DEVELOPMENT OF A FRAMEWORK FOR EFFECTIVE CONSTRUCTION ARBITRATION: A COMPARATIVE CASE STUDY OF CONSTRUCTION DISPUTES IN KENYA

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Development of a Framework for Effective Construction Arbitration: A Comparative Case Study of Construction Disputes in Kenya

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DECLARATION

This thesis is my original work and has not been presented for a degree in any other University:

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This thesis has been submitted with our approval as the University Supervisors:

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DEDICATION

Dedicated to my dear family consisting of my wife, Bridget and my three children for their moral support, encouragement, and their untiring endurance during the long period of study. Their patience and encouragement inspired me to put in more effort while focusing on the final output of the research.

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LIST OF ABBREVIATIONS AND ACRONYMS

AAA	Association of American Arbitrators
AAK	Architectural Association of Kenya
ABA	American Bar Association
ADR	Alternative Dispute Resolution
CIArb	Chartered Institute of Arbitrators
DAB	Dispute Adjudication Board
DRB	Dispute Review Boards
FIDIC	International Federation of Consulting Engineers
IEK	Institution of Engineers of Kenya
IQSK	Institute of Quantity Surveyors of Kenya
JBCC	Joint Building Construction Council
JBC	Joint Building Council
Ksh	Kenya Shilling
NCIA	Nairobi Centre for International Arbitration
PPRA	Public Procurement Regulatory Authority
S.No.	Serial Number
TCE	Transaction Cost Economics
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
USA	United States of America

ABSTRACT

Disputes have become a common problem afflicting the construction industry and they have the tendency to cause undesirable effects if not effectively resolved. Such effective resolution requires timely and economical resolution, with final outcomes that are satisfactory to the disputants involved. Arbitration has for a while been the preferred resolution method. However, it has recently been the subject of discussion both in industry and academia because of incessant delays, high costs and increasingly unacceptable awards. Although studies have attempted to identify the various causes of ineffective arbitration, they have not only been descriptive but also relied on anecdotes and subjective opinions. Consequently, the studies' findings have little explanatory power, making it difficult to confront the underlying causes of arbitral ineffectiveness. The aim of this comparative case study was to develop a framework for effective arbitration of construction disputes in Kenya. A review of the related literature brought out ten determinants of arbitral effectiveness, including award favourability, perceived award fairness, perceived procedural fairness, perceived quality of the decision-making process, perceived quality of treatment, perceived adequacy of the size of the tribunal, approaches to the presentation of evidence, competence of the tribunal, distribution of control and complexity of the dispute. These factors were conceptualised into a structural model. Qualitative data collection and analysis were then undertaken to establish the relationships among the factors. Thirteen semi-structured interviews of participants in five construction disputes in Kenya helped to explain the factors influencing the effectiveness of construction arbitration, which formed the basis upon which the framework was developed. Pattern-matching analysis helped to reveal that out of the ten identified factors, only award favourability was found to directly influence arbitral effectiveness. Four other factors including the approaches to the presentation of evidence, the competence of the tribunal, distribution of control and complexity of the dispute also influenced arbitral effectiveness among the cases, but through award favourability. In this study, the researcher makes a distinct contribution to knowledge by demonstrating that award favourability and the control model of procedural justice are the components of organisational justice that did influenced arbitral effectiveness in the cases studied. Thus, disputants in the cases were more interested in material gains than in maintaining and sustaining their business relations, explaining why the awards were challenged, hence straining their relationships. This instrumental nature suggests that these disputants were less interested in fairness of the process and its outcome, explaining why the influence of award fairness, procedural fairness and interactional justice on arbitral effectiveness was not supported. Despite the ineffectiveness of the cases, participants maintained that they would still refer future construction disputes to arbitration, mainly because of its procedural and interactional justice. Finally, a schematic framework was synthesised from the data analysis results. The framework requires implementation of institutional, legal and policy interventions for effective construction arbitration. The proposed interventions include a review of the training curricula to impart soft skills on effective construction arbitration, review of the arbitration rules, standing panels to match arbitrators to the various case complexities and the need for arbitrators to proactively manage their cases. There is also a need for disputants to customise the dispute resolution clauses during the contract drafting stage to incorporate desired

qualifications of the arbitrators to minimise mismatches between case complexities and competence. During contract execution, there is a need proactively gather and document evidence that is likely to be useful to enhance evidence presentation. The need for disputants to conduct themselves well and for the tribunals to use their powers in instilling discipline and for the tribunals to make their awards timely, based on evidence cannot be overemphasised. If implemented, these interventions can assist in enhancing the effectiveness of construction arbitration by minimising delays, unnecessary costs and improving award acceptability. The researcher recommends further quantitative research to test the structural model on other cases and to generalise the findings.

Keywords: arbitration, effectiveness, disputes, construction, organisational justice

CHAPTER ONE

INTRODUCTION

1.1 Background to the Problem

Several sectors, including the construction industry, deliver projects using contracts. Such projects are temporary undertakings, and unlike routine processes, are initiated to create a unique product, service or result (Project Management Institute, 2013). The success of these projects has been associated with the ability of the project team to complete the project within defined constraints of time, scope, risks, budget, resources, and quality performance standards.

In addition to these indicators, effective dispute resolution is a significant step toward project success (Gebken II, 2006; Mante, 2014). Disputes arise from claims that have been raised by one party, rejected by the other party and such rejection not accepted by the claimant (Kumaraswamy, 1997). The ensuing intransigence is rooted in justiciable contractual rights that have been breached as a result of fractured business relations (Hughes et al., 2015). Disputes must, therefore, be resolved quickly, cheaply and satisfactorily to increase chances of project success and for the society to remain civilised (Torgbor, 2013). Some of the most used resolution methods include negotiation, mediation, adjudication, arbitration, expert determination, litigation, or their variants. The focus of this research is arbitration.

In the context of contractual disputes, ineffective dispute resolution affects not only project success, but also the relationship between the disputants and the way business is conducted (Adams, 1965; Blau, 1964). According to Thibaut and Walker (1975), "the quality of future human life is likely to be importantly determined by the effectiveness with which disputes can be managed, moderated and resolved" (p. 1). Such quality depends on disputants' perception of the effectiveness of the methods used in resolving their disputes.

Research has shown that arbitration is the preferred method for settling commercial disputes. Several surveys, for instance, Mistelis (2004); Norton Rose Fulbright (2015); PriceWaterhouseCoopers and Queen Mary, University of London (2013) and

White & Case and Queen Mary, University of London (2015) indicate that most respondents prefer arbitration to litigation and other dispute resolution methods. Arbitration is expected to remain the preferred method for the final resolution of intractable and complex contractual disputes that shall not have been addressed by alternative methods, especially at the international scene (Hinchey, 2012). Thus, arbitration remains a popular method of dispute resolution.

In most jurisdictions, a set of favourable legislation supports the popularity of arbitration, giving its outcome the much-desired force of law that enables parties to enforce resultant awards. Further, arbitral awards are internationally recognised and can be enforced in any of the 154 countries that have ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. With such regulation and recognition, arbitration is perceived to be an effective method of dispute resolution (Danuri et al., 2012). However, arbitration must take advantage of such regulation and recognition to retain its place as the preferred dispute resolution mechanism.

The perceived attributes of arbitration, such as speed, economy, the finality of its decision, flexibility, use of experts and confidentiality contribute to its popularity. Arbitration has therefore gained widespread use in resolving disputes in construction, banking, mining, manufacturing, healthcare, energy, communication, retail and wholesale (Stipanowich, 1996; Stipanowich & Lamare, 2014). Arbitration contributes towards economic activity by not only employing the services of arbitrators, counsel, experts and stenographers but also generating income by making use of facilities available as venues for its sittings (Charles River Associates, 2012). Economic growth can be sustained if efforts are made to improve efficiency of the various economic sectors. Thus, arbitration must be carried out efficiently to realise its real contribution to economic growth.

Despite its popularity locally and internationally, arbitration has attracted an equal measure of criticism from several users who have expressed dissatisfaction arising from the ineffectiveness of its process and outcome. Evidence from recent studies, for example, Moza and Paul (2017) and Stipanowich and Lamare (2014) reveals that confidence in arbitration has been waning. Therefore, users of the arbitral process

seem to have resigned themselves to the fact that the method no longer offers the advantages of time efficiency and cost savings.

The importance of arbitration to the construction industry rests in the critical role of the industry in economic development. In Kenya, for instance, official estimates place the contribution of the industry at between 4.9 percent and 5.6 percent of the gross domestic product for the period 2014-2018 (Kenya National Bureau of Statistics, 2019). This is indeed a small contribution compared to other sectors, but its multiplier effect on other sectors is enormous. The industry delivers projects that result from contractual relationships, which if breached, can have an enormous multiplier effect on other economic sectors in the supply chain (Hillebrandt, 2000).

A key observation made by Fenn et al. (1997) that the construction industry produces more litigated disputes than other industries implies that these interconnected sectors are bound to suffer when construction projects get entangled in protracted disputes. The importance of effective resolution of such disputes is recognised as an integral part of project claim management, which is one of the unique construction extensions to the project management knowledge areas (Project Management Institute, 2003). Thus, improving the effectiveness of arbitration of contractual disputes in the construction industry is a major step towards enhancing the efficiency of the industry and the economy.

1.2 Statement of the Problem

The problem addressed in this research is the *ineffectiveness of arbitration as a method of resolving contractual disputes*. Although arbitration was conceived to make dispute resolution more efficient than litigation (Brooker & Lavers, 1997), its proceedings have become 'judicialised', less efficient and less effective as discovery could be extended, motions and evidence filed at will, notwithstanding its effect on the time, cost and outcome (Houghton et al., 2013; Stipanowich, 2010). According to Stipanowich (2010), "arbitration's evolution…and its subsequent 'legalization', the growing popularity of mediation and other 'thin-slicing' alternatives, and fairness concerns stemming from the use of binding arbitration…all contribute to present dissatisfaction with arbitration and raise questions about its future" (p. 50). These

questions linger because of the negative effects of arbitration, which are felt by consumers of the process, as manifestations of its ineffectiveness, dispelling the widely publicised preference of, and thus manifest the problems faced by arbitration as a method of dispute resolution.

Arbitration generally takes much longer than other alternative dispute resolution mechanisms. While alternative methods take days or weeks, arbitration can last several months or years (Cheung et al., 2002). For instance, the practice in Kenya is that arbitration takes an average of one year and seven months from the filing of an application of enforcement to the final writ of execution attaching assets, which is significantly higher than the world average of 179 days, yet mediation cases are, on average, settled within thirty days (The World Bank Group, 2010). McIlwrath and Schroeder (2008) noted that most arbitration matters take two to three years to resolve. Consequently, the ineffectiveness of arbitration is likely to provide a conducive environment for more effective dispute resolution methods such as mediation to thrive.

While some disputes are effectively arbitrated, others frequently take a considerably long period and high cost to resolve, with resultant awards hardly satisfying aspirations of the disputants. As evidently observed by Braun (1998):

> …arbitration can be an expensive, unending kangaroo court in which the concepts of justice and fairness are trampled and neither the arbitrators nor the arbitration association seem to have any interest in anything other than maximizing the fees paid to them by the parties. (p. 9)

These symptoms of ineffectiveness present a challenge of formidable concern facing modern arbitration practice (Gluck, 2012; Risse, 2013; Stipanowich, 2010). In some instances, awards often face enforcement challenges through cumbersome registration procedures and/or applications to set aside the awards. Muigua (2012) demonstrated that "the practice of arbitration in Kenya continues to be weighed down by litigious parties who even after the arbitrator makes an award, they still would want to challenge it in court" (p. 224). For this reason, arbitration is in a crisis of form and identity (Torgbor, 2013).

Moreover, anecdotal evidence from Kenya depicts arbitration as an ineffective dispute resolution mechanism. For instance, likening arbitration to litigation, Muigua (2015b) succinctly asserts that "arbitration practice in Kenya has been said to have increasingly become more formal and cumbersome due to lawyers' entry" (p. 122). The effect is an increasing reference of matters to the courts by dissatisfied parties (Muigua, 2015b), to the detriment of arbitration as a private dispute resolution mechanism.

There are two major consequences of this state of affairs: dissatisfaction of disputants with the process and outcome of the arbitration, and diminishing confidence levels in arbitration. Torgbor (2013) observes that ineffective arbitral justice *"contributes to frustration, uncertainty, delay and expense"* (pp. 17-18; emphasis added). These effects imply that the resultant award is likely be of little value to business entities (Naimark & Keer, 2002; Risse, 2013). When such businesses find it difficult to continue operating, confidence in arbitration may wane as disputants seek alternative approaches to the resolution of their disputes.

The diminishing confidence in arbitration is the natural occurrence of disputants' dissatisfaction. This is evident in the changes to dispute resolution clauses in standard forms of contract to obviate arbitration as the default method for final resolution of contractual disputes (Hinchey, 2012). Hence it remains unsurprising that only 44 percent of the 121 respondents to a survey on the effectiveness of arbitration indicated that their previous experience encouraged them to include an arbitration provision in future contracts (Shontz et al., 2011). In addition, newer methods of dispute resolution, such as mediation, dispute review boards and adjudication are slowly emerging as preferred alternatives to arbitration, thus challenging its future (Seifert, 2005; Stipanowich, 2010; Torgbor, 2013). Consequently, arbitration has become unattractive to potential users (Muigua, 2012; Overcash, 2015; Stipanowich & Lamare, 2014) and to those who feel that their concerns regarding costs are not enthusiastically addressed (Sussman & Underwood, 2011), thus against the very tenets upon which the method was introduced as an alternative to litigation. Despite increased competition, "arbitration cannot and ought not to remain stagnant or complacent, particularly because disputes in modern times are often multi-faceted, more complex and technical than ever before, requiring

participants with the relevant knowledge, training and expertise to deal with them" (Torgbor, 2013, p. 346).

The benefits of arbitration cannot be reaped unless action is taken to address the trend toward increased 'judicialisation' (Holt, 2008), which is an impediment to the achievement of effective arbitration. Efforts aimed at enhancing efficiency as an aspect of arbitral effectiveness remain critical to improving the administration of justice (Kaufmann-Kohler, 2009). However, such efforts have not borne fruit as most are at variance with the achievement of fair outcomes (Stipanowich, 2011; Stipanowich & Lamare, 2014). Hence, the practice of arbitration must take cognisance of due process in addressing aspects that enhance such efficiency.

Previous research works have not exhaustively addressed the problem of arbitral effectiveness in construction. For example, Al-Humaidi (2014); Besaiso et al. (2018); Chaphalkar et al. (2015); El-Adaway et al. (2009); Hansen (2019); Marques (2018); Moza and Paul (2017); Ossman III et al. (2010); Patil et al. (2019) and Torgbor (2013) have not addressed exhaustively the question of why construction arbitration is considered to be ineffective. Consequently, these exploratory and descriptive studies do not provide concrete solutions to the problem.

Parties to contractual disputes opt for arbitration in the hope that their disputes shall be resolved by an expert in the subject matter of the dispute, resulting in a swift, cost-effective, final, binding and enforceable award (Stipanowich, 1988, 2010). Arbitration must thus be conducted in an efficient manner that follows due process and produces correct outcomes that are satisfactory to the parties (Fortese & Hemmi, 2015). However, while some disputants consider arbitration as effective, others find it ineffective depending not only on how they perceive the process and its outcome but also on the effects of its ineffectiveness on disputants. Therefore, there is a need to examine the entire practice of construction arbitration to establish why it is ineffective. Addressing varying perceptions of effectiveness of construction arbitration, thus, requires a clear understanding of the underlying factors influencing such effectiveness.

1.3 Purpose of the Study

The purpose of this case study is to help in improving the effectiveness of construction arbitration as a method of resolving contractual disputes. Although researchers and stakeholders have made significant efforts to address the problem of arbitral effectiveness, the subject has not been systematically investigated on participants in arbitration cases in construction. Thus, addressing the problem of the unresolved pattern of relationship between these factors and their interaction in influencing the effectiveness of construction arbitration is likely to play a key role in realising this purpose.

1.4 Aim and Objectives

The aim of this study is to develop a framework for effective construction arbitration. To realise this aim, the following specific objectives guided the research:

1) To establish the effectiveness of construction arbitration in Kenya.
2) To describe the factors influencing the effectiveness of construction arbitration.
3) To explain the relationship between effectiveness of construction arbitration and its influencing factors.
4) To synthesise the findings into a framework for effective construction arbitration.
5) To validate the framework for effective construction arbitration.

The research relied on a three-pronged approach to address these specific objectives: literature review, fieldwork, and validation. The researcher conducted an extensive review of previous research to identify the key factors underlying the main variables of arbitral effectiveness and its influencing factors. These factors include distribution of control, complexity of the dispute, competence of the arbitrator, perceived adequacy of the size of the tribunal, perceived award fairness, award favourability, perceived quality of the decision-making process, perceived quality of treatment experienced, perceived procedural fairness and the approach to the presentation of evidence. Secondly, the researcher administered research instruments to participants

drawn from purposively selected cases. The data emerging from the fieldwork was then analysed and its findings availed to a select group of practitioners for validation.

1.5 Research Proposition

The various theories of organisational justice can largely explain disputants' perceptions about the effectiveness of arbitration. Organisational justice literature discusses these theories under the four dimensions of organisation justice: outcome favourability, distributive justice, procedural justice, and interactional justice (Adams, 1965; Bies & Moag, 1986; Lind & Tyler, 1988; Thibaut & Walker, 1975, 1978). Outcome favourability is rooted in the economic exchange theory, which posits that people are self-interested and will seek to maximise material gains they receive in their group interactions (Blau, 1964; Brockner & Wiesenfeld, 1996; Tyler & Blader, 2000). Such people will tend to cooperate in these groups and defer to the group decisions when they perceive the outcomes to be favourable (Adams, 1965; Blau, 1964).

The two main theories of distributive justice include the equity theory and the relative deprivation theory (Adams, 1965). Under the equity theory, disputants evaluate the fairness of a dispute resolution process based on their perception of the fairness of the outcome (Adams, 1965; Folger & Cropanzano, 2001). Conversely, the relative deprivation theory provides that disputants experience injustice when their socially constructed expectations of the resolution process are violated (Adams, 1965; Tyler, 2000; Tyler & Lind, 1992). Thus, the two theories of distributive justice are outcome-based (Tyler & Blader, 2000).

However, outcome is only one aspect of the dispute resolution process. The procedural justice dimension addresses the process leading to this outcome. Under this dimension, disputants evaluate outcomes based on the fairness of the procedures used to arrive at the outcome (Brockner & Wiesenfeld, 1996; Folger & Cropanzano, 2001; Skitka et al., 2003; Thibaut & Walker, 1975; Tyler, 1988; Tyler & Lind, 1992). Disputants evaluate such procedures based on the extent to which they could exercise control over the process and the outcome (Thibaut & Walker, 1978). Giving a disputant an opportunity to present its case helps in achieving process control.

Conversely, when the disputant achieves outcome control, he can realise favourable outcomes.

The degree to which a disputant can exercise such control, however, not only depends on the complexity of the dispute (Harmon, 2004; Hinchey & Perry, 2008) but also influences the way the disputant presents its evidence (Besaiso et al., 2018). The evidence presented can influence the outcome in favour of the disputant, depending on its admissibility, relevance, weight, and materiality (Kangari, 1995). These evidential decisions are made by the arbitrator, depending on the arbitrator's competence (Torgbor, 2013). The complexity of the dispute, in turn, influences the arbitrator's competence (Stipanowich & Lamare, 2014). In this regard, disputes that are more complex may require competent arbitrators than less complex disputes. Some complex disputes require more than one arbitrator to provide the much-desired diversity for effective resolution (Harmon, 2004; Holt, 2008). This enhanced size of the tribunal aims at ensuring that a disputant can realise a fair award (Giorgetti, 2013; Harmon, 2004).

Procedural justice is made up of two models: self-interested or instrumental model and the group value or relational model (Lind & Tyler, 1988). The self-interested model explains why a disputant may seek to control the resolution process to realise a fair or favourable outcome (Lind & Tyler, 1988; Tyler, 2000; Tyler & Lind, 1992). On the contrary, the group value model provides that disputants value their relations with others and are likely evaluate resolution procedures in terms of their neutrality, trust and the extent to which such procedures preserve disputants' dignity (Lind & Tyler, 1988; Tyler, 2000; Tyler & Lind, 1992). Thus, the procedural justice component links the outcome and its process.

