parties which included an arbitration agreement. It is imperative to consider the agreement at the preliminary meeting, if there are written or oral agreement between the parties and to also know if the parties are correctly identify. Parties' arbitration agreement is esteemed to the extent that, in the agreement, parties are expected to be called upon to agree on details of the arbitral process such as venue, procedure, and evidence to be called among others matters. In **Heyman& Another-v-Darwins Ltd(1942) AC 356** stated as follows on arbitration agreement:

*"... an arbitration clause in a contract ... is quite distinct from other clauses. The other clauses set out the obligations which the parties undertake towards each other, but the arbitration clause does not impose on one of the parties an obligation in favour of another. It embodies the agreement of both parties that if any dispute arises with regard to the obligations which either party has undertaken to the other, such disputes shall be settled by a tribunal of their own constitution."*

The arbitration agreement may also contain detailed provisions providing for structured settlement negotiations, or it may be very brief. It may incorporate by reference rules for the conduct of the arbitration by including phrases such as: -

*"The parties agree to refer any dispute arising out of or in connection with this contract or the work performed hereunder to a single arbitrator nominated by the Chairman for the time being of the Nigeria Chapter of the Chattered Institute of Arbitrators and the arbitration shall be conducted in accordance with the rules of the said institute for the conduct of commercial arbitrations".*

The effect of such a clause is to identify the arbitrator, identify their means of nomination, and by reference to set in place a series of procedures to be followed in the arbitration.

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**c) Confirm Arbitrator's Appointment**

This stage will also help to confirm the appointment of arbitrator(s) and it will be determined if the parties agreed in writing on the appointment of the arbitrators and as well as if the appointment is acceptable. Also it is therefore important that there should be clear exposure to the parties of any circumstance which might give rise to an apprehension that the arbitrator might not bring an unbiased mind to the task.In **Gas and Fuel Corporation of Victoria v WoodhallLimited [1978] VR 385 at 413.**

Marks J said: - "*suspicion may reasonably been engendered in the minds of the corporation of in the minds of the public that the arbitrator did not and would not bring to the resolution of the question arising before him a fair and unprejudiced mind."*

It is also necessary that once the arbitral panel confirm their appointment and the acceptability, they must also Confirm Arbitrator's fees, that is the costs of the arbitration, manner of payment and the arbitrators' fees should be considered and as well as the disbursements and responsibility for those fees.

**d) 2Confirm Arbitrators Jurisdiction**

Preliminary meeting will enable the parties to discuss the jurisdiction and any objection to jurisdiction as the case may be. In section 12 and 13 of the Arbitration and Conciliation Act 2004 considered the jurisdiction of the arbitral tribunal. The competence to rule on its jurisdiction and the power to order interim measure will be determined. Generally, the doctrine of "*kompetenzkompetenz*" gives the arbitral tribunal the wherewithal to rule on its own jurisdiction. Such ruling may encompass matters including existence or validity of the arbitration agreement (section 12) (1). The fact that a party has appointed or participated in appointing an arbitrator is not a bar to challenging the jurisdiction of the. It is desirable that any challenge to the jurisdiction should be resolved in the preliminary meetings.

**e) Establish the Issue(s) Of The Dispute**

Preliminary meeting will help to first identify the issue of the dispute by asking the parties to state briefly and if they are unable to do that with decorum it will be clear to the arbitrators what to expect in the proceedings. Surprisingly, parties apparently locked in vigorous disagreement sometimes discovered that there is no relevant dispute between them. In **Commonwealth v Jennings Construction Ltd (1985) VR 586** the Court said:" A dispute arises when one party claims something, and the other party notifies the other that he rejects the claim".