The final dimension, interactional justice, provides that disputants' evaluation of outcomes depends on the quality of the decision-making process and how the arbiter treated them during the resolution process (Bies & Moag, 1986; Colquitt, 2001; Tyler & Blader, 2000). These two aspects highly depend on the competence of the arbitrator, which consists of the arbitrator's knowledge, skills, and attitude. Disputants' perception of interactional justice influences their perception of award fairness and procedural justice. The lower their perception of interactional justice, the

higher the chance that the dispute may take longer and cost more to resolve, the higher the chance that the unsuccessful disputant may refuse to comply with the award and the higher the chance that the disputants' working relationship will be fractured (Colquitt, 2001; Tyler & Blader, 2000). The interactional justice component thus supports the procedural justice component in linking the outcome to its process.

Under the fairness heuristic theory, disputants make decisions on the fairness of dispute resolution procedures by evaluating more than one component of the justice system (Lind, 2001). Drawing on these four dimensions of organisation justice, this researcher conceptualised that the disputants' perception of fairness of arbitral decision-making interacts with dispute factors to influence their perception of arbitral effectiveness. In this study, dispute factors include the complexity of the dispute, competence of the arbitrator, perceived adequacy of the size of the tribunal and the approach to the presentation of evidence. Conversely, fairness perception includes the six constructs of organisational justice, including distribution of control, award favourability, perceived award fairness, perceived procedural fairness, perceived quality of the decision-making process and perceived quality of treatment. Thus, the specific objectives under Section 1.4 above were addressed by establishing support for the following main proposition:

> Effectiveness of arbitration is influenced by ten key factors namely: (i) distribution of control, (ii) complexity of the dispute, (iii) competence of the arbitrator, (iv) perceived adequacy of the size of the tribunal, (v) procedural fairness, (vi) the approach to the presentation of evidence, (vii) award fairness, (viii) award favourability, (ix) quality of the decision-making process and (x) quality of treatment experienced.

All these factors are latent variables and were thus indirectly measured using various surrogates, as shown in **Table 1.1**. A more detailed discussion of how these variables were measured is contained in Section 3.5. In addition, the above main proposition was broken down into 53 propositions based on the theoretical framework developed in Section 2.9.

Table 1.1: List of variables and their surrogates

Variable	Surrogates
Arbitral effectiveness	Cost-effectiveness, Time efficiency, Quality of the award
Distribution of control	Nature of party representation.
	Conduct of the parties.
	Repeat player effect.
	The degree of arbitrator's use of conferred powers.
	The extent of any pre-action protocol.
Complexity	Number of parties.
	Nature of the cause of the dispute.
	Language differences.
	Cultural differences.
	Number of sittings.
Competence of the arbitrator	Knowledge.
	Skill set.
	Attitudes.
Perceived adequacy of the size of the tribunal	Perceived adequacy of the size of the tribunal
Procedural fairness	Fairness of the procedures and rules.
	Satisfaction with the procedures and rules.
	Whether the arbitrator tried to be fair.
	Whether the dispute was decided fairly.
	The extent to which the tribunal showed concern for disputants' rights.
	Ease of award recognition, enforcement, and execution.
Approach to the presentation of evidence	The meticulousness of documentation.
	Number of experts and fact witnesses.
	Techniques for preparing and presenting evidence.
	The timing of the expert appointment.
	The timing of expert reports and witness statements.
Award favourability	Award value as a percentage of the claim or counterclaim.
	Perceived favourability of the award.
	Satisfaction with the award.
Perceived award fairness	Award relative to expectation.
	Award relative to what the disputant deserved.
	The extent of fairness of the award.
	Award compared to outcomes for similar disputes.
Quality of the decision-making process	The extent to which the arbitrator decided the dispute based on facts and not personal biases.
	The extent to which the arbitrator decided the dispute without favouritism.
	The extent to which the arbitrator decided the dispute truthfully.
	The extent to which the arbitrator showed consistency in the application of rules.
Quality of treatment-experienced	The extent to which the arbitrator refrained from improper remarks or comments.
	Whether the award was well reasoned.
	The extent to which the tribunal treated disputants politely, with dignity, courtesy, and respect.

1.6 Justification and Significance

Arbitration is the preferred terminal method of dispute resolution in the standard forms of contract used in the construction industry in Kenya. Consequently, the popularity of arbitration has seen more disputes referred to arbitration. However, the confidential nature of arbitration makes it difficult to establish the number of cases, nonetheless the important role of arbitration in facilitating dispute resolution cannot be overemphasised. Hence, there is a need for an effective arbitral process.

This need is grounded in three propositions. Firstly, there is a renewed quest for legal systems to finding new and more effective ways of resolving disputes more expeditiously and at lower costs (Muigua, 2012). Secondly, the establishment of the Nairobi Centre for International Arbitration implies a greater interest in arbitrating international disputes locally. Thirdly, by virtue of Article 159 of the new Kenyan Constitution, the judiciary is required to promote the use of alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Thus, by hiring arbitrators, the courts are encouraging the use of arbitration as a method of resolving disputes prior to litigation. All these efforts call for a proper framework for effective arbitration to make Nairobi as competitive as other established destinations for international arbitration, such as London.

An enabling business environment requires effective dispute resolution systems for enforcing contracts. Kenya's performance on the ease of enforcing contracts has been rather dismal in the recent past, but generally improving, from position 151 in 2014 to position 88 in 2019, all out of 190 countries (The World Bank Group, 2014, 2019). While the reforms implemented in the judiciary have contributed to this improvement, there is little evidence to show that arbitration has implemented similar measures. The ease of contract enforcement is a key measure of the ease of doing business in any country. Contract enforcement becomes important when disputes arise, such that disputants require the assistance of third parties to resolve their disputes. Poor ranking means that the regulatory environment, which includes arbitration, desperately requires reforms.

An effective dispute resolution system helps in achieving project objectives. Effectively resolving construction project disputes critically determines the overall project cost and ensures the satisfaction of relevant parties (Hwang & Yau, 2015). Documenting the effectiveness of construction arbitration is likely to help in providing feedback to the construction industry in areas that contribute toward slow, costly, and unsatisfactory arbitral awards. Such feedback should (i) enable participants to focus on measures that enhance chances of success so that the resolution process becomes more efficient, and (ii) help participants to avoid pitfalls that make the process ineffective. This information is crucial to the parties not only before they make the final decision to refer their disputes to arbitration but also as they make crucial decisions during the arbitral process.

Finally, the study will help in bridging the gaps in knowledge by contributing to the academic and professional debate on the factors influencing the effectiveness of arbitration. A key requirement for doctoral study is an original contribution to knowledge (Phillips & Pugh, 2005). Thus, findings arising from this study will add to the depth and breadth of knowledge in the subject of arbitral effectiveness.

1.7 Scope and Limitations

The work presented in this research is based on the construction industry. The underlying reason for the choice of the construction industry is the researcher's occupation, which has exposed him to the way projects within the industry are executed and the way construction arbitration is undertaken. Construction projects involve significant investment sums which when entangled in disputes, can adversely affect not only the parties involved but also other players in interconnected sectors. As Stipanowich (1996) observed, "the construction industry represents not only the cutting edge of experience with dispute resolution processes but also the spearhead of experimentation with mechanisms aimed at avoiding disputes by attacking the roots of controversy" (p. 68). Contractual disputes arbitrated in the construction industry, therefore, provide a solid foundation on which to conduct a study on the effectiveness of arbitration.

The geographical scope was limited to Kenya. There are three reasons for this choice. Firstly, the institution hosting the research is based in Kenya, giving the researcher the much-needed proximity to the study participants. Secondly, the researcher has extensive experience in Kenya’s construction industry, spanning almost two decades, giving him a clearer picture of the way the industry operates. Thirdly, in terms of party autonomy, Kenya represents one of the many countries within Sub-Saharan Africa experiencing a clear disconnect between the strength of her legal provisions and arbitration practice on the ground (The World Bank Group, 2010). Therefore, the country is strategically placed to provide leadership in solving problems afflicting arbitration practice. Since arbitration is globally recognised as a method of dispute resolution, and as demonstrated later in the literature review section, challenges experienced in Kenya may be like those experienced in other countries. Their incidence, however, could vary from country to country.

Disputes in other geographic locations are different because of differences in social norms and values, and hence, the relative weights of the selection factors for the various dispute resolution techniques may lead to the display of different patterns of behaviour (Cheung & Suen, 2002). In addition, construction claims encountered in a particular country can be influenced by the claim category heads that are permissible and common under the prevalent conditions of contract (Kumaraswamy, 1997). Further, there is no one best way of dealing with disputes, as often they are different in scale, complexity and nature; therefore, in deciding which dispute resolution strategy to apply, there is a need to take into consideration various technical, political, financial, social, economic and legal factors (Cheung & Suen, 2002). Therefore, dispute resolution problems inherent in Kenya may display an environmental pattern that is quite different from patterns experienced in other territories where similar studies have been conducted. Thus country-specific differences may warrant further research work to be done in different countries in order to make the findings specifically applicable to the situations of such countries (Mante, 2014).

Finally, this research is limited to disputes settled through the domestic arbitration process only. The rationale for the choice of arbitration is that it is the only alternative dispute resolution method with a clear legislative framework, such as the

Kenyan Arbitration Act, and corresponding Acts in several other countries. Such a framework ensures that procedural rules intended to protect the public govern the process and outcome. It, therefore, provides a final, enforceable, and binding outcome of the dispute whose effectiveness can be readily measured. Nonetheless, the domestic aspect of arbitration was selected to ensure homogeneity in the applicable law.

1.8 Assumptions

The following assumptions guided this study:

1. That the parties have agreed on the location for the proceedings. Section 21 of the Kenyan Arbitration Act gives parties the freedom to agree on the place of any hearing or meeting. It is thus assumed that upon such agreement, parties have considered all possible implications of this choice and hence the factor does not have a bearing on the effectiveness of the arbitration.
2. That the cases considered in the study are based on awards that meet the minimum requirements as to the form and contents stipulated in Section 32 of the Kenyan Arbitration Act. These include ensuring that the award is in writing, is signed by the arbitrator(s), is dated, and is delivered to each party. However, this researcher considers reasons accompanying the award as a major factor that may influence a party's perception of arbitral effectiveness.

1.9 Operational Definitions of Key Terms

Whenever used in this thesis, the following terms shall carry the indicated definitions:

Alternative dispute resolution (ADR): also known as appropriate dispute resolution refers to the set of non-adversarial techniques developed to resolve disputes, such as mediation, adjudication, and dispute review boards (Cheung & Suen, 2002; Gebken II, 2006).

Arbitral effectiveness: the extent to which arbitration fulfils disputants' aspirations in terms of the time efficiency, cost-effectiveness, and quality of the award (Risse, 2013). Some participants in the arbitral process may interpret the arbitral process as

being effective while others may interpret the same process as being ineffective, depending on whether their emphasis is on time-efficiency, cost-effectiveness, and quality of the award or any combination of the three indicators. The research uses the terms arbitral effectiveness and effectiveness of arbitration interchangeably.

Arbitral efficiency: the ratio of inputs to outputs. In the context of arbitration, inputs refer to the time and cost spent on arbitration, from the time commencement of proceedings to settlement (Risse, 2013). Outputs refer to the awards. Proceedings commence when one party writes to the other party to notify that other party of the dispute and to request that party to appoint or to concur on the appointment of an arbitrator.

Arbitration: the method of dispute resolution where the dispute is referred to a third party neutral whose determination is final and binding to the disputants (Muigua, 2012).

Arbitrator: the third-party neutral appointed by the disputants to resolve their dispute with finality (Muigua, 2012).

Competence: the set of knowledge, skills and experience embedded in the arbitrator, which are the minimum standard required to resolve the dispute to the satisfaction of the disputants (SPIDR Commission on Qualification, 1989).

Complexity of the dispute: the ease of resolving the dispute. A dispute may be complex because it requires interpretation of the contract, or because it consists of several issues (Hinchey, 2012; Hinchey & Perry, 2008; Park, 2010).

Contractual dispute: disagreement over a claim between parties to a contract (Kumaraswamy, 1997). It includes disputes between a contractor and the employer but does not include labour disputes between the contractor or employer and their employees.

Control: the extent to which participants can direct or influence the process or the outcome of the arbitration process (Thibaut & Walker, 1978).

Cost-effectiveness: the ratio of the funds spent to resolve the dispute from the commencement of proceedings to resolution compared to the expected ratio or some referent standard (Adams, 1965; Risse, 2013). The referent standard, in this case,

refers to what the disputant considers reasonable funds required to resolve the dispute using litigation or ADR mechanisms such as mediation.

Disputant: a party to the dispute, that is, the claimant or respondent, and includes a respondent with a counterclaim (Muigua, 2012).

Fairness: the measure of impartiality or bias (Goldman & Cropanzano, 2015).

Judicialisation: the use of court procedures in arbitration (Fortese & Hemmi, 2015).

Litigation: the adversarial method of resolving disputes in courts (Stipanowich & Lamare, 2014).

Quality of the award: subjective measures of the award in terms of its acceptability, extent to which the award sustains relationships and the extent to which the award encourages disputants to use arbitration in resolving future disputes (Cheung, 1999; Gross & Black, 2008).

Time efficiency: the ratio of the time taken to resolve the dispute from the commencement of proceedings to resolution compared to what the disputant expected or compared to a referent standard (Adams, 1965; Risse, 2013). The referent standard, in this case, refers to what the disputant considers the reasonable time required to resolve the dispute using litigation or ADR mechanisms such as mediation.

1.10 Organisation of the Thesis

This thesis is organised into five chapters. This chapter presents the statement of the problem, its justification, significance, and scope.

Chapter Two reviews relevant literature related to the study area. The chapter examines literature associated with the problem of the effectiveness of arbitration and reviews factors influencing the arbitral process and its outcome. It also considers the various measures of arbitral effectiveness and outlines the effects of ineffective arbitration. The chapter concludes by identifying the knowledge gap in the reviewed literature, develops a theoretical and conceptual framework that forms the foundation upon which the research methodology is framed.

Chapter Three details the methodology adopted for the study. The methodology includes a detailed discussion of the (i) research strategy and design, (ii) case and participant selection procedures, (iii) data collection and analysis procedures, (iv) validity and reliability considerations, and (v) ethical considerations.

Chapter Four presents the findings arising from the analysis of the data collected.

Chapter Five presents the summary of findings, draws conclusions, implications, limitations and gives recommendations on possible areas for further study.

CHAPTER TWO

LITERATURE REVIEW

2.1 Introduction

This Chapter presents extant literature in the field of arbitration and dispute resolution. The Chapter discusses previous research work related to the research problem and identifies gaps in knowledge that form the basis of the study. The literature review covers the context in which disputes arise as well as that in which they are resolved, with reference to arbitration as a method of dispute resolution. The review also focuses on the factors influencing the effectiveness of arbitration as well as some of the theories and methods applied in the study of the effectiveness of dispute resolution methods. In conclusion, the effectiveness of arbitration is theorised to be a variable influenced directly by five key constructs, namely the perceived quality of treatment experienced, perceived quality of the decision-making process, perceived procedural fairness, award favourability and perceived award fairness. It is also influenced indirectly by five other constructs, including distribution of control, the complexity of the dispute, the competence of the arbitrator, perceived adequacy of the size of the tribunal and approach to the presentation of evidence. Finally, the Chapter outlines the conceptual framework for this study.

2.2 Framework of Alternative Dispute Resolution in the Construction Industry of Kenya

As the most advanced economy of the East African region, Kenya has one of the most robust construction industries. Available data for the period between 2014 and 2018 shows that the industry contributed 4.9-5.6 percent to the Gross Domestic Product (Kenya National Bureau of Statistics, 2019). Although the contribution is smaller than that of other sectors such as agriculture and manufacturing, the industry provides built facilities that spur growth in these other sectors. Thus, the multiplier effect of the contribution of the industry to these other sectors is enormous.

This multiplier effect requires a conducive environment in which to conduct business. The built environment facilities created by the construction industry are largely implemented using contracts. When parties breach such contracts, access to justice by the aggrieved will depend on the ease of enforcing those breaches. As an indicator of doing business, enforcing contracts measures "how efficiently a commercial dispute can be resolved" (The World Bank Independent Evaluation Group, 2008, p. 34). This indicator is widely used by the World Bank as one of the measures of the ease of doing business because it determines business relationships (The World Bank Independent Evaluation Group, 2008). However, it only focuses on contract enforcement in the judiciary, disregarding other dispute resolution mechanisms.

Although its operationalisation has been evolving from time to time, the indicator is currently made up of three measures: time of resolving the dispute, cost as a percentage of the claim value and quality of judicial processes (The World Bank Group, 2019). Statistical data shows that in Kenya, this indicator has improved from position 151 in 2014 to position 88 in 2019, all out of 190 countries (The World Bank Group, 2014, 2019). However, whereas the time taken to resolve disputes has remained 465 days, the cost has reduced from 47.2 percent in 2014 to 41.8 percent in 2019 (The World Bank Group, 2014, 2019). While this data suggests that cost-effectiveness has been improving, the fact that the time taken to resolve disputes has remained static for more than five years raises pertinent questions on the reports' methodology. However, the data provide a good indication of the effectiveness of the court system in enforcing contracts, including arbitral awards. In Kenya, construction disputes are resolved in a framework consisting of several instruments and institutions, each playing different roles.

2.2.1 Legal Framework

The legal framework for resolving construction disputes in Kenya consists of several standard contracts, laws, rules, and regulations. The main standard forms of contract for works include the International Federation of Consulting Engineers (1999); Joint Building Council (1999) and Public Procurement Oversight Authority (2007). A

common thread in these standard contracts is a dispute resolution clause requiring referral of arising disputes to arbitration for terminal resolution.

Dispute resolution clauses in the three standard contracts, thus Clause 45 of the JBC 1999, Clause 37 of the PPOA 2007 and Clause 20 of the FIDIC 1999 require an aggrieved party to notify the other party of a dispute or difference arising from the contract. If the parties fail to resolve the said dispute amicably, the parties are required to refer the dispute to final arbitration by agreeing on the appointment of an arbitrator. The requesting party may request the named bodies to appoint an arbitrator should the parties fail to agree on the appointment.

The JBC 1999 standard contract was under review at the time of carrying out this research. One of the notable proposals was to overhaul the dispute resolution clause not only to increase the number of appointing bodies but also to introduce another layer of adjudication prior to arbitration. Additionally, FIDIC released a new second edition of the FIDIC 1999 standard contract in 2017. Under Clause 21 of this new edition, the Dispute Adjudication Board as it was known as in FIDIC 1999 was changed to read Dispute Adjudication/Avoidance Board (DAAB) (International Federation of Consulting Engineers, 2017). This Clause delinked the claiming process from the dispute resolution process.

The second aspect of the legal framework includes laws and regulations. Section 159 of Kenya's 2010 Constitution encourages the use of alternative dispute resolution mechanisms, including reconciliation, mediation, arbitration, and traditional dispute resolution. Other than arbitration, there is no statute governing the rest of the ADR methods. The Arbitration Act governs the arbitration process in Kenya. Amended in 2009, the Act governs both domestic and international arbitration. It emphasises party autonomy, thus minimising court intervention, as spelt out in Section 10 of the Act.

Moreover, the Government recently enacted the Nairobi Centre for International Arbitration Act No. 26 of 2013 to establish a regional centre for international commercial arbitration. However, the centre is largely viewed as an avenue for institutional arbitration of disputes involving the government, perhaps because the government has been dissatisfied with outcomes arising from *ad hoc* arbitrations.

The last aspect of the legal framework is the rules. Majority of the *ad hoc* arbitrations in Kenya are conducted under the Chartered Institute of Kenya (CIArb Kenya) 2012 Arbitration Rules. However, the NCIA has recently established the NCIA Arbitration Rules, 2015 to govern institutional arbitration.

Additionally, Section 40 of the Arbitration Act requires the Chief Justice to make rules for the recognition and enforcement of, and setting aside of arbitral awards; stay of legal proceedings and all court proceedings under the Act. While Rule 9 of the Arbitration Rules, 1997 indicates that an application for the recognition and enforcement shall be made by way of Chamber Summons, the procedure for enforcement is still governed by the Civil Procedure Rules, 2010. Although these Rules contain a specific section dealing with arbitration, the procedure for award enforcement is similar to that of a judgement or court decree (Torgbor, 2013). This means that there is no special court to handle arbitral awards. In addition, the courts do not accord such awards any preferential treatment. Thus, these awards must follow the court calendar, which considers other matters before the court. The effect is a lengthy and costly process of recognising, enforcing, and executing awards.

2.2.2 Policy Framework

The policy framework on alternative dispute resolution in Kenya is rather lean. At the time of conducting this research, two policies were being developed. Firstly, the draft Construction Industry Policy requires the Government to "establish an Alternative Dispute Resolution mechanism within the industry with various stakeholders to allow for out of court resolutions that will save on time and finances" (Republic of Kenya, 2018, p. 14). Although there exist ADR mechanisms in the industry, it is not clear which other mechanisms the policy seeks to achieve. Nevertheless, the policy recognises the need for efficiency in the dispute resolution process.

Secondly, the NCIA released a draft ADR policy that recognises several challenges in the arbitration practice, including high costs, judicialization, delays occasioned by unethical behaviour, unregulated practice and unstandardised curriculum (Nairobi Centre for International Arbitration, 2019). However, the policy statements

encapsulated in the draft do not seem to adequately address these challenges. Thus, the policy requires further work to help in improving arbitral effectiveness.

2.2.3 Institutional Framework

The institutional framework in Kenya consists of several institutions that either facilitate or support ADR. First is a supportive court system that encourages minimal court intervention as encapsulated under Section 10 of the Arbitration Act. A supportive court is likely to encourage continued use of arbitration as a dispute resolution mechanism.

Secondly, there are the various institutions that play a role in the appointment of persons to resolve construction disputes. The multiplicity of contract documents articulated under this Section 2.2 requires institutions such as the Architectural Association of Kenya (AAK), Institution of Engineers of Kenya (IEK), Institute of Quantity Surveyors of Kenya (IQSK), CIArb (Kenya Branch) and the NCIA to appoint arbitrators, adjudicators or mediators in instances where the parties have failed to agree on the appointment. These institutions maintain a panel of such arbitrators, adjudicators, and mediators from which they make such appointments. Their compliance with the provisions of the arbitration agreement may encourage parties to use arbitration if they appoint arbitrators with the right competence to handle the dispute at hand.

Thirdly, there are institutions involved in the training of arbitrators and party representatives. The CIArb (Kenya Branch) remains the most active institution on this front, by not only having a clear training curriculum, but also encouraging continuous professional development. To achieve this goal, it organises several seminars, workshops, and conferences. Other institutions include the Kenya School of Law and the various universities involved in training most party representatives. Such training and continuous professional development should churn out competent arbitrators and party representatives.

2.3 Organisational Effectiveness and Arbitration

Existing literature discusses the effectiveness of arbitration without providing a clear definition of the concept. Management scholars have associated effectiveness with organisations, hence the term 'organisational effectiveness,' which refers to, inter alia, the efficiency of the organisation's internal processes and the degree to which the organisation realises its goals (Cameron, 1982; Daft, 2010; Yuchtman & Seashore, 1967). The concept of organisational effectiveness may be applied to arbitration by first viewing an arbitration case not only as an organisation but also as a system.

The view of an arbitration case as an organisation is not farfetched. An organisation is defined as a goal-directed social entity that is designed as deliberately structured and co-ordinated activity systems linked to the external environment (Daft, 2010). It consists of people and their relationships with one another. These relationships emanate when people interact with one another to perform essential functions that help in attaining goals. These goals explain the existence of the organisation and define the outcome the organisation seeks to achieve.

An organisation can also be viewed as a system of interacting elements that acquires inputs from the environment, transforms them and discharges outputs to the external environment (Daft, 2010; Yuchtman & Seashore, 1967). An arbitration case has similar attributes. It consists of various people, including the arbitrator, the parties, party representatives, fact witnesses and experts, interacting, albeit in a temporary matrix organisational structure, to help in resolving the dispute. Therefore, principles of organisational effectiveness can be applied imaginatively in arbitration to improve the dispute resolution process and/or results.

Seven models of organisational effectiveness have been advanced in management literature (Daft, 2010). These models are classified into two broad categories: the contingency effectiveness and the balanced effectiveness models. The contingency effectiveness models include the goal model, the resource-based model and the internal process model while the balanced effectiveness models include the strategic constituencies model, the competing values model, the legitimacy model and the ineffectiveness model (Cameron, 1982; Daft, 2010).

The goal model defines organisational effectiveness as the degree to which an organisation realises its goals (Cameron, 1982; Daft, 2010). It identifies an organisation's output goals and assesses how well the organisation attains such goals. The systems approach defines organisational effectiveness as the ability of the organisation to exploit its environment in the acquisition of scarce and valued resources. The resource-based approach observes the beginning of the process and evaluates whether the organisation effectively obtains resources necessary for high performance. Its goal is to obtain and optimally exploit scarce resources from the environment. The internal process model examines internal activities and assesses effectiveness by indicators of internal health and efficiency. The strategic constituencies model is concerned with the extent to which stakeholders are satisfied with the organisation while the competing values approach combines diverse indicators of performance used by managers and researchers. These definitions suggest that organisational effectiveness is to a large extent goal oriented. Thus, goals form an integral part of the effectiveness of an organisation.

Effectiveness evaluates the extent of attaining multiple goals. An organisation may have multiple goals, the most common of which are cost minimisation or profit maximisation. To realise these goals, the organisation should operate efficiently. Efficiency is narrower in scope and is associated with the internal environment of the organisation, but it may influence the effectiveness of the organisation. It refers to the number of resources used to produce a unit of output and can be measured as the ratio of inputs to outputs (Daft, 2010). The goal of arbitration is to resolve the dispute satisfactorily, in a timely and cost-effective manner. Therefore, in the context of arbitration, effectiveness refers to the degree to which arbitration efficiently resolves the dispute to the satisfaction of the disputants.

The concept of organisational effectiveness is complex. Handy (1999) points out that it consists of over sixty indicators vested in the organisation, its individuals, and the environment within which the organisation operates. This multidimensional nature of organisational effectiveness lends the concept to numerous approaches to its measurement (Cameron, 1978; Cameron, 1986; Daft, 2010). Arising from difficulties associated with its measurement, Cameron (1986) argues that organisational effectiveness is a problem-driven construct, rather than a theory-

driven construct. He adds that the multiplicity of existing models dissipates the development of any single theory addressing the concept of organisational effectiveness. Thus, the criteria chosen by one person depends on the context in which he evaluates effectiveness and represents that person's values and biases.

The arbitration case represents a perfect context in which the values and biases of the participants create room for varying but conflicting criteria for evaluating effectiveness. Just like a project organisation, the arbitration case is a temporary organisation created with a goal of resolving the dispute. While the organisation consists of distinct entities with loyalties to their respective head-offices, the entities have a duty to work as a team towards a satisfactory resolution of the dispute. Therefore, they must have a common objective of achieving the organisational effectiveness of the arbitration case.

However, each entity has a different view of the organisational effectiveness in the case. While the claimant may be keen on speedy resolution of the dispute, the respondent (in the absence of a counterclaim) may engage in delaying tactics aimed at stalling the resolution process. Conversely, while interested in the efficiency of the proceedings, the arbitrator, with the aim of avoiding award challenge, may limit his intervention in such a process where interests diverge. This tension calls for the cooperation of all participants as the arbitrator tries to balance between actions intended to achieve efficiency and actions that enhance due process. Throughout the arbitration process to its logical conclusion, participants will be concerned about the fairness of the decision-making process. Hence, there is a need for the effectiveness of the process and outcome of the arbitration case.

2.4 Dimensions of Arbitral Effectiveness

The effectiveness of dispute resolution methods is as multidimensional as organisational effectiveness. It is a variable consisting of several surrogates, including speed, cost, the extent to which the method preserves relationships, openness and fairness, flexibility, voluntariness, creative remedies, degree of process control, confidentiality, expert determiner, satisfactory outcome and finality and enforceability of the decision (Cheung & Suen, 2002; Cheung et al., 2002; Gebken

II, 2006; Harmon, 2003; Lu et al., 2015; Risse, 2013; Stipanowich & Lamare, 2014; Torgbor, 2013). These surrogates are critical to disputants' access to justice (Muigua, 2015a). Apart from speed and cost that stand out as distinct surrogates, the rest are associated with the extent to which disputants are satisfied with the award. Perspectives of each of these surrogates are as diverse as the number of studies conducted on the effectiveness of dispute resolution techniques.

2.4.1 Cost-effectiveness

Cost-effectiveness can be determined by summing up all direct transaction costs relating to resolution of the dispute as a proportion of the claim value, counterclaim value or award. In the context of disputes, the cost of resolving the dispute refers to the total cost involved in reaching a settlement (Cheung & Suen, 2002). Cost-effectiveness is the ratio of this cost to the award value. This ratio is rooted in the equity theory, which relates the ratio of outcomes and inputs of participants in an economic exchange (Adams, 1965). Higher inequality between the parties' proportions creates a feeling of injustice and a sense of deprivation. This is the essence of the equity component of distributive justice, which demands fairness in the allocation of resources, and the relative deprivation component, which is concerned with the unfair violation of expectations (Adams, 1965). Therefore, to achieve equity in arbitration, there is a need to create a proper balance between the ratio of costs incurred by the disputants and the outcomes derived from the arbitral process.

This balance requires participants in the arbitral process not only to aim at efficiency in the proceedings but also to follow due process. In this regard, consumers of the arbitration process have a legitimate expectation of a fast and high-quality process conducted at a low price (Rees, 2015). Unfortunately, arbitration rarely achieves this objective in relation to cost. For instance, arbitration of a dispute involving a large scale construction project in Egypt was found to be cost-ineffective (El-Adaway et al., 2009). Similar observations have been made in Saudi Arabia (Alshahrani, 2017). Cost-effectiveness requires participants to conduct themselves in a way that ensures unnecessary costs are minimised to enhance effectiveness.

The cost of arbitration consists of two components: direct or objective and hidden or subjective costs, a portion of both of which may be necessary or unnecessary. Gebken II and Gibson (2006) observed that direct costs cover hard costs incurred by parties. These include (i) the cost of the arbitral process derived from the arbitrator's fees mostly charged at an hourly rate; (ii) administrative cost relating to the cost of the venue; (iii) legal fees consisting of the cost of preparation, discovery, hearing, registering or setting aside the award and (iv) expert fees consisting of the cost of deposition, investigation and analysis, and preparation. As a shared cost component, the arbitrator's fees and administrative cost of arbitration increase with the size of the panel but reduces with the number of parties involved. Parties can share or bear their own expert fees depending on how the expert is appointed. Direct costs vary from dispute to dispute and can thus be minimised by the way the participants conduct arbitration proceedings.

Legal fees constitute a significant portion of direct transaction costs (Newmark, 2008). Studies have shown that such legal fees may constitute up to 75 percent of the transaction cost of arbitration (Gebken II, 2006; Mistelis, 2004) and as high as 82 percent in international arbitration and domestic arbitration in some jurisdictions (International Chamber of Commerce Commission on Arbitration Task Force on Reducing Time and Costs in Arbitration Report, 2007). These high legal costs can possibly be attributed to the 'judicialised' nature of the arbitral process.

Resolving contractual disputes through arbitration also gives rise to hidden costs that are generally difficult to quantify. These costs include the effect of the dispute on the morale of project staff and their relatives, and lost company momentum (Gebken II, 2006). Other relevant costs include contractors' reputation damage which affects their bidding competitiveness, owners' reputation damage which attracts premium rates from contractors, trust damage which results in higher supervision costs, expenditure spent on favourable measures taken to amicably resolve disputes, time loss of claim personnel, project delay which may result in loss of revenue and difficulty in executing judgments (Lu et al., 2015), delayed recovery of money thus affecting investment and/or increasing financial cost, strained business relationships that may affect other running and future projects, and the cost of emotional stress (Gebken II, 2006; Lu et al., 2015). These unnecessary consequential costs

carry an emotional component and hence have a significant bearing on the disputants' perception of the effectiveness of arbitration as a dispute resolution mechanism.

Studies such as Mistelis (2004) have established that cost is the worst characteristic of international arbitration. Yet such high cost is an impediment to access to justice (Fortese & Hemmi, 2015; Schmitz, 2010). Cost ineffectiveness arises due to lack of effective sanctions from arbitrators who may be more concerned about the enforceability of their awards than the efficiency of the proceedings. Thus, there is a need for a proper balance between the cost-effectiveness objective and the need to follow due process.

2.4.2 Time Efficiency

Disputes take time to resolve, with some disputes requiring more time than others. Dispute resolution time refers to the period taken to resolve the dispute, from the time of the request for appointment of the arbitrator to the time of settlement or final writ of execution attaching assets, whichever comes first (Cheung & Suen, 2002). Such period includes time spent on document production, and time and effort involved in expert investigation and analysis (Wiezel, 2011). However, time efficiency refers to such dispute resolution time in relation to a referent standard, such as the time taken to arbitrate similar disputes, or the time taken to resolve similar disputes using other dispute resolution techniques. It has been recommended that arbitration should not take more than six months (Fortese & Hemmi, 2015; Risse, 2013; Rivkin & Rowe, 2015).

Time efficiency in arbitration depends on several factors. Cheung and Suen (2002) argued that the speed of resolving disputes depends on complexity, quantum, and number of disputants. Complexity is associated with the simplicity of the dispute. A complex dispute requires more time to resolve than a simple dispute. A simple dispute that takes as much time to resolve as a complex dispute is time inefficient. Quantum refers to the monetary size of the dispute. A large dispute may result from a series of issues that require time to scrutinise and resolve. It may also involve a few issues requiring time to interpret. The number of disputants refers to the parties in

dispute. The higher the number of disputants, the longer it is likely to take to settle. Thus, achieving time efficiency requires participants to pay attention to the factors that are likely to impact on the resolution time.

A qualitative analysis of 22 arbitration cases involving public sector projects in India established that arbitration generally took longer than desired (Moza & Paul, 2017). Similarly, a case study involving dispute resolution in a large-scale construction project in Egypt established that arbitration was characterised by delays (El-Adaway et al., 2009). Although these studies suggest that arbitration remains lengthy, none was conducted in the context of Kenya, whose construction industry is characterised by factors that may not necessarily mirror those of these countries.

2.4.3 Quality of the Award

Both time efficiency and cost-effectiveness are aspects of efficiency, but that is not what parties want most (Newmark, 2008). Parties are also keen on the quality of the award. Bush (1988) conceptualised the quality of dispute resolution processes and outcomes as consisting of five latent variables, broken down into fifty indicators. However, some of the indicators overlapped across the variables, lending credence to the caution by Tyler (1989) that a long list of quality criteria for evaluating dispute resolution programmes renders the evaluation process unmanageably complex.

Consequently, the evaluation criteria were classified into four categories: economy and speed, interpersonal climate, outcome quality or accuracy and community perspectives (Brunet, 1987; Tyler, 1989). Economy and speed are factors of efficiency while the interpersonal climate addresses the extent to which the resolution process maintains relationships among the disputants. Outcome quality is concerned with the objective assessment of the award and may be evaluated in terms of disputants' satisfaction. Community perspectives deal with the extent to which the technique stimulates social change through empowerment of the disadvantaged. According to Lind et al. (1990), managing the time and cost of arbitration does not necessarily enhance feelings of satisfaction and perception of procedural justice. Thus, the effectiveness of arbitration extends beyond the efficiency of the procedure used.

The organisational justice perspective of disputing behaviour introduced in Section 1.5 above demonstrates that disputants react to outcomes based on the extent to which the outcomes satisfy the criteria developed under the four-justice dimensions. Satisfaction with a dispute resolution technique depends on the disputants' role in the process (control), the behaviour of the neutral (Crowne, 2001; Lind & Tyler, 1988) and satisfaction with the outcome. In this regard, parties are generally more satisfied with outcomes arising from approaches where they exercise greater control over the outcome. Unfortunately, maintaining complete control over outcomes in adversarial approaches such as arbitration is difficult. Consequently, parties in such adversarial approaches seek greater process control on the assumption that such control will influence the outcome.

Several factors determine the quality of the award. Some of the main determinants include the validity of the award, its fairness, acceptability to the parties (ABA Section of Litigation Task Force on ADR Effectiveness, 2003) and the extent to which the award maintains business relationships (Cheung, 1999). The governing law or aspects of the common law determine the validity of the award. Section 52 of the English Arbitration Act and Section 32 of the Kenyan Arbitration Act deal with the form of the award including the date, reasons, signatures, juridical seat of the arbitration and its delivery. These factors determine disputants' satisfaction with the award (Gross & Black, 2008; Stipanowich, 2012). When these provisions are complied with, an arbitral award carries the trappings of a final and binding award, enhancing the effectiveness of arbitration as a dispute resolution technique (Torgbor, 2013). An award that does not comply with these requirements can thus be challenged in a competent court, increasing the time and cost of resolving the dispute.

The quality of the award may also be determined by its perceived fairness. Award fairness, otherwise known as outcome fairness in distributive justice literature, refers to disputants' response to their perceptions of the extent to which the award complies with rules or standards (Goldman & Cropanzano, 2015; Tyler, 2000). Disputants may choose the applicable rules, in default of which the governing law dictates what may constitute a fair outcome. However, standards may be either objective or normative. Objective standards may be determined by comparing an outcome to a

referent standard established in concluded disputes having similar characteristics. Such standards thus compare the outcome of one dispute to another dispute within the same dispute resolution method. However, no two disputes display the same characteristics. The normative standard compares a dispute resolution outcome to an outcome that parties could obtain from an alternative method. Unfortunately, disputants have no basis for establishing whether they could have obtained more under the alternative method (Tyler, 1989). Thus, the absence of well-established standards compromises the determination of the quality of dispute resolution mechanisms.

The finality of arbitral awards implies that disputants may voluntarily comply with the award even if they consider the award to be unfair. In this case, while the award remains unsatisfactory, accepting an award perceived to be unfair minimises the time and cost of resolving the dispute. However, the outcome of a mediation process compares favourably with a consent award resulting from arbitration, both of which are mostly considered satisfactory even though they are a product of perceived coercion and pressure (Tyler, 1989). When disputants find such outcomes satisfactory, their commitment to comply with the outcome voluntarily enhances the effectiveness of the resolution techniques.

One or more disputants may also challenge or decline to comply with the award voluntarily if the disputant(s) perceive the award to be unfair. This challenge or refusal to comply voluntarily is an indicator of the extent to which disputants express their acceptability of the award and determines the effectiveness of arbitration (Torgbor, 2013). Thus, the three determinants of the quality of the award are related and influenced by disputants' satisfaction with the award. A satisfactory award means an award that is valid within the juridical context, is fair and acceptable to both parties. However, the tribunal must make the award within reasonable time and cost, thus the process of making the award matters as well.

The process of achieving the award includes the various procedures adopted during the arbitration. Studies have shown that disputants are not only concerned with the outcome of the dispute resolution process, their reaction to the outcomes also depends on the fairness of the process that led to that outcome (Colquitt, 2012; Lind

& Tyler, 1988). Such fairness is one of the most significant predictors of the success rate of arbitral decisions (Patil et al., 2019). Generally, winners tend to be more satisfied with the outcome and the process than do losers, irrespective of the process and its outcome (Gross & Black, 2008). Unsuccessful disputants may also react positively by accepting and voluntarily complying with an unfavourable award if they perceive the process to be fair. However, such losers are likely to exhibit a negative reaction to outcomes arising out of procedures they perceive to be unfair. Once they learn of their negative outcomes, they start evaluating the quality of the decision-making process and the fairness of the procedures that led to those outcomes (Aibinu et al., 2011). Thus, process techniques that are procedurally unfair cannot be considered as effective in achieving satisfactory outcomes, especially where outcomes are unfavourable (Harmon, 2003). Hence, disputants' perception of procedural fairness depends on outcome favourability, perceived outcome fairness and perceived quality of the decision-making process.

Disputants evaluate their relationships and their perception of dispute resolution methods on the basis of the outcomes they receive (Lind & Tyler, 1988) and on their perception of the fairness of the procedures used (Thibaut & Walker, 1975). Time-consuming and costly outcomes fracture such relationships. According to Thibaut and Walker (1975), "one of the major aims of the legal process is to resolve conflicts in such a way as to bind up the social fabric and encourage the continuation of productive exchange between individuals" (p. 67). Such continuation is enshrined in the way disputants sustain their relationships after the dispute is resolved. Indeed, a global survey conducted to elicit perceptions and experiences of corporations in enforcing awards and settling disputes established that corporations that opted to settle their disputes before the arbitral award was issued were mainly motivated by their desire to maintain business relationships, weak cases and the need to minimise cost and delay (PriceWaterhouseCoopers & Queen Mary, University of London, 2008). Therefore, disputants are more concerned about the extent to which the resolution of their dispute may sustain their relationships.