In **Sandhurst Engineering Ltd v Citra Constructions Limited [1987] BCL 198**Tadgell J suggested as a useful test, to suppose that proceedings had been brought in court, and that a summons for final judgement was issued. In the circumstances would the defendant have submitted to judgement on the hearing of such a summons? If not, then there is a dispute. Also in **Ellerine Bros Pty Ltd v Klinger [1982] 1 WLR 1375 and Reservoir Hotel Pty Ltd v ES Clementson (Vic) Pty Ltd [1961] VR 721** where the Court said "*The question whether a dispute has arisen at the commencement of proceedings depends, I consider, not so much upon whether the defendant has, before action, expressed his disagreement with the claims being made by the plaintiff in his action, but whether the defendant has in substance admitted such claims."*

**f) Establish Arbitration Rules**

The preliminary meetings between the arbitral tribunal and the parties in dispute must also focus on which types of arbitration rules to use in the arbitration proceedings.Sometimes parties who have not included in their arbitration agreement a stipulation that a set of arbitration rules will govern their arbitral proceedings might wish to do so after the arbitration has begun. If that occurs, the Arbitration and Conciliation Act 2004.Law of the Federation. Rules may be used either without modification or with such modifications as the parties might wish to agree upon. In the alternative, the parties might wish to adopt the rules of an arbitral institution; in that case, it may be necessary to secure the agreement of that institution and to stipulate the terms under which the arbitration could be carried out in accordance with the rules of that institution. And if the parties have not agreed on a set of arbitration rules, would they wish to do so? UNCITRAL Yearbook, (1996)

i. Institutional Rules (with or without modification): this is the type of rules made by Arbitration institutional centres like; Chattered Institute of Arbitration Nigeria branch, (CIArb) or Arbitration and Conciliation Act 2004. Law of the Federation.

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ii. Arbitration Procedures should also be considered in the preliminary meetings, the parties should be guided on what type of arbitration procedure to adopt for the proceedings. The parties should consider whether an accelerated or 'fast-track' procedure is appropriate or maybe the parties can agree that the arbitral tribunal will decide the issues on documents alone?

**g) Establish Timetable**

The preliminary meetings is also an avenue where directions indicate the time table for the arbitration is set out and agreed upon e.g. filing of pleadings, applications, discovery and inspection and seeking further and better particulars.

- Statement of claim: The parties will also agree if the statement of claim will be with document or without and the type of relevant document to be filled and who to served them.
- Statement of defence: The meetings will also agree on the statement of defence if it will be with relevant documents or without the relevant documents to be filled and who to serve them.
- Pleadings and amendment: The term "pleadings" above is used to imply all documents that serve to identify issues in the party's dispute to the arbitrators. It is through this method that parties identify issues between them and articulate their case and the remedies sought against the other party in the arbitration. Generally, pleadings are a brief summary of the facts of the claim and defence against claim. The main pleadings are statement of claim, statement of defence and/or counterclaim, statement of reply and/or counterclaim. Section 19 of Arbitration and Conciliation Act 2004 supported this.
- Discoveries (disclosure and inspection):Each party is entitled to know the existence of all documents relevant, whether privileged or not, in possession, custody or power of the other party. This helps limit instances of trial by ambush. However, a party may only insist on and be allowed to inspect those that are not privileged. The arbitrator is to give directions on discovery and should restrict disclosure to only the relevant documents. The preliminary meetings will enable the parties to also agree if discovery and inspection will or will not be required and whether arrangements need to be made with respect to physical evidence and/or on-site inspections.
- Interlocutory Application: Interlocutory application as viewed by David, (1996) as the applications that address the needs of the parties for immediate and temporary protection of rights and property pending discussion on the merits by the arbitration tribunal. The orders seek to protect and/or conserve the subject matter of the arbitration from dissipation. Arbitration Act provides for interlocutory applications, whether before and during arbitration, Section 13 of Arbitration and Conciliation Act 2004 supported this.

**h) Establish Witness and Also An Expert Witness**

Section 22 of Arbitration and Conciliation Act 2004, addresses the participation of experts in arbitral proceedings. A frequent solution is that the arbitral tribunal has the power to appoint an expert to report on issues determined by the tribunal section 22 (1) (a); in addition, the parties may be permitted to present expert witnesses on points at issue. In other cases, it is for the parties to present expert testimony section 22 (1) (b), and it is not expected that the arbitral tribunal will appoint an expert. The parties would need to take part in designing the expert witness process and would need to consent to its use before any orders could be made. The intent behind the process is to save time and cost and to bring as much certainly to the process as possible relating to the expert evidences.

**i) Place of Arbitration**

Section 16 of Arbitration and Conciliation Act 2004, clears the issue of the venue of the arbitration proceeding. It is from this preliminary meeting the issue of seat of arbitration will be agreed upon and all its implications. If the place has not been so agreed upon, the rules governing the arbitration typically provide that it is in the power of the arbitral tribunal or the institution administering the arbitration to determine the place. If the arbitral tribunal is to make that determination, it may wish to hear the views of the parties before doing so section 16 (1) of Arbitration and Conciliation Act 2004. UNCITRAL Yearbook, (1996) explained that there are various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: (a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability

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and cost of support services needed; and (e) location of the subject-matter in dispute and proximity of evidence. This are the points that must be considered in the preliminary meetings in deciding the place of arbitration.

**j) Hearing**

Section 20 of Arbitration and Conciliation Act 2004, made it clear as to the cases in which oral hearings must be held and as to when the arbitral tribunal has discretion to decide whether to hold hearings. If it is up to the arbitral tribunal to decide whether to hold hearings, the decision is likely to be influenced by factors such as, the travel and other cost of holding hearings, and that the need of finding acceptable dates for the hearings which might delay the proceedings, must be settled in the preliminary meetings. The meetings must also estimate the numbers of days for the hearing, the place, the time and date. The issue whether the evidence will be taken on oath or not must be considered. The aspect of evidence recording, either by digital recording or handwritten notes should also be addressed. If the written brief is to be exchanged before the hearing and whether the exchange is to be simultaneous or consecutively, the preliminary meetings must decide on the direction. As regard the expert evidence, there must be a direction as par that in the meetings. The issue of site visit, strict rules of evidence and written submission must be decided upon whether to apply or not. Furthermore, the length of time of hearings, the order in which the parties will present their arguments and evidence and whether there should be a limit on the aggregate amount of time each party will have for oral arguments and questioning witnesses are germane points that must be considered.

**k) Confidentiality**

It is necessary to determine whether the arbitration will be considered confidential or whether an Order to the effect is required. The process of arbitration is generally intended to be private. However, cases such as **Esso Australia Resources Limited v Plowman (1995) 183 CLR 10** make it clear that there was no implied term in an arbitration agreement that documents produced for the purpose of the arbitration are protected by any obligation of confidentiality between the parties (Nosworthy, 1995). In most cases, it would be desirable at the preliminary meetings to ascertain whether there is an express term of the arbitration agreement that the proceedings and any documents produced are confidential, or whether such an agreement is required. If required it should be dealt with in the preliminary meeting. An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e.g. pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means.

**l) Language**

The preliminary meeting will help to determine the language of the proceedings, the language that is to be used in the hearings. Section 18 of Arbitration and Conciliation Act 2004empower the arbitral tribunal to determine the language or languages to be used in the proceedings, if the parties have not reached an agreement thereon. Furthermore, if interpretation will be necessary during oral hearings, it is advisable to decide in the meetings whether the interpretation will be simultaneous or consecutive and whether the arrangements should be the responsibility of a party or the arbitral tribunal. In an arbitration administered by an institution, interpretation as well as translation services are often arranged by the arbitral institution. Moreover, in taking decisions about translation or interpretation, it is advisable to decide whether any or all of the costs are to be paid directly by a party or whether they will be paid out of the deposits and apportioned between the parties along with the other arbitration costs.