Another aspect of the quality of the award is the extent to which the award motivates disputants to recommend arbitration as a method of resolving future disputes. People make long-term judgements about groups based on the quality of outcomes they

receive from the groups, across situations, relative to outcomes from alternative groups and the degree of resources invested in the group (Tyler & Blader, 2000). Thus, if arbitration can be taken as a group, then disputants are likely to recommend it as a method of resolving future disputes if they are satisfied with its awards, if they can trust the arbitrator and if such awards compare favourably with outcomes likely to come from other dispute resolution mechanisms. The quality of such outcomes enhances commitment to arbitration as a dispute resolution method (Brockner & Wiesenfeld, 1996).

Most of the previous research, such as Mistelis (2004) and Stipanowich and Lamare (2014) have been concerned with post-resolution evaluations of counsel or arbitrators, with very few studies evaluating actual disputants' satisfaction with dispute resolution procedures. In one study, qualitative data analysis of school education mediation cases found that disputants value the mediation process for its procedural justice and its outcome (Welsh, 2004). Further, a study conducted to elicit opinions on the effectiveness of securities arbitration found that majority of customers were not only dissatisfied with outcomes but also indicated that such arbitration was very unfair when compared with litigation (Gross & Black, 2008). This finding confirms the long-held perception that arbitration remains an ineffective method compared to mediation and surprisingly, litigation, whose shortcomings arbitration was to cure.

A longitudinal study that analysed users' *ex ante* (pre-experience) and *ex post* (post-experience) perception of their satisfaction with dispute resolution procedures used established that parties that were more attracted to third-party control over the outcome, process and rules were more satisfied with the outcome when they used adjudicative procedures (Shestowsky & Brett, 2008). In addition, the researchers found that contractual disputants valued business relationships and hence tended to prefer procedures that granted them control over the outcome, process, and rules. However, the researchers relied on a sample of 44 cases in which only 38 reported the procedure used to resolve the dispute. In addition, contract claims constituted only 12 percent of the sample, the rest covering a wide range of cases including medical or legal malpractice claims, personal injury claims, intentional torts, and property damage claims. Finally, the study considered only one arbitration case. The

rest were negotiation, litigation, and mediation. Thus, its findings are of limited application to the effectiveness of arbitration as it relates to contractual disputes in construction.

2.4.4 The Magic Triangle

The three measures of arbitral effectiveness are all related, in what Risse (2013) refers to as the ‘magic triangle’. **Figure 2.1** shows that adjusting any of the corners of the triangle is likely to affect other measures. In other words, processes aimed at efficient proceedings, which deal with the time and cost of the proceedings, may compromise the quality of the award (Hinchey, 2012; Lind et al., 1990; Park, 2011). Consumers of arbitration should consider both cost and time as integral to the achievement of quality awards (Risse, 2013). This approach requires a proper balance between the three measures: that participants can compromise unnecessary processes and procedures to save time and cost. This delicate balance, therefore, suggests that participants can achieve a high-quality award by using standard processes and procedures without amendments, but at considerable time and cost to the parties. The three dimensions must not always be discordant with one another. In this regard, arbitration can still be efficient and equitable in the result (Bruner, 2011; Welser, 2014). Hence, participants must exercise care when making decisions about procedures by considering the impact of such decisions on the three dimensions to achieve the fairest outcome in the most efficient manner.

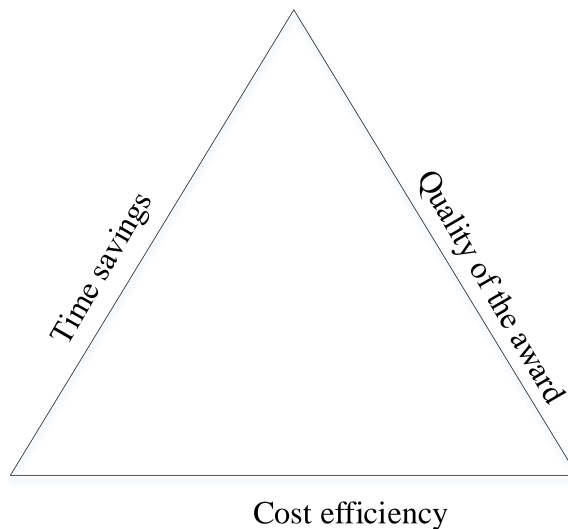

Figure 2.1: Measures of arbitral effectiveness

(Source: Modified from Risse (2013))

These dimensions guide parties in the choices they make in arbitration. Researchers have conducted several studies to elicit the opinions of users on their preferred considerations in the choice of arbitration as a dispute resolution technique. The most important criteria vary, for example, surveys on domestic arbitration have identified a fair and just result (Naimark & Keer, 2002) and time and cost (Stipanowich & Lamare, 2014). On the contrary, international arbitration surveys have singled out flexible procedure (Mistelis, 2004), right to appoint an arbitrator (PriceWaterhouseCoopers & Queen Mary, University of London, 2013), confidentiality (Norton Rose Fulbright, 2015) and enforceability of the award (White & Case & Queen Mary, University of London, 2015). However, there is a lack of consensus on the most important criteria within and between both categories of arbitration, as these findings display some semblance of inconsistency. Consequently, the difficulty in ascertaining what parties value most in arbitration complicates the process of seeking solutions to the problems afflicting the practice.

2.5 Effectiveness of the Arbitral Process

A proper understanding of the historical development of arbitration is best achieved by classifying satisfactory and unsatisfactory situations (Wolaver, 1934). Satisfactory

situations include circumstances where arbitration has been effective while unsatisfactory situations include instances where disputants have suffered the consequences of ineffective arbitration. This section examines the history of arbitration in brief; highlighting satisfactory and unsatisfactory situations, then considers some of the surveys that compare the performance of arbitration to its alternatives and concludes with a discussion on the effects of ineffective arbitration.

The history of arbitration dates to Biblical times during the reign of King Solomon. One of the earliest cases of arbitration can be traced to King Solomon, who was required to arbitrate a dispute between two women fighting over the custody of a child (I Kings 3:16-28, The New International Version). The kind of dispute dealt with at that time was not as complex as disputes faced later, thus it did not involve as much time and financial resources. However, to the extent that it provided a solution that was as binding and as final as characteristic of any modern arbitration, it was satisfactory.

In traditional societies, for instance, kings and village elders helped in resolving disputes in their areas of jurisdiction. One of the methods widely used in dealing with inter-ethnic disputes in these early societies is war. While it remains prevalent in some communities, it is one of the primitive routes to dispute resolution. This method of dispute resolution leaves losers disillusioned as winners celebrate the outcome of their effort. It thus provides a solution that leaves some disputants satisfied and others dissatisfied. As civilisation set in, laws were established, and it became necessary to establish administrative structures that would deal with disputes among citizens in different parts of the world. Court systems were thus set up, giving birth to litigation.

These courts dealt with criminal and civil matters according to the court register and with time, the number of cases increased to levels where delays and high costs became common (Wolaver, 1934). The greatest culprit in this situation was civil disputes. Delays, escalating costs, unending appeals, fractured relationships, industrial unrest, the complex nature of litigation and the technical nature of commercial disputes, which judges found difficult to deal with, pushed civil litigants to reflect on alternative ways of resolving their disputes, giving rise to arbitration to

address these shortcomings (Abernethy, 1984; Brooker & Lavers, 1997; Wolaver, 1934). However, from time to time, arbitration became a victim of its own creation, suffering the same fate as litigation due to increased 'judicialisation' (Harmon, 2008).

Ineffectiveness of arbitration became an active subject of debate among practitioners during the mid-twentieth century. For instance, the escalating cost of arbitration in labour disputes and measures to contain such costs were discussed during one of the earliest conferences of the National Academy of Arbitrators in the USA (Woodcock, 1959). Ever since, the debate on how to improve the effectiveness has remained an active subject in conferences, seminars and research, organised or sanctioned by leading arbitration professional bodies (Newhall, 2012; Sussman & Underwood, 2011). The common denominator has been how to make arbitration live up to its aspiration as the best alternative to litigation whose pitfalls it was established to cure.

2.5.1 Arbitration and Litigation

Several studies depict arbitration as a popular method of dispute resolution. A global survey involving 763 respondents found that in resolving cross-border disputes, 56 percent prefer to use international arbitration while 34 percent prefer to combine international arbitration with other ADR techniques (White & Case & Queen Mary, University of London, 2015). In addition, at least 84 percent of the respondents in the construction industry believed that arbitration was well suited to resolve international disputes within the industry (PriceWaterhouseCoopers & Queen Mary, University of London, 2013). However, comparing the effectiveness of arbitration to a referent standard is a better way of understanding its performance.

Such referent standards include the effectiveness of litigation and the effectiveness of alternative dispute resolution mechanisms. While it provides a terminal process of resolving the dispute after the alternative methods have collapsed (Hinchey, 2012), modern arbitration is now roughly equivalent to litigation in time and cost of dispute resolution (Seifert, 2005; Shontz et al., 2011). For instance, some jurisdictions rank arbitration as slower and more expensive than litigation (Besaiso et al., 2018; Seifert, 2005; Teo & Aibinu, 2007). In addition, Lande (1998) and Lipsky and Seeber

(1998) established that increased ‘judicialisation’ of arbitration likens the arbitration award to litigation, casting doubt on the fairness of the award, thus rendering arbitration less favourable as a dispute resolution method. Consequently, arbitration has become less attractive compared to litigation (Al-Humaidi, 2014; Alshahrani, 2017; Gross & Black, 2008). Thus, the cost and time shortcomings and fairness concerns about arbitration have affected its attractiveness as a method of resolving disputes.

While results of the foregoing studies reflect users’ diminishing confidence in arbitration compared to litigation, the other studies conducted during the same period appear to contradict. For instance, about 78 percent of the respondents to the ABA Section of Litigation Task Force on ADR Effectiveness (2003) and Fulbright & Jaworski L.L.P. (2007) surveys indicated that international arbitration takes less time than litigation, compared to 43 percent polled in the Fulbright & Jaworski L.L.P. (2006) study. In addition, 75 percent of the respondents to the Fulbright & Jaworski L.L.P. (2007) survey reported that there was no cost difference between arbitration and litigation compared to about half of the respondents to the ABA Section of Litigation Task Force on ADR Effectiveness (2003) and Fulbright & Jaworski L.L.P. (2006) surveys. These contradictory results not only reflect a consensus that arbitration carries the trappings of litigation but also show that respondents are unsure about the difference between the way disputants should conduct arbitration and litigation.

2.5.2 Arbitration and Alternative Dispute Resolution

The effectiveness of arbitration has been declining compared to the effectiveness of non-adversarial methods of dispute resolution. Consequently, arbitration in its current form is classified as a traditional dispute resolution technique rather than an ADR technique (Chong & Zin, 2012). This is because advantages previously associated with arbitration such as speed, cost-effectiveness and flexibility have been waning over time (Danuri et al., 2012; Fahy, 2012; Helfand, 2015; Mante, 2014; Park, 2011; Torgbor, 2013). Professionals actively involved in the arbitral process are clearly aware of the problem of arbitral ineffectiveness, yet nothing is being done to address the underlying issues (Rees, 2015). Unless the increased arbitration cost

and times imply fairer arbitral awards, arbitrators and researchers should continually seek ways of achieving satisfactory outcomes in the most efficient manner.

The past two decades have been characterised by a multiplicity of studies conducted to solicit opinions on the effectiveness of arbitration as a dispute resolution method. One of the studies that sought the opinions of 300 corporate counsel in the USA shows that more respondents were in favour of arbitration compared to those who disfavoured the method (Fulbright & Jaworski L.L.P., 2004). Nevertheless, the results also indicate that more respondents favoured mediation compared to arbitration. In addition, more than twice as many respondents disfavoured arbitration compared to those who disfavoured mediation. Regarding costs, 70 percent of the respondents reported cost savings in mediation compared to 47 percent of respondents in arbitration. A higher proportion of the respondents also reported that there were no cost savings in arbitration compared to mediation. Similar sentiments were expressed by respondents to other surveys conducted on the effectiveness of arbitration in the USA (Gross & Black, 2008; Lipsky & Seeber, 1998). These results are indicative of the growing dissatisfaction with arbitration compared to mediation.

Two other surveys of Fortune 1000 companies conducted by Cornell University in 1997 and 2011 provide further insights into perceptions of corporate counsel on dispute resolution mechanisms (Stipanowich & Lamare, 2014). Results of these surveys, which received responses from 606 and 368 companies, respectively, reveal that of the 1997 respondents, over 68 percent indicated that they chose arbitration because it saved time and money while about 60 percent cited a more satisfactory process and the limited extent of discovery. Only about 35 percent of the respondents indicated that they used arbitration because it provided a satisfactory outcome. These studies indicate that users were less satisfied with arbitration than they were with mediation.

Unless participants take measures to address arbitral ineffectiveness, arbitration is likely to continue suffering as emergent alternative dispute resolution mechanisms become more popular. About 98 percent of the respondents to the 2011 survey indicated that they had used mediation during the three years preceding the survey compared to 83 percent who had used arbitration (Stipanowich & Lamare, 2014).

Comparatively, 87 percent and 80 percent had used mediation and arbitration respectively in the earlier survey conducted in 1997. Further, only 71 percent of the 1997 respondents indicated that they were likely or very likely to use arbitration in resolving future disputes, compared to 84 percent who preferred to use mediation (Stipanowich & Lamare, 2014). These results indeed signify the expanded use of mediation at the expense of arbitration.

The dwindling popularity of arbitration was reflected in all sectors, including construction. The 2011 survey did not predict future use of arbitration in contractual disputes, but different sectors recorded higher predicted use of mediation compared to arbitration. An analysis of trends between 1997 and 2011 indicates that majority of the dispute categories recorded a significant drop in arbitration use (Stipanowich & Lamare, 2014). On the contrary, mediation either expanded or retained its market grip over most of the dispute categories. Thus, users seemed to have greater confidence in mediation compared to arbitration.

In addition, Gebken II (2006) found that the duration taken to resolve a dispute, measured from the date of first occurrence of the dispute to its resolution, varied depending on the method of dispute resolution used, with negotiation taking the shortest time, followed by arbitration and mediation taking the longest. As can be discerned from **Table 2.1**, what remained intriguing from his findings is the long duration taken to resolve the disputes. Not only did high-value claims take considerably longer and cost significantly more to resolve, but they also required streamlined approaches like mediation and arbitration. As Stipanowich (2012) averred, unreasonable delays can jeopardise the fairness of arbitration. Hence, the longer disputes take to resolve, the more they are likely to cost and the more a party is likely to feel that the resolution process was not fair.

Table 2.1: Mean transaction cost and mean dispute resolution time

Dispute resolution method	Median size of the claim (USD)	Mean transaction cost (USD)	Mean Resolution time (days)
Arbitration	1,800,000	1,167,182	805
Mediation	1,050,000	1,212,433	991
Negotiation	250,000	330,199	582

(Source:Gebken II (2006))

Other studies have focused on dispute resolution processes and procedures employed by parties to infrastructure projects in developing countries. Relying on qualitative data from 56 interviewees drawn from the government and foreign contractors in Ghana, Mante (2014) observed that both parties were satisfied with negotiated outcomes, but the Employer was dissatisfied with international arbitration outcomes. While his study relied on the case study research design approach and hence facing limitations on the representativeness of the sample and generalisation of findings, it is instrumental to the advancement of knowledge on the effectiveness of arbitration compared to alternative dispute resolution methods.

2.5.3 Party Autonomy and Due Process

The concept of 'judicialisation' has been linked to party autonomy as a principle that governs arbitration practice. Party autonomy firmly places with the parties the responsibility of establishing priorities for arbitration and translating those priorities into arbitration agreements and subsequent decisions (Stipanowich, 2010), but is in most instances at odds with values of effective arbitration practice (Gluck, 2012; Houghton et al., 2013; Risse, 2013). The ensuing conflict between the arbitrator's desire for efficient proceedings and the parties' aspirations for due process creates a hostile environment in which the result is an ineffective arbitral process. Unfortunately, the disputants bear the burden of the effects of such ineffectiveness.

Many of the ineffective arbitrations are characterised by a number of challenges, most of which are entertained by the arbitrators out of the fear that their awards may be challenged by parties for not having been given a reasonable opportunity to present their cases. These challenges include piecemeal boilerplate solutions to

procedural matters as the case progresses, frequent challenges to arbitrators and to the arbitral jurisdiction, enforcement challenges, frequently extended deadlines, late admission of fresh evidence and disruptive tactics by counsel (Torgbor, 2013). These party-driven challenges contribute to delay and expense in arbitration (Fortese & Hemmi, 2015; Torgbor, 2013). Adhering to the party autonomy doctrine can be a critical cog in arbitration if the parties, their representatives and the tribunal work together with the arbitrator towards realising efficient proceedings (Hinchey, 2012; International Chamber of Commerce, 2014; Welser, 2014). Thus, there is a need for a proper balance between enhancing the efficiency of the proceedings and the desire of the parties to take advantage of the flexibility inherent in arbitration.

2.5.4 Effects of Ineffective Arbitration

Once a dispute is declared and referred to a third party, disputants resign themselves to effects that the resolution process portends on their organisational effectiveness. Some of the effects are positive, particularly for the winning party, but even that party shall have endured a painfully time-consuming and costly process. Negative impacts of dispute resolution in construction include increased cost of insurance (Song, 2013), lack of future co-operation, damage to the contractor’s reputation and project delay (Lu et al., 2015). Ineffective arbitration also fractures business relationships (Besaiso et al., 2018; Cheung et al., 2002; Stipanowich, 2010). A disputant is thus likely to suffer the negative consequence of dispute resolution, whether that disputant realises a favourable outcome or not.

The damaging effect of arbitration on business relationships seems to affect its attractiveness as a method of dispute resolution. A survey of the Fortune 1000 companies conducted to establish reasons for use of ADR instead of litigation indicated that only about 41 percent of the respondents preferred to use arbitration because it preserves good relationships between disputing parties (Stipanowich & Lamare, 2014). Because of the need to reduce these impacts, it is necessary to put in place systems that ensure the entire arbitral process is conducted effectively.

2.6 Dispute Factors influencing Arbitral Effectiveness

A review of extant literature revealed that four dispute factors determine the effectiveness of arbitration. These include complexity of the dispute, competence of the arbitrator, perceived adequacy of the size of the tribunal, and approach to the presentation of evidence. These factors may interact with the various aspects of organisational justice including award favourability, perceived award fairness, perceived procedural fairness, distribution of control, perceived quality of treatment and perceived quality of the decision-making process to influence the effectiveness of arbitration.

2.6.1 Complexity of the Dispute

Contractual disputes arise from several causes that may result in simple or complex disputes. Gebken II (2006) classified disputes as simple, moderately simple, average/normal, moderately complex, and complex. Simple disputes deal with relatively straightforward issues. Conversely, complex disputes may involve multiple parties and issues, multiple layers of contractual documents, conflicting sources of contractual rights and obligations, and multicultural considerations (Hinchey, 2012; Overcash & Gerdes, 2009; Redmond, 2016).

Burgess and Maiese (2004) argue that components of a complex dispute tend to be interrelated, are unpredictable and contribute to the intractability of disputes. Complex disputes require more depositions to help in learning the theory and approach being developed by the opponent (Harmon, 2004). Arbitration of such complex disputes is hardly efficient and economical, as it will depend on the importance and value of the dispute (Cheung et al., 2002; Park, 2010; Wiezel, 2011). Ulmer (2010) attributes the high cost and duration of arbitration to the size and complexity of the disputes, adding that larger disputes attract high arbitration fees. Consequently, complex disputes may take longer and cost more to resolve.

However, empirical data suggests that disputes that are more complex cost less than disputes of less complexity. Research conducted in the USA to establish the impact of perceived dispute complexity on dispute resolution costs found that less complex disputes cost 39 percent of the original claim amount while more complex disputes

cost 17 percent (Gebken II & Gibson, 2006). One would expect that less complex disputes are less protracted, and, therefore, result in claims values that require relatively less effort to prepare and defend compared to more complex disputes. The tendency is for many claimants of complex disputes to exaggerate their claim values to increase their bargaining power, thus the overall cost of resolving the complex dispute remains a small proportion of the claim value.

a) Number of Parties

The construction industry has evolved from its infancy stages of the master-builder to its status where the number of players involved in the entire supply chain has exponentially grown. As the industry grows, conflict arising from group dynamics among these participants intensifies. Consequently, modern arbitration practice is faced with a multiplicity of highly complex disputes between an increasing number of sophisticated and diverse participants, directly contrasting with simple disputes encountered in the past (Gluck, 2012). This complexity is exacerbated by continuing advances in science, technology and general know-how, making it even harder to determine suitable procedures, increasing demand for resources, including experts and administrative secretaries required, with the attendant escalation in both time and cost required to resolve such disputes (Cheung et al., 2002; Odoe, 2014; Stipanowich, 2010; Wiezel, 2011). Hence, there is a need to develop an understanding of the effect of such complexity on arbitral effectiveness.

The number of parties involved in a dispute can raise jurisdictional challenges that may stall, delay, or increase the cost of resolving the dispute. Generally, arbitrations involving multiple parties are more complex in terms of proceedings, thus take more time and are more costly (Cheung et al., 2002). Where the disputes have distinct arbitration clauses, part of the time and cost is spent in determining whether the disputes should be consolidated to save time and cost, and to produce consistent awards (Redmond, 2016). Thus, parties must choose between proceeding with their disputes as distinct arbitrations, with the attendant increase in the time and cost involved and the risk of getting inconsistent awards, against consolidating the disputes for consistent and effective outcomes.

b) Nature of the Cause

Another factor that determines the effectiveness of the resolution approach is the nature of its cause. Simple disputes entail simple quantum claims while complex disputes require analysis of complex facts and their interpretation in the context of the contract and the law. Disputes involving complex facts and interpretation issues are likely to be inclined toward litigation-derived procedures, calling for more time and energy, but such due processes find little relevance in disputes entailing quantum and quality issues (Hinchey, 2012; Hinchey & Perry, 2008).

In addition, complex disputes require a high quantum of proof, and, therefore, more time and cost to resolve and to write the award (Choi et al., 2014; Hinchey, 2012). Thus, complex disputes may be characterised by numerous hearings and lengthy awards (Choi et al., 2014). Yet a party may be dissatisfied with the outcome of such complex disputes if his request for extensive discovery, which can aid in the much-desired proof, is declined (Gluck, 2012). Consequently, in choosing appropriate procedures for dealing with the dispute, arbitral participants must be cognisant of the nature of the cause of the dispute.

c) Language Differences

It is common for parties who may not fully understand the language of the arbitration to have translators who drag the proceedings by translating everything for the benefit of the participants. However, translators may misunderstand or misinterpret the original message, the effect of which can be an inaccurate award, delay or additional cost of the proceedings (International Chamber of Commerce, 2014; Welser, 2014). Translation of proceedings has become entrenched into the Kenyan arbitral system where a significant number of non-English speaking owners of Chinese construction companies are involved in construction disputes. The need for translation requires concerted effort to ensure that such translation gives a party a reasonable opportunity to present its case efficiently.

d) Cultural Differences among the Participants

The cultural background of the parties and other participants in arbitration plays a major role in influencing the effectiveness of arbitration. Variations in cultural systems are generally attributed to differing professional, legal and geographical backgrounds (Park, 2014). Participants in the arbitral process include quantity

surveyors, architects, engineers, lawyers, and a host of businesspersons whose business and professional practices are at variance with one another. Each of these categories of participants is drawn from a cultural system that cooperates with other members of the same cultural system but hostile to members from other cultural systems (Phua & Rowlinson, 2003). This hostile attitude creates an environment that is not conducive for effective resolution of contractual disputes.

One party may come from a cultural system that allows certain practices that may not be palatable to the other party. For instance, the American system supports excessive document production compared to the English system (Park, 2010). Permitting a party to engage in conduct that is not acceptable to the other party may to a great extent offend the basic notions of fair play and procedural justice (Fortese & Hemmi, 2015; Park, 2014). It may also cause misunderstandings that eventually delay the process (Lörcher et al., 2012; Odoe, 2014). The conflict continuum, which naturally flows from this vacuum, creates confusion and uncertainty, which in many instances culminates into the adoption of complex court procedures that are not only costly but also consume considerable time (Gluck, 2012; Wiezel, 2011). The effect is a proceeding or outcome that does not satisfy the offended party.

2.6.2 Competence of the Arbitrator

The term competence can be defined as the "ability or capability, which will enable satisfactory completion of some task(s)" (Hager & Gonczi, 1996, pp. 15-16). Linking competence to tasks generally means that competence is context-specific and must be interpreted with reference to the specific profession under consideration. Hence, the competence of the arbitrator is the ability or capability of the arbitrator to resolve the dispute under consideration. Arbitrators require knowledge in the field of arbitration, technical knowledge in the subject area of the dispute, relevant skills, and attitudes to resolve the dispute successfully.

The central role of arbitrators' competence on the effectiveness of the arbitral process cannot be underestimated, leading to the widely held maxim that "arbitration is only as good as the arbitrator" (Derains & Lévy, 2011, p. 7). Such competence determines arbitrators' neutrality and fairness, both of which are reflected in the way

they conduct their proceedings, thus influencing arbitral effectiveness (Cheung et al., 2002; Croall, 1998; Stipanowich, 2012; Torgbor, 2013; Wiezel, 2011). Arbitrators' utility of their competence also determines the extent to which the proceedings are likely to be affected by challenges (LaVan et al., 2012; Welser, 2014). Their diverse competence and cultural backgrounds determine their approach to common problems manifest in arbitration, which often leads to controversial awards that render it difficult to develop a consistent and normative arbitration practice (Brekoulakis, 2013; Kauffman et al., 1994; Torgbor, 2013). Therefore, parties must make choices informed by adequate knowledge about arbitrators' competence.

One of the most critical components that shape the arbitrators' competence domain is experience. Experience is embedded in the arbitrators' past participation in or observation of arbitration proceedings and professional activities. Experience requires the arbitrator to master the technicalities and procedures of arbitration (Schultz & Kovacs, 2012). With such experience, the arbitrator can make procedural decisions and rulings that help in enhancing arbitral efficiency. Additionally, experience helps in making awards that can withstand possible court challenges. However, some highly experienced but busy arbitrators cannot carry out arbitrations efficiently (Ngotho, 2014).

Nonetheless, inexperienced arbitrators may have difficulty in narrowing and clarifying the issues in dispute, thus opening the way for the introduction of irrelevant and extraneous evidence (Stipanowich, 1988). Early identification of such issues is the most effective method of expediting arbitral proceedings as it can result in the summary disposition of all or part of the issues, saving time and money (Holt, 2008; Newmark, 2008). However, determination of such issues requires considerable hearing time (Park, 2011). Inexperienced arbitrators may equally not know when to take the initiative to obtain evidence of fact and law, a factor that contributes to procedural inefficiency by extending both time and cost (Landolt, 2012; Overcash, 2015). Inexperience may also result in an unsatisfactory outcome or unjustifiable compromise in the award, which may include reluctance to make large awards due to the perceived fear that such awards may reduce their chances of securing future appointments (Gluck, 2012; Stipanowich, 1988). In addition, inexperienced arbitrators hardly know how to adequately prepare for the proceedings and may be

seen shuffling documents during the hearing (Welser, 2014). Thus, inexperience depicts lack of the skills required to drive the process.

Competent arbitrators may work with the parties to overcome deficiencies of inadequate procedures and effectively use their discretion in striking a balance between efficiency and fairness while incompetent arbitrators may undermine the best crafted procedural programme (Park, 2010; Stipanowich, 1988, 2010). Towards this end, arbitrators may proceed cautiously to avoid any doubts that may result in vacatur of the award (Stipanowich, 2010). This may entail the arbitrators' liberal request for, and admission of confirmatory evidence, effectively prolonging hearings and escalating costs (Helm et al., 2016). It may also entail avoiding dispositive rulings, accepting estimates of counsel regarding hearing schedules and maintaining consistency in the application of rules.

Studies point to conflicting findings on whether arbitrators' competence influences arbitration outcomes. Houghton et al. (2013) argued that inexperienced arbitrators represent unpredictable and unknown outcomes in the USA. However, Choi et al. (2014) established that experience in the securities sector in the USA did not influence the outcome of arbitral awards, but such experience influenced the outcome when claimants were represented by counsel. A similar analysis of 429 respondents who were presented with a scenario and asked to respond to the accompanying questionnaire indicated that previous arbitration experience did not contribute to consistency in the award (Ossman III et al., 2010). Franck's (2017) experimental research conducted on 262 arbitrators attending the biennial Congress of the International Council for Commercial Arbitration (ICCA) in 2014 in Miami established that the arbitrators were influenced by (i) irrelevant but not numeric anchors in determining damage awards, (ii) representative cues in resolving disputes, (iii) the possibility of gains and losses when deciding disputes, and (iv) egocentric bias. However, a separate case study of 459 labour and employment arbitrators in the USA found no significant relationship between arbitrator characteristics and arbitration outcomes (Bemmels, 1990). These conflicting findings suggest that competence influences the effectiveness of arbitration differently depending on the nature of the dispute in question.

Additionally, studies have shown that most users of arbitration are generally dissatisfied with the outcome of the proceedings, partly due to arbitrators' incompetence. These studies have attributed such dissatisfaction to bad outcomes, arbitrators' inability to control proceedings, delays occasioned by the arbitrator, poor reasoning in the award, lack of knowledge or expertise in the subject matter, delay in rendering the award, lack of independence, bias, and the arbitrator awarding himself excessive fees (Bruner, 2011; Paulson, 2013; White & Case & Queen Mary, University of London, 2010). This trend has called for increased regulation of the arbitrators' conduct to tame incompetence (White & Case & Queen Mary, University of London, 2015). Such incompetence adds to the ineffectiveness of arbitration as a dispute resolution method.

Competence of arbitrators is a function of their knowledge, skillset, and attitudes. Modern arbitration as a high-level profession requires all these subsets of competencies without one of which the arbitrator's competence becomes deficient.

a) Knowledge

Knowledge is one of the most important measures of competence. In the context of arbitration, knowledge includes qualifications in the practice of arbitration, specialisation in the subject area of the dispute and/or legal knowledge (Lane, 1997; Schultz & Kovacs, 2012). Knowledge in the practice of arbitration enhances the arbitrator's confidence, which is critical to the speedy resolution of the dispute (Lane, 1997). An arbitrator who is not well versed with the applicable law requires the assistance of legal experts who must be paid (Welser, 2014) to reduce the risk of issuing unenforceable awards (Odoe, 2014).

Stipanowich and Lamare (2014) observed that most of the selected arbitrators are not qualified to handle disputes presented before them. Muigua (2012) argued that disputes involving construction projects are highly specialised, thus they require arbitrators with a construction background. Using arbitrators with construction expertise can significantly reduce chances of arbitrary, unfair or ill-informed awards, and the time and cost spent on hearing and award writing (Fahy, 2012; Hobbs, 1999; Stipanowich, 1988; Wiezel, 2011). Unfortunately, one of the challenges in construction arbitration is the choice of arbitrators lacking construction expertise.

Such arbitrators require the assistance of construction experts to help them understand the subject matter, thus delaying the resolution process and increasing the cost of arbitration.

b) Skillset

In addition to the requisite knowledge, arbitrators require a set of critical skills to help them drive the arbitration process. According to Spitzberg (2003), skills embody "the actual behaviour manifested in the attempt to accomplish some goal" (p. 95). Skills reflect an underlying ability to perform tasks and can be acquired through training in legal and procedural matters of arbitration (Stipanowich, 2012). Arbitrators must, therefore, have such skills that will enable them to render accurate and enforceable awards in the fairest and most efficient manner (Park, 2011; Torgbor, 2013).

The skills required of arbitrators fall in three categories. Firstly, technical skills entail the knowledge and capabilities required of an arbitrator. For purposes of this research, technical skills are deemed to have been acquired through the requisite education and training as canvassed above. Secondly, functional skills include (i) communication skills – listening attentively, speaking clearly, reading and writing reasoned opinions in a neutral language, (ii) organisation skills – for effective case management, (iii) analytical skills – propensity to quickly and accurately identify salient issues, to deal with complex facts and to distinguish between facts and opinions, and (iv) problem-solving skills – ability to make decisions (Lane, 1997; Schultz & Kovacs, 2012; SPIDR Commission on Qualification, 1989; Watkins, 1992). These skills are essential not only to the achievement of efficiency in arbitration (Davison & Nowak, 2009) but also to enhancing the quality of the decision-making process. Finally, interpersonal skills include presence and persistence, ability to separate personal opinions from the disputed issues, ability to understand power imbalances, sensitivity to disputants' strongly felt values and ability to deal with underlying emotions (Schultz & Kovacs, 2012; SPIDR Commission on Qualification, 1989). Interpersonal skills are critical to the disputants' perception of the quality of treatment experienced.

Analytical skills generally influence the arbitrator's ability to interpret the contract and the law, adopt procedures that limit delays and reduce costs (Muigua, 2012; Rivkin & Rowe, 2015; Torgbor, 2013; Welser, 2014). The arbitrator must not only work with the parties in identifying issues in dispute but also restrict irrelevant, repetitive and unnecessary evidence (Rivkin & Rowe, 2015; Welser, 2014). In the process, the arbitrator demonstrates that he is attempting to resolve the dispute based on concern for time and cost (Overcash, 2015; Park, 2010; Stipanowich, 2010). Analytical skills also influence the arbitrator's ability to analyse and resolve the dispute considering the adduced evidence. These skills require arbitrators to rely on deliberative reasoning as opposed to intuition. Unfortunately, studies have shown that arbitrators' decisions are influenced by intuition, which explains some of the poor arbitral decisions (Franck et al., 2017; Helm et al., 2016). Possessing and making proper use of good analytical skills thus plays a key role in enhancing arbitral effectiveness.

Arbitrators also require organisational skills to help in case management. In this regard, arbitrators must not only indicate the time within which they will make the award but also issue the award in the agreed timeline (Cresswell, 2013; Risse, 2013; Rivkin & Rowe, 2015). These skills require arbitrators to be proactive in managing the case by maintaining control of the proceedings (Cresswell, 2013), thus reducing the chances of unnecessary expense and delay.

Working with the parties also calls for strong interpersonal skills. With interpersonal skills, arbitrators can listen to the parties before deciding, respect their jurisdiction as conferred by the parties through the arbitration agreement and remain independent and impartial (Park, 2011). Lack of independence and impartiality signals bias on the neutral's part, which is a stumbling block to effective arbitration (Klement & Neeman, 2013). Arbitrators' candid use of such interpersonal skills helps in enhancing both procedural and interactional justice in the arbitral process.

Interpersonal skills are linked to social capital. Social capital refers to the exploitation of the network of associations, for instrumental reasons, among members of the society (Puig, 2014). Arbitrators' interpersonal skills shape their response to social pressures. For instance, in a tribunal, an arbitrator may agree or

disagree with the majority to conform to the social pressures that come with the state of belonging to a closed arbitration class (Puig, 2014). The arbitrator may also desire to advance a new decision or maintain precedent he has already established in previous matters. This attribute is fundamental for procedural and distributive justice in arbitration and is embedded in the institutional theory, which advocates for institutional arbitration, as opposed to *ad hoc* arbitration (Brekoulakis, 2013; Puig, 2014). Unless arbitrators are guided by principles of neutrality and fairness, social pressures arising from the need to belong to the club of the select few may influence the quality of the award.

Another aspect of social capital that shapes the way arbitrators decide is the arbitrator's perception of the arbitration market. Arbitrators operate in a market where their income depends on the number of cases handled. Therefore, some arbitrators have the tendency to increase their chances of repeat appointments by splitting the damages sought, otherwise known as 'splitting the baby' (Brekoulakis, 2013; Puig, 2014), making large awards or favouring the party that is likely to reappoint them in future (Helm et al., 2016). Consequently, such arbitrators pay little attention to the efficiency and effectiveness of the resolution process (Lane, 1997). Unfortunately, unless legal teams guide their parties, the confidential nature of the arbitral proceedings makes it difficult for most parties to know how a certain arbitrator decides cases.

c) Attitudes

The third component of competence is the arbitrator's attitude. Attitude refers to "a psychological tendency…expressed by evaluating a particular entity into some degree of favour or disfavour" (Eagly & Chaiken, 1993, p. 1). In trying to resolve the dispute, an arbitrator may exhibit certain tendencies that a disputant may consider in evaluating the fairness of the arbitration. Disputants may evaluate an arbitrator through such attitudinal lens as pro-industry, anti-industry (Gross & Black, 2008; Stipanowich, 2004) or balanced (Brekoulakis, 2013; Puig, 2014) depending on how favourable the award is to the evaluator. Thus, disputants' evaluation of the fairness and ultimately the effectiveness of the arbitration depends on their perception of the arbitrator's attitude.

In everyday circumstances, people's attitudes about a phenomenon are evaluated on a bipolar scale: a negative attitude or a positive attitude. However, measurement of attitude toward a phenomenon is not that simplistic. Just like many of the constructs considered in this study, attitude is a latent construct which varies depending on context (Krosnick et al., 2005). According to Hacking (2011), the arbitrators' attitude may be evaluated based on the way they (i) assess damages, (ii) decide issues of law and evidence, (iii) examine witnesses, (iv) deal with discovery requests and (v) handle procedural issues. The arbitrators' knowledge, skills and experience determine their approach to these issues.

2.6.3 Perceived Adequacy of the Size of the Tribunal

Most arbitration statutes grant parties the freedom to choose the number of arbitrators to sit in their tribunal. For instance, Section 11 of the Kenyan Arbitration Act gives parties the freedom to determine the number of arbitrators, in default of which the number is determined as one. Section 35(2) of the Act provides that an award can be set aside if the tribunal is not properly constituted in accordance with the arbitration agreement. However, long before a dispute arises and before the nature of the dispute is known, parties draw the arbitration agreement in which they may agree to have more than one arbitrator. The attendant cost of the tribunal can be tremendous if a low-value dispute arises under such an arbitration agreement (Hinchey, 2012; Jones, 2012; Wiezel, 2011). Thus, having the right size of the tribunal is crucial to achieving effectiveness in the arbitral process.

The size of the tribunal positively influences both the time and cost of arbitration, but its perceived adequacy can negatively influence the outcome. For instance, appointing a sole arbitrator has been found to be one of the most effective methods of expediting arbitral proceedings (Holt, 2008). A sole arbitrator may achieve cost savings by imposing strict time limits on written submissions or limiting the number of witnesses or rounds of witness statements, or by issuing a truncated award without reasons, but runs the risk of not achieving desired distributive justice (Harmon, 2004; Hinchey, 2012). Thus, a sole arbitrator may enhance efficiency but can increase the possibility of getting an unsatisfactory award.

However, a sole arbitrator may not possess all personal and professional strengths pertinent to the resolution of the dispute (Stipanowich, 1988). Thus, a multi-member tribunal can bring in diversity that may result in better and stronger awards, reducing the possibility of award challenge (Giorgetti, 2013; Harmon, 2004). Such diversity enhances the competence of the tribunal. Nonetheless, a multi-member tribunal may take longer to write the award as the tribunal deliberates on different reasons for the award, escalating arbitration costs (Holt, 2008; Newmark, 2008; Park, 2011). The complexity of the case may also dictate the use of more than one arbitrator, increasing attendant cost and time. As a secondary profession, arbitration is confronted with the reality of conflicting scheduling dates that must essentially take into account schedules of the various parties involved, including all members of the tribunal (Harmon, 2004; Rivkin & Rowe, 2015). Multi-member tribunals, therefore, face stiff challenges in synchronising diaries for hearing dates, prolonging hearing time (Jones, 2012; Newmark, 2008). Thus, a multi-member tribunal can help in achieving satisfactory outcomes in complex disputes but at considerable time and cost.

2.6.4 Approach to the Presentation of Evidence

Evidence includes all documents and oral testimonies that support each party's case. The success or failure of a party's pleadings depends on the extent to which parties compile their evidence, present it and how such evidence convincingly supports each party's case. The approach used by each party has a bearing on the process in terms of cost and time (Park, 2010; Risse, 2013). For arbitration to be effective, parties must present their evidence in an effective manner.

a) Meticulousness of documentation

Documentation in construction arbitration includes letters, minutes, drawings, maps, photographs, videos, emails, faxes, contracts, invoices, and receipts. Considerable time and cost can be incurred by the party searching and producing the documents, as well as the party that studies and analyses them (International Chamber of Commerce, 2014). Nonetheless, access to requisite evidence and ability to conduct discovery can aid in achieving a fair and meaningful outcome (Stipanowich, 2012). But such discovery has been condemned as the most expensive part of arbitration

because it is hardly proportional to the complexity of the dispute (Claiborne, 2008). Parties must thus prepare and present their documents in a manner that facilitates the effective resolution of their dispute.