**m) Administrative Services**

The preliminary meeting will help the arbitral tribunal and the parties to determine who will be responsible for the organization and administration of the arbitration. The arbitral tribunal may also wish to consider the appointment of a secretary and its functions. Various administrative services (e.g. hearing rooms or secretarial services) may need to be procured for the arbitral tribunal to be able to carry out its functions. When the arbitration is administered by an arbitral institution, the institution will usually provide all or a good part of the required administrative support to the arbitral tribunal.

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**n) Communications among the Parties**

It is necessary for the arbitral tribunal to clarify the question on how documents and other written communications should be routed among the parties and the arbitrators suitably early so as to avoid misunderstandings and delays. Some of the various route of communications the parties can agree upon with the arbitral tribunal are; a party can transmits the appropriate number of copies to the arbitral tribunal, or to the arbitral institution, if one is involved, which then forwards them as appropriate. Another example is that a party is to send copies simultaneously to the arbitrators and the other party or parties. Documents and other written communications directed by the arbitral tribunal or the presiding arbitrator to one or more parties may also follow a determined pattern, such as through the arbitral institution or by direct transmission. For some communications, in particular those on organizational matters (e.g. dates for hearings), more direct routes of communication may be agreed, even if, for example, the arbitral institution acts as an intermediary for documents such as the statements of claim and defence, evidence or written arguments.

**o) Cost**

As it has been mentioned in section 49 of Arbitration and Conciliation Act 2004the costs of the arbitration, manner of payment and the arbitrators' fees should be considered in the preliminary meetings (Ali, 2007). The parties must agree as regard the costs of the arbitration the arbitrator should make an award. If there is no agreement on that, the parties should agree on the allocation. As regard arbitrator's fees, decision should be taken in the preliminary meetings and as well as the payment, parties should agree, if is on interim bill basis.

**p) Deposits for Cost**

In an arbitration administered by an institution, the institution often sets, on the basis of an estimate of the costs of the proceedings, the amount to be deposited as an advance for the costs of the arbitration. In other cases it is customary for the arbitral tribunal to make such an estimate and request a deposit. This is in accordance with section 50 of Arbitration and Conciliation Act 2004. The estimate typically includes travel and other expenses by the arbitrators, expenditures for administrative assistance required by the arbitral tribunal, costs of any expert advice required by the arbitral tribunal, and the fees for the arbitrators. Paragraphs (a), (b), (c) of section 49 (1) of this Act have provisions on this matter, including on whether the deposit should be made by the two parties (or all parties in a multi-party case) or only by the claimant.

**q) Settlement Negotiation**

In the preliminary meeting, the arbitral panel will discuss the extent (if at all) to which it should offer to facilitate settlement negotiations. This is in accordance with section 25 of Arbitration and Conciliation Act 2004.

**r) Award**

An arbitration award (or arbitral award) is a determination on the merits by an arbitration tribunal in arbitration, and is analogous to a judgment in a court of law. It is referred to as an 'award'. In the preliminary meetings, the parties must decide if the delivery of the award is to be by post/fax/email/personal delivery.

## 3. CONCLUSION AND RECOMMENDATION

Considering the numbers of importance and highlights of preliminary meetings discussed in this paper, it is pertinent to note that the importance of preliminary meetings in the arbitration proceeding cannot be over emphasized in the success of arbitration proceeding, in resolving dispute between parties. To borrow the word of Kariuki, (2010) that "if arbitration proceedings were human, preliminary meetings would embody the childhood, the arbitration hearing the teenage and youth-as this is where growth and much ground is covered and, lastly arbitral award is the adulthood. Thus, if the arbitration proceedings survive the rigors and vagaries of preliminary proceedings, they mature to arbitration hearing and then progress to adulthood-a final and an enforceable award". In view of the facts above, though preliminary meetings is not legally required, but it is necessary for the Quantity Surveyors and all other construction professionals that are involve in arbitrations to imbibe the culture of having a preliminary meetings before the commencement of the actual and proper arbitration proceedings.

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