The meticulousness of documentation can be segregated into two broad categories: good documentation and poor documentation. Good documentation includes adequate documents that are relevant to the issues in dispute, presented in a chronological, non-confusing manner (Kangari, 1995). It shortens the process of resolving the dispute by providing clarity in referencing, making the arbitrator's and the parties' work easier and faster (White & Case & Queen Mary, University of London, 2012). Thus, good documentation has a positive impact on the effectiveness of arbitration.

Poor documentation entails excessive submission of documents, including submitting more than one round of documents, some or most of which are poorly prepared, impertinent to the dispute or in varying formats (Kangari, 1995; Stipanowich, 1988; Torgbor, 2013). It requires the arbitrator to devote more time, and hence an additional cost, to reviewing such documentation to determine the extent to which the documents support that party's case (Ennis, 2013; Jones, 2012; Risse, 2013). Poor documentation also requires the other party to spend more time reviewing the same documents to enable that party to rebut or yield to the opponent's demands. At the same time, parties may spend additional time and incur extra cost working to transform documents into a format requested by the arbitrator or into the language of the arbitration (Welser, 2014). Thus, poor documentation has a negative impact on the effectiveness of arbitration.

Regardless, the negative impact of poor documentation on the arbitral process must be considered in light of the existing legislative framework. Consequently, arbitrators may not be inclined to limit the amount of evidence presented out of fear of excluding evidence that may turn out to be of probate value (Stipanowich, 2009; Stipanowich, 1988). This fear rests in the assumption that a party can challenge the award for not having been given a reasonable opportunity to present its case (Jones, 2012). Besides delaying the process, admission of such evidence most often does not add much value to the case as most of the admitted evidence is hardly relevant to the

outcome of the case (Risse, 2013). In fact, Kangari (1995) established that poor documentation negatively affected the outcome of the case. Thus, the tribunal and the parties should work towards ensuring that document production is cost-effective (Rivkin & Rowe, 2015). In so doing, the arbitrators must, without fear or favour, exercise their powers on admissibility, relevance, materiality and weight of the evidence as conferred under Section 20(3) of the Kenyan Arbitration Act.

Two major approaches that have been adopted to help in improving documentation are the use of information technology and witness summaries. Information technology can significantly reduce the number of hard copies involved but it escalates the cost of obtaining evidence through e-discovery (Gregory & Berg, 2013; Jones, 2012). Hence, participants must use information technology in a manner that facilitates efficient access to and presentation of evidence to improve the effectiveness of arbitration. Replacing witness statements with witness summaries significantly reduces the time and cost spent on the prehearing phase but escalates the hearing time and cost spent as the parties extract further details from the witnesses (International Chamber of Commerce, 2014). Witness statements should be used to prove facts that cannot be proven from such documents (Jones, 2012). Thus, witness statements or summaries should be concise and avoid repeating what has been included in submitted documents.

b) Number of Experts and Fact Witnesses

Experts and fact witnesses can also increase the cost and time required to resolve the dispute. The need for experts is determined by the nature of the issues, the legal and cultural background of the tribunal, availability of the required experts, case strategy and the impact on time and cost (International Chamber of Commerce, 2014). Experts in complex, technical and specialised disputes such as construction are quite costly. However, such experts can help in clarifying or explaining certain aspects of the case (Frécon, 2004). Nonetheless, the cost and time of arbitration depends on the number of experts and fact witnesses involved (Jones, 2012).

c) Method of appointing experts

Several techniques are recommended to help the tribunal and the parties save on the time and cost spent on experts. In practice, there are two approaches commonly adopted to appoint such experts. One approach is to use a single expert appointed by

the tribunal, especially in highly technical low-value disputes (Ennis, 2013). A tribunal-appointed expert approved by the parties reduces the likelihood of disputes arising between the parties over the suitability of their respective proposals, thus reducing chances of the award being challenged, effectively saving time and cost (Galloway, 2012; International Chamber of Commerce, 2014). Unfortunately, this approach largely deprives the parties of some degree of process control.

Parties who wish to retain their control over the process may opt for the second, more effective approach of appointing their own experts (Ennis, 2013). Under this approach, the choice between in-house experts with hands-on knowledge of the technical matter in dispute, who are likely to be viewed by the tribunal as being biased, or the more expensive and time-consuming external experts who may be considered more impartial, rests with the parties (International Chamber of Commerce, 2014). In exercising their discretion over such choice, parties must thus strike a balance between the efficiency of the process and independence of such experts.

Although time-consuming, a reasonable compromise is for the tribunal to choose from a list of experts jointly submitted by the parties (Galloway, 2012; International Chamber of Commerce, 2014). However, this approach is difficult to achieve when parties are in dispute. The tribunal may also request the parties to comment on its own list of experts or to provide qualifications of the desired expert (Galloway, 2012). This second approach gives the parties some degree of control on the qualifications of the experts and may thus save time and cost.

d) Timing of experts' appointment

Aside from the challenging task of dealing with the expert appointment, the timing of their appointment has a bearing on the effectiveness of the arbitral process. Engaging the expert early encourages timely advice thus helping disputants to focus on issues (Ennis, 2013), which helps in timely identification of agreed and disputed issues, saving both time and cost. This identification of issues has been singled out as the most effective method that counsel can use to improve arbitral effectiveness (White & Case & Queen Mary, University of London, 2015). Hence,

timely appointment of the experts has a positive impact on the effectiveness of arbitration.

e) *Techniques for Preparing and Presenting Expert Reports and Witness Statements*

The time and cost of arbitration depend on how evidence and testimony from experts and witnesses are managed (Galloway, 2012). Where more than one expert is involved, three main techniques that are useful in the process of preparing and presenting expert opinions in arbitration include expert conferencing, oral testimony, and the document-only technique.

First, expert conferencing brings the experts together to explore contentious issues before such experts prepare their reports. It helps in narrowing issues in dispute, saving time and cost (Ennis, 2013; Rivkin & Rowe, 2015). Significant time and costs can be saved and utility of the evidence enhanced if such reports are prepared after the experts have issued joint statements (Ennis, 2013; Jones, 2012). Where experts have not agreed on issues or where they cannot issue joint statements, an expert facilitator can be used to broker constructive agreement (Ennis, 2013). However, the facilitator carries an additional cost that will have to be borne by the parties.

The second technique is the oral testimony. Under this technique, in addition to filing reports and statements, experts and fact witnesses appear before the tribunal for questioning by the parties and/or the tribunal. Substantial time and legal fees are incurred by the parties in deconstructing witness statements and expert reports (White & Case & Queen Mary, University of London, 2012). However, lengthy cross-examination has little bearing on the final award (Risse, 2013). Additionally, considerable time and cost are wasted where the representatives examine the experts and witnesses after preparing and adopting their reports or statements. Thus, direct cross-examination can save considerable time and cost. This approach requires the tribunal to guide the disputants and their representatives "in determining how far the investigation of a particular issue should be taken in order to avoid an unduly protracted examination of witnesses" (Torgbor, 2013, p. 137). Oral testimony must thus be conducted in a manner that promotes procedural efficiency.

There are five tools that can be used during oral testimony. These include 'hot-tubbing', questioning by the tribunal, video conferencing, witness conferencing and

document-only method. Firstly, 'hot-tubbing' is a practice where experts testify concurrently. This tool suits arbitrations where each party has appointed an expert or more than one expert, where the dispute consists of complex factual and technical matters, and where there are justifiable doubts as to the independence and credibility of one or more experts (Ennis, 2013; Jones, 2012; Rivkin & Rowe, 2015). While the practice reduces the extent to which evidence can be controlled and is not suitable for cases where joint statements have been issued by the experts, it can be used to clarify areas of disagreement and to demonstrate the strength of one party's case against the other, encouraging settlement negotiations (Galloway, 2012). Thus, hot tubbing helps in promoting efficiency in the proceedings.

Secondly, the tribunal can opt to question the experts and/or witnesses directly. Such questioning, especially when questions are written, has been found to contribute to delays in arbitration (White & Case & Queen Mary, University of London, 2010). Under this tool, there is no room for direct examination or cross-examination (Ennis, 2013), which may deprive parties of a reasonable opportunity to present their evidence in the most desired manner.

Thirdly, video conferencing can be used where participants are geographically dispersed. Video conferencing saves additional costs incurred through travel expenses of witnesses and experts (International Chamber of Commerce, 2014). However, the cost of setting up or using an existing video conference facility must be considered.

Fourthly, witness conferencing can play a key role in narrowing issues in dispute, provided it is kept short and focused. Parties have greater control of the conference if the conference is directed by party representatives than when it is directed by the tribunal. Additionally, limiting cross-examination to matters contained in the witness statement can save both time and cost (International Chamber of Commerce, 2014; Welser, 2014).

The final technique is the document-only method. The researcher has coined this term to refer to the technique that relies on witness statements and expert reports without requiring the witnesses and experts to make oral testimony. While preparing such reports and statements increase the time and cost spent on the prehearing phase,

such reports eliminate the hearing time and cost spent on oral testimony, unless they introduce new evidence or opinion (Ennis, 2013; Jones, 2012; Risse, 2013). Thus, the document-only technique influences the efficiency of presenting evidence.

The tribunal and the parties must devise cost-effective and time-saving techniques that ensure the arbitral process of extracting evidence from experts and fact witnesses gives each party a reasonable opportunity to present its case in an efficient manner.

f) Timing of Expert Reports and Witness Statements

Experts and fact witnesses are required to prepare and file their reports and witness statements with the tribunal. The timing of the expert reports and witness statements influence the effectiveness of the arbitral process. In this regard, timely provision of witness statements and expert reports can help experts in the early analysis of the dispute, thus saving time and cost (Ennis, 2013; Jones, 2012). Submitting witness statements alongside written submissions not only provides direct proof of the facts at the time they are alleged but also helps in identifying and narrowing down the factual issues, subsequently providing an opportunity for more focused and shorter submissions (International Chamber of Commerce, 2014). Thus, prompt submission of expert reports and witness statements has a positive impact on the efficiency of arbitration.

A second aspect of the timing is the choice between sequential and simultaneous filing. Under sequential filing, expert reports and witness statements are filed one after the other. Sequential filing can be time-consuming where new issues are raised in subsequent reports and statements, which may require a response from the other party. However, simultaneous filing requires expert reports and witness statements to be filed and exchanged at the same time. Savings in time and cost can be realised by the simultaneous filing of such reports, provided the issues in dispute have been clearly delineated (International Chamber of Commerce, 2014). However, sequential filing may save time and cost where such disputed issues remain unclear. But this Memorial approach may also be counterproductive and can lead to additional costs resulting from unproductive discussions, difficulty in narrowing positions and the need for more time for cross-examination (Ennis, 2013). Accordingly, the choice

between the sequential and simultaneous filing of expert reports impacts on arbitral effectiveness.

2.7 Methods of studying the Effectiveness of Arbitration and Alternative Dispute Resolution

Examining methods that have been used to study the effectiveness of arbitration and other dispute resolution methods can play a key role in developing an appropriate research design. From **Table 2.2**, it is evident that survey designs have dominated most of the studies in this area, having been used in more than half of the 43 studies considered. Most of these surveys have solicited opinions of practitioners and attorneys on various aspects of arbitral effectiveness and have relied on frequencies to analyse their data. However, ten surveys utilised additional techniques including exploratory factor analysis (Chong & Zin, 2012; Lu et al., 2015), regression (Cheung et al., 2010; Patil et al., 2019; Shestowsky & Brett, 2008), log-linear analysis (MacCoun et al., 1988) and structural equation modelling (Lee et al., 2018b, 2018c). Multivariate data analysis techniques have thus been rarely used in the surveys on the effectiveness of dispute resolution methods. Most of these surveys used the individual as the unit of analysis, suggesting that these studies relied on opinions only and did not delve into the effectiveness of actual cases.

Experimental designs and case studies have been used sparingly, probably because of the confidential nature of arbitration and the one-off nature of disputes. Case studies have been employed for both qualitative and quantitative studies while experimental designs have been used for quantitative studies only. Two qualitative case studies used thematic analysis (Danuri et al., 2012; Welsh, 2004), two others used qualitative content analysis (Besaiso et al., 2018; Hansen, 2019) while one doctrinal study relied on content analysis (Torgbor, 2013). Among the five quantitative studies, only one with a sample size of 200 awards, and which relied on the award as the unit of analysis, used descriptive statistics to analyse data. The remaining studies used neural networks (Chaphalkar et al., 2015), regression on cases (Adler et al., 1983; Colvin, 2011) and structural equation modelling (Lind et al., 1990). Logistic regression (Helm et al., 2016) and ANOVA (Joosten et al., 2016) were used for data

analysis in experimental designs, both of which relied on the individual as the unit of analysis. Thus, multivariate data analysis dominated quantitative case studies and experimental designs.

Although eighteen studies have been conducted in the construction industry, very few have focused on the effectiveness of construction arbitration. Most studies have examined the development and use of arbitration in resolution of construction disputes (Al-Humaidi, 2014; Besaiso et al., 2018), case studies on performance of construction arbitration (El-Adaway et al., 2009; Marques, 2018; Moza & Paul, 2017) and outcomes (Chaphalkar et al., 2015; Hansen, 2019; Kangari, 1995; Patil et al., 2019). Most of the studies remain descriptive, thus, they have do not provide explanations for the effectiveness of construction arbitration.

Table 2.2: Previous methods in the study of the effectiveness of arbitration and alternative dispute resolution

S.No.	Authors	Research Design	Context	Data collection methods	Unit of analysis	Sample size	Data analysis methods
1	Adler et al. (1983)	Case study	USA	Questionnaire Interviews	Cases. Individual.	544 arbitration cases, 151 award appeals, 66 individual interviewees, 29 institutional interviewees.	Frequencies Multiple regression.
2	Al-Humaidi (2014)	Case study	Kuwait	Unspecified	Country	1	Unspecified
3	Bemmels (1990)	Case study	USA	Content analysis.	Arbitrators	459	Multiple regression.
4	Besaiso et al. (2018)	Case study	Palestine	Interviews, Documentary analysis	Individual	12	Qualitative content analysis
5	Chaphalkar et al. (2015)	Case study	India	Questionnaire	Claims Arbitrators	239 claims, 50 arbitrators	Neural networks. Friedman Chi-square test.
6	Cheung et al. (2000)		Hong Kong	Questionnaire	Projects	48	Multivariate discriminant analysis.
7	Cheung et al. (2010)	Survey	Hong Kong	Questionnaire Interviews	Projects	48	Logistic regression
8	Choi et al. (2014)	Survey	USA		Arbitration awards.	381	Ordinary Least Squares Regression
9	Chong and Zin (2012)	Survey	Malaysia	Questionnaire	Individual	60	Principal Components Factor Analysis
10	Colvin (2011)	Case study	USA		Cases	3945	Regression
11	Danuri et al. (2012)	Survey	Malaysia	Interviews	Individual	29	Thematic analysis
12	El-Adaway et al. (2009)	Case study	Egypt	Interviews	Case	1	Unspecified
13	Gebken II (2006)	Survey	USA	Questionnaire Interviews	Projects	46 projects. 80 individuals	ANOVA
14	Gross and Black (2008)	Survey	USA	Questionnaire	Individual	3087	Frequencies
15	Hansen (2019)	Case study	Indonesia	Documentary analysis	Arbitration cases	6	Qualitative content analysis
16	Harmon (2003)	Survey	USA	Questionnaire	Individual	48	Frequencies
18	Helm et al. (2016)	Experiment	USA	Questionnaire	Individual	94	Frequencies t-test Fisher’s exact test Logistic regression.
19	Hill (2003)	Case study	USA	Questionnaire	Awards	200	Means. Frequencies.

Table 2.2 *(cont'd)*

S.No.	Authors	Research Design	Context	Data collection methods	Unit of analysis	Sample size	Data analysis methods
20	Joosten et al. (2016)	Experiment	Netherlands	Questionnaire	Individual	156	Mean. Standard deviation. t-test. ANOVA.
21	LaVan et al. (2012)			Content analysis	Arbitration awards	101	Phi coefficients. Chi square analysis.
22	Kangari (1995)	Survey	USA	Questionnaire	Individual	10	Frequencies
23	Lee et al. (2016)	Desktop study	International	Systematic literature review	Articles	446	Thematic analysis
24	Lee et al. (2018a)	Survey	Malaysia	Questionnaire	Contractors	25	Frequencies
25	Lee et al. (2018b)	Survey	Malaysia	Questionnaire	Individual	128	Structural equation modelling
26	Lee et al. (2018c)	Survey	Malaysia	Questionnaire	Individual	128	Structural equation modelling
27	Lind et al. (1990)	Case study	USA	Interviews	Individual	286	ANOVA. Structural equation modelling.
28	Lipsky and Seeber (1998)	Survey	USA	Questionnaire	Corporations	606	Frequencies
29	Lu et al. (2015)	Survey	China	Questionnaire	Individuals	233	Exploratory factor analysis
30	MacCoun et al. (1988)	Survey	USA	Questionnaires	Cases Individual	639 auto negligence cases, 300 litigants, 400 attorneys	Frequencies Chi-square test. Mean. t-test. z-test. ANOVA. Multiple regression. Correlations. Log-linear analysis.
31	Marques (2018)	Case study	Portugal	Unspecified	Arbitration case	1	Unspecified
32	Mistelis (2004)	Survey	International	Questionnaire Interviews	Individual	103 respondents. 40 interviewees	Mean. Frequencies.
33	Moza and Paul (2017)	Case study	India	Content analysis	Arbitration cases	22	Content analysis
34	Ossman III et al. (2010)	Survey	USA	Questionnaire	Individual	429	Frequencies
35	Patil et al. (2019)	Survey	India	Questionnaire	Individual	38	Chi-square, Pearson correlation,

Table 2.2 *(cont'd)*

S.No.	Authors	Research Design	Context	Data collection methods	Unit of analysis	Sample size	Data analysis methods
							Spearman correlation, Multiple regression
36	Phillips (2003)	Survey	USA	Questionnaire	Individual	43	Frequencies
37	Schmitz (2010)	Survey		Questionnaire. Focus Group Interviews.	Cases Individual	13 credit card contracts. 306 respondents.	Frequencies.
38	Shestowsky and Brett (2008)	Survey	USA	Questionnaire	Individual	108	Frequencies, Chi-square, Exploratory factor analysis, Multinomial logistic regression.
39	Shontz et al. (2011)	Survey	USA	Questionnaire	Individual	121	Frequencies
40	Stipanowich and Lamare (2014)	Survey	USA	Questionnaire Interviews	Individual counsel	368 in 2011. 606 in 1997.	Frequencies
41	Torgbor (2013)	Case study	Kenya, Zimbabwe, Nigeria	Interviews, Doctrinal analysis			Content analysis
42	Welsh (2004)	Case study	USA	Interviews	Individual	70	Thematic analysis.
43	Wissler (2004)	Case study		Questionnaire Interviews	Cases	10	Frequencies

2.8 Knowledge Gap in the Literature

Empirical research work on the effectiveness of arbitration remains sparse. Much of the debate rests largely on anecdotes and opinions, but not realistic data (Fenn et al., 1998; Gluck, 2012; Rutledge, 2008). This scenario implies that the problem of arbitral effectiveness is yet to be comprehensively addressed. Nevertheless, previous work provides useful insights into the subject of arbitral effectiveness. It has addressed the following five major aspects of arbitral effectiveness:

1. Arbitrators' perception of poor documentation on the arbitration process (Kangari, 1995).
2. Causes of ineffectiveness in arbitration and other dispute resolution techniques (Besaiso et al., 2018; Cheung et al., 2002; Harmon, 2003; Mante, 2014; Moza & Paul, 2017; Torgbor, 2013).
3. The effectiveness of court-annexed arbitration (Adler et al., 1983; Lind et al., 1990; MacCoun et al., 1988).
4. Assessment of dispute resolution cost (Gebken II, 2006; Li et al., 2013; Lu et al., 2015; Song, 2013).
5. Assessment and prediction of outcomes (ABA Section of Litigation Task Force on ADR Effectiveness, 2003; Bemmels, 1990; Chaphalkar et al., 2015; Choi et al., 2014; Ossman III et al., 2010; Patil et al., 2019).

In most of the above-listed studies, each of the three dimensions of effectiveness – time, cost, and quality of the outcome – has been addressed separately. Nonetheless, the complex environment in which disputes are resolved implies that the occurrence of one aspect will impact on the other aspects. In this regard, a more comprehensive understanding of the transaction cost of resolving disputes, for instance, requires an analysis of factors that affect the time and cost of resolving the dispute (Gebken II, 2006). The few studies that examined the three dimensions did not explore how the factors manifest in construction arbitration, leaving a gap in understanding why construction arbitration remains ineffective.

Two further weaknesses of the previous research findings in this area of study are lack of analytical rigour and subjectivity of the data collected. Firstly, a number of the studies have attempted to examine the three dimensions, for example, Shontz et al. (2011) and Stipanowich and Lamare (2014). However, they are purely descriptive and lack the requisite analytical rigour to show the multiplicity of the interactions amongst the variables. Hence, they do not adequately address the problem of arbitral ineffectiveness and its influencing factors.

Secondly, the work of Gebken II (2006), for example, analyses the transaction costs of dispute resolution methods and provides critical leads to the comparative costs of resolving contractual disputes using various resolution methods but does not detail how and why such costs arise in arbitration. In addition, Choi et al. (2014) demonstrate that representation by counsel mediates the influence of experience on the outcome of the arbitration, but does not show how such representation and experience influences disputants' satisfaction with the award. Other studies (e.g. El-Adaway et al., 2009; Marques, 2018) remain descriptive of the performance of arbitration cases in construction thus they do not delve into the root causes of ineffectiveness in such cases.

A constructive body of knowledge has progressively emerged in the past to help in explaining the causes of the ineffective dispute resolution (Gross & Black, 2008; Kangari, 1995; Rutledge, 2008; Torgbor, 2013). However, most of these studies relied on the opinions of practitioners and counsel in their roles representing the client. Moreover, results from these studies are not only characterised by observable contradictions in their findings but also did not examine how and why these factors manifest in cases. These issues could explain why some of these variables seem to defy easy solution, as observed by Torgbor (2013).

In brief, the effectiveness of a process can only be improved if all aspects of the process, including its cost, time and outcome are addressed. Two decades ago, the admission by Kumaraswamy (1997) that his research did not explore the effectiveness or efficiency of the different dispute resolution techniques, including arbitration, was indeed recognition of an existing problem that required attention. More recent studies, for example, Houghton et al. (2013) and Naimark and Keer

(2002) observed that the extent of the contribution of the arbitrator's competence to the quality of the outcome as one aspect of arbitral effectiveness remains largely untested. Today, the problem of arbitral ineffectiveness persists and has resulted in lack of meaningful decision criteria for improving the effectiveness of the system (Moza & Paul, 2017; Muigua, 2015b; Torgbor, 2013). Mante (2014) underscored the importance of active post-resolution evaluation, focusing on ascertaining the extent to which the process achieved the dispute resolution objectives of the parties, the shortfalls or underperformances, the innovations, and the lessons to improve future processes.

Much of the debate has demonstrated that arbitral processes are ineffective but has not systematically explained why construction arbitration remains ineffective. In addition, the nature of the relationship between the effectiveness of construction arbitration and its influencing factors remain unexplored. Hence, there is a need for further study in this field.

2.9 Theoretical Framework

One possible way towards explaining the effectiveness of construction arbitration is to focus on the behaviour of disputants. Such behaviour plays a key role in the process of resolving construction disputes. Aibinu (2007) identified four different but interrelated perspectives that explain disputing behaviour: (i) economic and quasi-economic perspective, (ii) transaction cost economics perspective, (iii) social-legal and political perspective, and (iv) organisational justice perspective.

2.9.1 Economic and Quasi-economic Perspective

The economic and quasi-economic viewpoint is concerned with the cost-benefit analysis of the dispute resolution technique (Bebchuck, 1984). This viewpoint operates on the basic assumption that disputants are self-interested, and they dispute on the understanding that the outcome will benefit them personally and socially (Black, 1987; Priest & Klein, 1984). In this regard, disputants react to the outcome of dispute resolution techniques based on their assessment of the benefits accrued against the cost incurred. Their reactions depend on the award value, the

extent to which the award favours them, the time spent, and cost incurred. Thus, their satisfaction with the award and their decisions to accept or contest the award depends on these factors.

2.9.2 Transaction Cost Economics Perspective

The Transaction Cost Economics (TCE) perspective is based on the TCE theory. This theory consists of five elements: governance structure, contractual incompleteness and the consequent *ex-post* adjustments, asset specificity, opportunism, and credible commitments.

The TCE perspective posits that organisations enhance efficiency in their operations by choosing governance structures that minimise transaction costs (Williamson, 1981). These transaction costs are anchored on two behavioural assumptions: bounded rationality and opportunism. Generally, human actors are self-interested (opportunistic) and bounded by rationality (Williamson, 1981, 1998, 2008). This latter characteristic means that the transactional contracts are unavoidably incomplete and executed under conditions of uncertainty (Williamson, 1998). Consequently, and as contingencies arise *ex-post*, one or both parties may engage in such opportunistic, deceitful, and non-cooperative behaviour as lying, stealing, and cheating because of which transaction costs escalate.

However, asset specificity ensures that parties adopt credible commitments that cope with the opportunistic behaviour arising from such incomplete contracts by acceding to a governance structure that ensures their working relationship is sustained until the transaction is concluded (Williamson, 1998, 2008). The governance structure adopted must accord with the complexity of the transaction (Yates, 1998). In essence, a transactional contract creates a bilateral dependency relationship that renders the assets involved in the transaction virtually non-transferrable (Tadelis & Williamson, 2010). This attribute increases the possibility of a party engaging in opportunistic behaviour that creates conflict (Yates, 1998). However, both parties' cooperative approach toward the transaction essentially helps them address arising contract hazards.

In arbitration, the transaction costs of resolving the dispute are diverse and include direct and indirect costs. Participants in the arbitral process have a duty to ensure that the dispute is resolved efficiently. However, by relying on the party autonomy principle, at least one of the parties may engage in opportunistic behaviour that increases transaction costs directly or through delayed resolution. Such behaviour includes taking advantage of an obviously losing party to escalate costs, extensive discovery requests arising from incomplete documentation and the tendency to delay the proceedings by the party that is likely to pay. However, the parties find themselves entangled in an adjudicative process from which they cannot escape. Thus, they must cede to the intricacies of this delicate process until they agree to a consent award or until the arbitrator issues the final award.

As hostilities escalate, the chance of resolving the dispute diminishes, increasing the time and cost of resolution. The TCE viewpoint thus provides a useful framework that explains the efficiency of arbitration as one aspect of effectiveness. However, applying the TCE perspective is rather difficult because of challenges associated with quantifying intangible costs such as costs associated with opportunistic and non-opportunistic behaviour (Walker, 2015). Nevertheless, there has been some effort to apply the TCE theory to the study of conflicts and disputes in the construction industry. For instance, Yates (1998) and Ntiyakunze (2011) attributed conflicts and disputes to opportunistic behaviour arising from incomplete contracts.

2.9.3 Social-legal and Political Perspective

Under the social-legal and political perspective, a party names the event causing the damage, assigns blame to the other party for the breach and claims compensation for the damage suffered (Felstiner et al., 1980-1981). If the other party accepts responsibility and pays or rejects the claim and the claimant accepts the rejection, the claim is settled. However, a dispute arises if the claim is rejected and the rejection is not accepted by the claimant (Kumaraswamy, 1997). Unless the disputants amicably settle or abandon the dispute, a neutral third party, such as an arbitrator, must step in. It is in the process of the arbitrator trying to resolve the dispute that time is spent, and cost incurred as disputants precipitate their arguments on naming, blaming, and claiming or challenging the claims.

2.9.4 Organisational Justice Perspective

Organisational justice is rooted in the theory of justice, which was first conceptualised by Rawls (1958). The theory is predicated upon several principles, among them the principle of fairness (Rawls, 1971). This principle requires a person to do his part as defined by the rules of an institution when the institution satisfies the two principles of justice and he has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further his interests. The two principles of justice require institutions to be just or fair. Under the first principle, each person is entitled to the most extensive scheme of basic equal liberties compatible with a scheme of equal liberties for others (Rawls, 1958, 1971). The second principle requires social and economic inequalities to be arranged so that they are reasonably expected to be to everyone's advantage and attached to positions and offices open to all. Based on these principles, disputants expect arbitration as an institution to be fair or just in the process of resolving their dispute.

In organisational settings, people tend to be naturally concerned about the fairness of decisions because such decisions affect them. The term organisational justice refers to people's perception of the fairness of decision-making processes and procedures within organisational settings (Folger & Cropanzano, 1998; Greenberg, 1996). This perception determines their reactions to these decisions and shapes their feelings, behaviour, and attitudes towards the organisation. When such decisions and their procedures are consistently judged to be unfair, people affected by those decisions react negatively and vice versa (Brockner & Wiesenfeld, 1996; Folger & Cropanzano, 2001). In the end, these reactions shape the effectiveness of the organisation.

The fairness theory assumes that these reactions seek to assign blame to someone who should be held to account for any social injustice (Folger & Cropanzano, 2001). Such injustice is felt when a person's material or psychological well-being is threatened. The fairness theory requires a decision-maker to try to be fair both in the process and in the outcome (Folger & Cropanzano, 2001). The fairness theory is thus the foundation upon which the various facets of organisational justice are established.

Just like organisational effectiveness, organisational justice is a multidimensional construct. It has been associated with four different components (also known as dimensions): (i) outcome favourability, (ii) distributive justice, (iii) procedural justice, and (iv) interactional justice.

a) Outcome favourability

Outcome favourability is rooted in the economic exchange theory. This theory postulates that people are self-interested and seek to maximise material gains in their group interactions (Blau, 1964; Brockner & Wiesenfeld, 1996; Tyler & Blader, 2000). Such people may only cooperate and accept decisions from these groups when they perceive those decisions to be favourable (Adams, 1965; Blau, 1964). This aspect is critical to the effectiveness of arbitration in the sense that sometimes people challenge arbitral awards because they perceive those awards to be unfavourable.

b) Distributive justice

The distributive justice component advanced by Adams (1965) suggests that disputants evaluate dispute resolution procedures by considering the perceived fairness of the outcomes. Disputants' perception of outcome fairness is higher when the allocation of the outcome is consistent with their aspirations (Colquitt, 2001). Distributive justice is thus concerned with the outcomes of the dispute resolution process (Folger & Cropanzano, 2001). It is predicated upon three principles: equity, equality and need (Tyler & Blader, 2000). The equity principle requires equally deserving people to receive equal amounts of what they merit (von Platz, 2018). The equality principle requires all people to have the same while the need principle requires people to have sufficient resources and opportunities. Thus, distributive justice requires distribution of outcomes to conform to some standard. In a dispute, a third-party neutral must allocate resources in a manner that ensures disputants' goals are realised. However, this aim remains difficult to achieve in arbitration where disputants' aims are grossly at variance and must thus be harmonised by the arbitrator.

Arbitrators deal with matters that disputants have been unable to resolve. These matters are difficult to resolve because of the underlying emotions (Tyler, 1997). These emotions, coupled with the scheduling challenges faced by the different

entities participating in the arbitral process, contribute to the delays and high costs of resolving the dispute. At the end of the proceedings, disputants may not necessarily get what they expected or feel they deserved. Consequently, at least one of the disputants is likely to be dissatisfied with the arbitration.

Distributive justice consists of two main theories: equity theory and the relative deprivation theory. According to the equity theory, people evaluate decision-making procedures by assessing the ratio of inputs to outcomes and comparing against a similar ratio for a referent other (Folger & Cropanzano, 2001). Outcomes are perceived to be fair when one's input-outcome ratio is approximately equal to the referent other's (Adams, 1965). This degree of equality affects people's perception of the fairness of the outcome (Tyler, 1988). Thus, the extent of perceived inequality between the input-outcome ratios influences people's perception of outcome fairness.

When people perceive inequality, they experience some averse emotional state. This experience depends on whether a person is under-rewarded or over-rewarded. Under-rewarded people react with anger and resentment while over-rewarded people react with feelings of guilt, which reactions provide the much-needed impetus to resolve the inequity (Folger & Cropanzano, 2001). However, people can readily compare their input-outcome ratio provided they have not exaggerated their expectations or their inputs. Unfortunately, exaggeration of expectations and inputs is a common practice in arbitration (Choi et al., 2014).

The relative deprivation theory relies on the assumption of the expectations people have in the decision-making process. Under this theory, people evaluate their outcomes by comparing such outcomes against an expected standard (Tyler & Blader, 2000). These expectations are socially constructed and shape people's choice of comparison standards (Tyler, 2000; Tyler & Blader, 2000). People tend to be more satisfied with outcomes that are fairly distributed when such outcomes are compared to others' outcomes (Tyler & Blader, 2000). Thus, when people compare their outcomes to others' outcomes, they expect to get what they deserve. When such expectations are violated, feelings of injustice are experienced (Adams, 1965; Tyler & Lind, 1992). The relative deprivation theory is thus concerned with individuals' allocations about their own expectations without paying attention to whether such

allocations comply with rules of equity. However, like the equity theory, the relative deprivation theory explains why conflict is sustained when disputants consider their expectations, exaggerated or otherwise, to have been violated.

c) Procedural justice

The third component, procedural justice, originating from studies by Thibaut and Walker (1975) recognises that there are no objective standards against which decisions can be evaluated. Instead, people's perception of the fairness of outcomes is influenced by the perceived fairness of the procedures used to arrive at the outcome (Lind & Tyler, 1988; Tyler & Lind, 1992). The quality of decisions is thus evaluated on the basis of the fairness of such procedures used to process those decisions (Tyler & Lind, 1992).

People's perception of the fairness of decision-making procedures plays a key role in fostering positive relations among group members (Thibaut & Walker, 1975). These positive relations encourage long-term commitment to the decision-making groups if the people believe the authorities are trying to be fair in dealing with the disputants and their matters (Tyler, 1997) and show concern for the rights of the disputants (Tyler, 1988). Hence, procedural justice moderates people's reactions to decisions in situations where they can accept unfavourable or unfair decisions (Folger & Cropanzano, 2001; Tyler & Blader, 2000).

Procedural justice is made up of two models: the self-interested and the group value model. The self-interested or control or instrumental model assumes that disputants seek to control processes to ensure that outcomes favour them (Lind & Tyler, 1988; Thibaut & Walker, 1978; Tyler & Lind, 1992). This model is rooted in the social exchange theory, which postulates that people react to organisations based on the resources they receive or expect to receive from such organisations. Generally, disputants aim to maximise self-gain through process or outcome control (Tyler & Blader, 2000). Thibaut and Walker (1978) delineated process control as "control over the development and selection of information" crucial to the resolution of the dispute and decision control as the degree to which one of the disputants may "unilaterally determine the outcome of the dispute" (p. 546). Thus, people are inclined to choose

procedures and methods that are likely to increase the chance of securing favourable outcomes.

Outcome control is influenced by process control, which can be realised through opportunities available for participation in the decision-making process, otherwise known as representation or voice (Folger & Cropanzano, 2001; Tyler, 1988, 2000; Tyler & Blader, 2000). Generally, a voice in the decision-making process demonstrates that one is respected (Folger & Cropanzano, 2001; Tyler & Blader, 2000). People seek to control procedures in situations where they do not have control over the outcome. Such process control has a bearing on decision control as it increases the chance of securing fair or favourable outcomes (Brockner & Wiesenfeld, 1996; Thibaut & Walker, 1978).

The group value model, which is relational and with roots in the expectancy theory and social identity theory, assumes that disputants value their relationships with others (Brockner & Wiesenfeld, 1996; Lind & Tyler, 1988; Tyler & Blader, 2000). Hence disputants will evaluate procedures in terms of their (i) neutrality – honesty, impartiality and objectivity; (ii) trust – sincerity; and (iii) how such procedures preserve disputants' dignity (Tyler, 2000; Tyler & Lind, 1992). These attributes suggest that the relational model addresses bias suppression and ethicality. Disputants will thus react negatively to unfavourable outcomes when they perceive as unfair the procedures used to arrive at those outcomes because such unfair procedures diminish the dignity held by the group members.

In the context of arbitration, parties have greater control over the process than the outcome (Burch, 2010). They can exercise control over the process by their choice of party representatives and how these representatives handle the proceedings, their conduct, pre-arbitration attempts and prior arbitration experience (Besaiso et al., 2018; Gebken II, 2006; Moza & Paul, 2017; Torgbor, 2013). The extent to which the tribunals exercise their powers has a bearing on the balance of process control. Disputants also have the latitude to select procedures that give them greater control over the outcome (Tyler et al., 1999). While such procedures may help to secure favourable outcomes (Thibaut & Walker, 1975), disputants' evaluation of the fairness of such procedures determines their acceptance and deference to the award,

the likelihood of post-dispute conflict and enforcement costs (Burch, 2010; Kazemi et al., 2015). Gluck (2012) explicitly observed that "an unsatisfactory proceeding, no matter how short and inexpensive, is always too long and expensive" (p. 241). Thus, disputants' perception of procedural fairness has an impact on the effectiveness of arbitration.

Most contracts and arbitration statutes provide that the award arising from the arbitration process is final and binding to the disputants. This finality requires disputants to cede decision-making authority to the arbitrator, creating room for the exploitation of the disputants. According to the fairness heuristic theory, this possibility makes disputants uncertain about their relationship with the arbitrator and raises questions on whether the arbitrator can be trusted to render a fair outcome (Lind, 2001; Lind & Tyler, 1988; van den Bos et al., 2001). This trust determines how disputants are likely react to the award arising from the arbitration. They may react positively if they perceive the dispute to have been decided fairly (Tyler & Blader, 2000), and vice versa. Thus, disputants react to the award depending on their assessment of the procedural and award fairness.

Both distributive justice and procedural justice are central to determining the effectiveness of arbitration. One of the theories that have been developed to explain the interactive effect of both justice aspects is the referent cognitions theory (RCT). Developed by Robert Folger in 1986, the RCT assumes that individuals evaluate dispute resolution procedures by comparing their outcomes to referent outcomes (Folger & Cropanzano, 2001). These referent outcomes provide the standard against which disputants evaluate how their outcomes *should be*. When their outcomes, favourable or otherwise, are as they should be, disputants do not experience injustice. This feeling, also known as the fair process effect, provides that disputants may consider favourable outcomes to be fair and may even accept negative outcomes arising from fair procedures (Skitka et al., 2003). Additionally, studies have shown that the perception of procedural fairness is higher when outcomes are favourable than when they are unfavourable if such procedures are marred by impropriety (Lind & Lissak, 1985).

However, injustice is experienced when a negative outcome is inconsistent with the referent outcome and the procedures leading to those outcomes are unfair (Brockner & Wiesenfeld, 1996). When one disputant feels such injustice, conflict intensifies, and resolution becomes more difficult. A series of experimental studies performed by Thibaut and Walker (1975) established that disputants' satisfaction with outcomes is shaped by their perception of procedural fairness. Hence, the assessment of procedural justice is critical to disputants' perception of distributive justice.

Unfortunately, arbitration remains a confidential process under which it is difficult for disputants to establish suitable referent standards against which to compare their outcomes. First-time disputants in arbitration can only compare their outcomes against similar outcomes obtainable through competing dispute resolution mechanisms such as mediation, adjudication, DABs, and litigation. While repeat disputants can readily compare their current outcomes to their previous arbitration outcomes, disputes are one-off, and different disputes display different patterns that make it difficult to establish reasonable referent standards. Thus, relying on the distributive and procedural justice aspects only to evaluate the effectiveness of arbitration is rather simplistic and may not provide an adequate framework for meaningful analysis. Therefore, an evaluator must consider interactional aspects of the economic exchange.

d) Interactional justice

The interactional justice component advanced by Bies and Moag (1986) is concerned with the relationship between participants in the dispute resolution process. Interactional justice refers to the experience people receive as group authorities enact formal procedures (Bies & Moag, 1986; Colquitt, 2001). It is concerned with the quality of the relationship or the exchange taking place between people (Kazemi et al., 2015). It provides that disputants' reaction to the outcomes arising from the dispute resolution process is influenced by their perception of how they were treated and the quality of the decision-making process (Tyler & Blader, 2000). Interactional justice provides a useful explanation of why mistreated disputants might feel unfairly treated even after receiving favourable outcomes arising from fair procedures (Bies & Moag, 1986). It is governed by two principles: truth and human dignity (Bies,

2015). Thus, interactional justice is concerned with the social aspect of the dispute resolution process.

Colquitt (2001) conceptualised interactional justice as a component consisting of two aspects. The first aspect, interpersonal justice, refers to the perceived degree of dignity and respect shown by decision-makers (Colquitt, 2001; Greenberg, 1993). Treating disputants politely, with dignity, courtesy and respect is one way of achieving interpersonal justice (Tyler & Blader, 2000). These are attributes of the quality of treatment experienced. While some authors (e.g. Lind & Tyler, 1988; Tyler & Blader, 2003; Tyler & Lind, 1992) argue that interpersonal justice relates to the relational model of procedural justice, for conceptual clarity, this researcher takes the view by Bies and Moag (1986) that interactional justice (which includes interpersonal justice) is a distinct form of organisational justice. The second aspect, informational justice, refers to the perceived adequacy and thoroughness of the explanations for decisions and outcomes (Colquitt, 2001; Greenberg, 1993). It requires decision-makers to handle disputes truthfully and to justify their decisions. Thus, informational justice relates to the quality of the decision-making process. Despite this distinction, the two interactional justice components are related (Cropanzano et al., 2001).

Disputes requiring the tribunal to supply a reasoned award are costlier and more time consuming as they expect the tribunal to analyse all documents and evidence submitted, with a view to establishing the extent to which such documents support their reasons (Kangari, 1995; Stipanowich, 2012; Wiezel, 2011). While these reasons promote greater fairness by enhancing the transparency of the award, they may also necessitate the employment of stenographers to transcribe the proceedings (Holt, 2008). Thus, these arbitrations require a proper balance between efficiency against demands for reasoned awards to enhance the overall effectiveness of arbitration.

Interactional justice influences people’s behavioural reactions to authorities and decisions. In this regard, disputants have the tendency to accept decisions arising from processes where interactional justice is fostered (Colquitt, 2001). For instance, Tyler and Blader (2000) established that the quality of the decision-making process influenced employees’ willingness to accept decisions in organisational settings.

According to Folger (1993), interactional justice interacts with outcome favourability and procedural justice, to the extent that arbiters must not only enact fair procedures and foster equitable outcomes but also treat disputants respectfully. Consequently, disputants receiving unfavourable outcomes may react resentfully toward the decision-maker if they perceive the decision maker's conduct to be improper (Brockner & Wiesenfeld, 1996). In the context of arbitration, acceptance of awards not only plays a key role in influencing the cost and duration of resolving the dispute but also depends on the interpersonal skills of the arbitrator, which define the way the arbitrator handles the dispute and treats the disputants.

Giorgetti (2013) argues that an arbitrator can never be independent and impartial, adding that while an arbitral decision should be guided by the merits of the case, the arbitrators' decisions are influenced by their moral, cultural, professional education and experience. Hence, some parties may nominate arbitrators capable of delivering predictably favourable outcomes, even if such outcomes are wrong or imperfect (Brekoulakis, 2013; Colvin, 2011; Puig, 2014). This preference means that such parties would like to exercise some degree of control over the outcome, creating a bias effect against the opposing party. An arbitrator appointed in this manner is under a duty to disclose such grounds that may give rise to justifiable doubts as to his impartiality (Stipanowich, 2012). However, there have been calls for such party nominations, which include repeat nominations, to be regulated in order to reduce the perception of bias (White & Case & Queen Mary, University of London, 2015). Such regulation is not only likely to provide guidelines that may assist the parties but may also ensure that nominated arbitrators accept such appointments on the understanding that they will conduct their arbitrations to acceptable ethical standards.

Lim and Loosemore (2017) asserted that people are likely to work harmoniously and to collaborate in resolving problems when they believe their economic exchanges are fair. Their online survey of 135 consultants, contractors, subcontractors, and suppliers in Australia indicates that project managers can enhance project performance by treating project participants with politeness, respect, and dignity. Politeness, respect and dignity are facets of interactional justice (Loosemore & Lim, 2015) indicative of the quality of treatment experienced and hence determine contractor's conflict intensity and potential to dispute (Aibinu, 2007). Conflict

intensity and potential to dispute remain critical aspects of the extent to which a dispute can be readily resolved, thus determine the time, cost, and acceptability of the resolution outcome.

Interactional justice manifests in arbitration in two forms. The first form, embedded in Section 19 of the Kenyan Arbitration Act is the requirement for equal treatment of the disputants. This Section requires the tribunal to treat each disputant equally and to grant each disputant a fair and reasonable opportunity to present its case. A similar provision is contained in Section 33 of the English Act. The second form of interactional justice, informational justice is contained in Section 32(3) of the Kenyan Act and Section 52(4) of the English Act. These sections require the award to contain reasons (explanations) that form the basis upon which the tribunal made the award. Upon agreement, the parties, however, may dispense with such reasons. Unfortunately, this approach may deprive disputants of the ability to assess whether informational justice is fostered.

e) Interactions among the justice components

From the above discussion, it is apparent that each of the components of organisational justice is concerned with one aspect. Notably, the four dimensions are concerned with either outcomes or the process. While outcome favourability and distributive justice are concerned with outcomes, procedural and interactional justice are concerned with the process leading to those outcomes. However, while interactional justice determines the disputants' reactions to arbiters, procedural justice determines the disputants' reactions to the resolution system (Bies & Moag, 1986). Further, both procedural and interactional justice have been found to influence arbitrator selection in labour and management disputes (Posthuma et al., 2000). In addition, interactional justice influences the disputants' perception of procedural justice (Tyler & Blader, 2000). Similarly, disputants who are fairly treated are unlikely to accept such fair treatment if they consider the outcome of the process as unreasonable (Gross & Black, 2008; Lind & Tyler, 1988; Naimark & Keer, 2002). Rawls (1971) cautioned against assessing a conception of justice by its distributive role alone, arguing that its wider connections must be considered. Thus, the four components are not only distinct but also closely related.

Based on the fairness heuristic theory, disputants respond to justice by relying on information relating to different components of justice based on overall fairness rather than specific components of justice (Lind, 2001). The four components of justice may not only affect each other (Cropanzano et al., 2001) but also have been found to be significant predictors of overall justice judgements (Ambrose & Schminke, 2009). For instance, a study on the perception of 41 building and civil engineering contractors in Singapore established that the extent to which the contractor exercised control over the decision-making process, outcome favourability, the perceived quality of treatment-experienced and the quality of the decision-making process largely predicted perception of decision outcome fairness (Aibinu et al., 2011). The study also established that procedural justice depends on three constructs of organisation justice: perceived quality of decision-making process, outcome favourability and decision outcome fairness. Separately, Lim and Loosemore (2017) established that not only did the two aspects of interactional justice positively affect perception of distributive and procedural justice, but also perception of interpersonal justice positively affected project participants' perception of informational justice. Thus, evaluating outcomes only without considering the process leading to those outcomes does not provide a holistic view of why those outcomes result in the stated effects. Hence, an evaluator must consider the four components in determining the effectiveness of the process.

2.9.5 Relevance of the Perspectives to Dispute Resolution

The four perspectives discussed above provide a useful guide for explaining the effectiveness of arbitration. However, other than the organisational justice perspective, the three other perspectives are concerned with one aspect of the dispute resolution process. For instance, the economic and quasi-economic perspective is like the equity theory of distributive justice as both are concerned with the comparison of inputs and outputs. The TCE and social-legal and political perspectives are more inclined to the way disputes arise, rather than the *ex-post* approaches to the resolution of such disputes. The different components of the organisational justice perspective are comprehensive enough to address both outcome and process aspects of a dispute resolution process such as arbitration.

Thus, organisational justice provides a solid foundation for carrying out a study on the effectiveness of arbitration.

A contractual dispute is the product of the systemic collapse of the process of economic and social exchange. Whereas economic exchange is anchored on short-term transactional activities, social exchange focuses on long-term relationships based on parties trusting that each will fairly discharge its obligations (Holmes, 1981). Essentially, social exchange theory engenders reciprocal interdependent actions among the parties to the exchange process (Cropanzano & Mitchell, 2005). The degree of success of such interactions has the potential to cause enduring commitments among the parties (Blau, 1964). The relationship between the parties has an influence on the type of exchange much as the exchange influences the relationship (Cropanzano & Mitchell, 2005). Hence, parties to an arbitral process may opt to engage in future business depending on the degree of hostility established during the arbitral process.

The degree of such hostility may determine whether each party is likely to consider referring future disputes to arbitration. As demonstrated by Organ (1988), the "exchange relationship binding an individual to a collective body can take on the quality of [the] covenant" (p. 69). Arbitration is a collective body that seeks a third party to provide a final and binding solution to the dispute. It consists of an interdependent structure in which arbitrators depend on the referred disputes for economic gain. Arbitrators also depend on the parties to adduce evidence that will enable them to render awards that are fair and acceptable to the parties. However, disputants depend on the arbitrators' expertise to determine the dispute in an impartial manner. This interaction, evaluated by the disputants based on the process and the award, determines parties' trust in and commitment to arbitration and has a significant bearing on the effectiveness of arbitration.

The organisational justice perspective has been the subject of attention in studies that evaluate the effectiveness of dispute resolution procedures. For example, an evaluation of the Pittsburgh arbitration programme established that the programme was not only cost-effective but also the components of organisational justice interacted in determining disputants' satisfaction with the outcome and the

process (Adler et al., 1983). Later, MacCoun et al. (1988) evaluated the effectiveness of court-annexed arbitration in 1000 auto negligence cases filed in New Jersey courts and found that arbitration procedures were viewed as fair, more efficient than litigation and that cases received high-quality treatment. Lind et al. (1990) found that tort litigants' subjective evaluation of the outcome, cost, and delay and subjective perception of the process accounted for 54-59 percent of the variation in procedural justice judgements and 57-82 percent of the variation in outcome satisfaction in Bucks Bounty in Pennsylvania, USA. While these three studies demonstrate the importance of organisational justice in the evaluation of the effectiveness of arbitration, they only focused on court-annexed arbitration programmes. Thus, they did not consider non-court-annexed construction arbitration.

The importance of the concept of organisational justice in construction cannot be underestimated. This emerging concept has been the subject of several recent studies, the majority of which have mainly focused on the assessment of fairness in the decision-making process. For example, fairness perceptions in project relations (Kadefors, 2005), organisational justice in the claims handling process (Aibinu, 2007; Aibinu et al., 2011; Aibinu et al., 2008), intra- and inter-organisational justice within the construction industry (Loosemore & Lim, 2015; Loosemore & Lim, 2016), the effect of inter-organizational justice perceptions on organizational citizenship behaviours (Lim & Loosemore, 2017) and the importance of organisational justice in dispute negotiation (Lu et al., 2017). Despite these concerted efforts, there is no documented evidence of a study that has applied the concept of organisational justice in explaining the effectiveness of construction arbitration.

2.9.6 Propositions

Arbitral effectiveness refers to the extent to which arbitration satisfies disputants' aspirations in terms of cost-effectiveness, time efficiency and quality of the award. Adam's (1965) equity theory postulates that people's reaction to decisions depends on the comparison of their ratio of inputs and outcomes to similar ratios of referent others. In the context of arbitration, input refers to the time and cost while outcome refers to the award. Therefore, cost-effectiveness refers to the ratio of the cost of

resolving the dispute to the award value. The higher the ratio, the less cost-effective the arbitration is and the less effective the arbitration. Similarly, time efficiency refers to the ratio of the time taken to resolve the dispute compared to the time the disputant expected the matter to take or compared to some other referent standard. The higher the ratio, the less time-efficient the arbitration is and the less effective the arbitration.

Based on social exchange theories, exchange of resources creates reciprocal interdependent relationships which if successful can lead to enduring commitments (Blau, 1964; Cropanzano & Mitchell, 2005; Organ, 1988). Quality of the award, which refers to the extent to which the award is acceptable, is one test of such relationships. A disputant who accepts the award is likely to voluntarily comply with the award and may not challenge it in court, resulting in dispute closure. In addition, a good award does not necessarily require parties to renegotiate or to resort to the courts for enforcement. At the same time, satisfied disputants are likely to engage in future business and will be motivated to refer future disputes to arbitration. Thus, the higher the quality of the award, the more effective the arbitration.

Arbitral effectiveness is influenced by several factors, including the complexity of the dispute, distribution of control, competence of the arbitrator, perceived adequacy of the size of the tribunal, perceived procedural fairness, approaches to the presentation of evidence, perceived quality of the decision-making process, perceived quality of treatment experienced, award favourability and perceived award fairness. Interaction of these variables in the arbitration environment has a bearing on arbitral effectiveness. Disputants receiving favourable awards are more likely to accept the award and to conclude that the award is worth the time and cost spent (Adams, 1965; Blau, 1964). Hence:

- Award favourability positively influences the effectiveness of arbitration (P1).

Such disputants are likely to perceive as fair the award and the procedures leading to the award (Adams, 1965; Cropanzano et al., 2001; Lind & Tyler, 1988; Thibaut & Walker, 1975; Tyler & Blader, 2000). They may thus avoid contesting the award and may conclude that the process was effective:

- Award favourability positively influences perception of award fairness (P2).
- Perceived award fairness positively influences the effectiveness of arbitration (P3).
- Perceived award fairness mediates the influence of award favourability on the effectiveness of arbitration (P3.1).
- Perceived award fairness positively influences perception of procedural fairness (P4).
- Perceived procedural fairness positively influences the effectiveness of arbitration (P5).
- Perceived procedural fairness mediates the influence of award favourability on the effectiveness of arbitration (P5.1).
- Perceived procedural fairness mediates the influence of perceived award fairness on the effectiveness of arbitration (P5.2).
- Award favourability positively influences perception of procedural fairness (P6).
- Perceived award fairness mediates the influence of perceived award favourability on perception of procedural fairness (P6.1).

Disputants who wield some decision control through settlement offers have higher chances of securing favourable awards (Brockner & Wiesenfeld, 1996; Thibaut & Walker, 1978). Additionally, disputants who wield some process control are likely to secure favourable awards because of the experience acquired through previous arbitrations, choice of better representatives and the possibility of choosing tribunals that are likely to rule in their favour. However, disputants receiving unfavourable awards are likely to have a positive perception of the award fairness if they had meaningful control over the process and if they judge the procedures leading to the award as fair. Hence, the following propositions:

- Distribution of control positively influences the award favourability (P7).
- Distribution of control positively influences perception of award fairness (P8).

- Award favourability mediates the influence of distribution of control on perceived award fairness (P8.1).

When such control remains imbalanced, unsuccessful disputants are likely to perceive as poor the quality of the decision-making process because of perceived favouritism and bias (Aibinu et al., 2011; Colquitt, 2001; Tyler & Blader, 2000). The unsuccessful party may thus perceive the award to be unfair:

- Distribution of control influences perceived quality of the decision-making process (P9).
- Perceived quality of the decision-making process positively influences perception of award fairness (P10).
- Perceived quality of the decision-making process mediates the influence of distribution of control on perceived award fairness (P10.1).

Disputants who evaluate the award to be fair, have a good perception of the quality of the decision-making process and have been treated well are also likely to view as fair the procedures leading to the award (Aibinu et al., 2011; Colquitt, 2001; Tyler & Blader, 2000). Similarly, if such disputants are treated well by the tribunal, they are likely to have a positive evaluation of the quality of the decision-making processes. In addition, disputants are likely to judge the award as fair if they have been treated well and they have a positive view of the quality of the decision-making process. In the absence of a favourable award, a combination of fair procedures, good treatment, good decision-making procedures and a fair award are likely to result in positive dispute closure. This is because the parties are likely to accept the award without challenging it, to maintain their relationships and to refer future disputes to arbitration. They are also likely to conclude that the time and cost spent in resolving the dispute was reasonable. Consequently:

- Perceived quality of the decision-making process positively influences perception of procedural fairness (P11).
- Perceived award fairness mediates the influence of perceived quality of the decision-making process on perception of procedural fairness (P11.1).

- Perceived quality of the decision-making process positively influences the effectiveness of arbitration (P12).
- Perceived award fairness mediates the influence of perceived quality of the decision-making process on the effectiveness of arbitration (P12.1).
- Perceived procedural fairness mediates the influence of perceived quality of the decision-making process on the effectiveness of arbitration (P12.2).
- Perceived quality of treatment positively influences perception of award fairness (P13).
- Perceived quality of the decision-making process mediates the influence of perceived quality of treatment on perception of award fairness (P13.1).
- Perceived quality of treatment positively influences perception of procedural fairness (P14).
- Perceived award fairness mediates the influence of perceived quality of treatment on perception of procedural fairness (P14.1).
- Perceived quality of the decision-making process mediates the influence of perceived quality of treatment on perception of procedural fairness (P14.2).
- Perceived quality of treatment positively influences the effectiveness of arbitration (P15).
- Perceived award fairness mediates the influence of perceived quality of treatment on the effectiveness of arbitration (P15.1).
- Perceived quality of the decision-making process mediates the influence of perception of the quality of treatment on the effectiveness of arbitration (P15.2).
- Perceived procedural fairness mediates the influence of perception of the quality of treatment on the effectiveness of arbitration (P15.3).
- Perceived quality of treatment positively influences perception of the quality of the decision-making process (P16).

Generally, complex disputes are more difficult to resolve than simple disputes because of the desire to wield more process control that can increase the chance of securing favourable awards (Gebken II & Gibson, 2006; Harmon, 2004; Hinchey & Perry, 2008). This aspect may not only escalate the time and cost of resolution but also increase the chance that one party may challenge the resultant award:

- Complexity of the dispute influences distribution of process control (P17).

A disputant who wields greater control over the process is likely to have a say on the qualifications of the tribunal, thus influencing its competence (Torgbor, 2013). Such competence, however, depends on the complexity of the dispute, with more complex disputes requiring tribunals that are more competent (Stipanowich & Lamare, 2014). Thus:

- Complexity of the dispute positively influences competence of the tribunal (P18).
- Distribution of control positively influences competence of the tribunal (P19).
- Distribution of control mediates the influence of complexity of the dispute on competence of the tribunal (P19.1).

Nonetheless, a competent tribunal can dispel perception of bias by remaining impartial and treating each disputant equally. It may also win the confidence of the disputants by treating them well. Thus, if the tribunal remains impartial and treats disputants well, the disputants are likely to have a positive perception of the quality of the decision-making process and the quality of treatment (Brekoulakis, 2013; Torgbor, 2013). Hence:

- Competence of the tribunal positively influences perception of the quality of the decision-making process (P20).
- Competence of the tribunal mediates the influence of distribution of control on perception of the quality of the decision-making process (P20.1).
- Competence of the tribunal positively influences perception of the quality of treatment (P21).

- Perceived quality of treatment mediates the influence of competence on perception of the quality of the decision-making process (P21.1).

Competence also determines the perceived adequacy of the size of the tribunal. Because of the dispute complexity, one arbitrator may not possess all the qualifications required to handle the subject matter, calling for a multi-member tribunal (Harmon, 2004). Disputants may also agree on a larger tribunal to cushion against instances where a sole arbitrator may be perceived to be biased, enhancing the fairness of the award. Such a large tribunal also cushions against inadequate competence and bias in procedural decision-making that may characterise tribunals made of sole arbitrators (Harmon, 2004; Hinchey, 2012; Holt, 2008; Jones, 2012). Hence:

- Perceived adequacy of the size of the tribunal positively influences perception of award fairness (P22).
- Perceived adequacy of the size of the tribunal positively influences perception of procedural fairness (P23).
- Perceived award fairness mediates the influence of perceived adequacy of the size of the tribunal on perception of procedural fairness (P23.1).
- Competence of the tribunal positively influences perceived adequacy of the size of the tribunal (P24).
- Complexity of the dispute positively influences perceived adequacy of the size of the tribunal (P25).
- Competence of the tribunal mediates the influence of complexity of the dispute on perceived adequacy of the size of the tribunal (P25.1).

Once the tribunal is established, it has the power to determine the admissibility, materiality, relevance, and weight of the evidence adduced, thus its competence influences the approach to the presentation of evidence (Landolt, 2012; Torgbor, 2013). Better approaches to the presentation of evidence are likely to result in favourable awards (Kangari, 1995; Stipanowich, 2009). However, such a presentation in turn depends on the complexity of the dispute and the distribution of control among the disputants (Besaiso et al., 2018). Hence the following propositions:

- The approach to the presentation of evidence positively influences award favourability (P26).
- The approach to the presentation of evidence mediates the influence of distribution of control on award favourability (P26.1).
- Competence of the tribunal positively influences the approach to the presentation of evidence (P27).
- Competence of the tribunal mediates the influence of complexity of the dispute on the approach to the presentation of evidence (P27.1).
- Distribution of control influences the approach to the presentation of evidence (P28).
- Distribution of control mediates the influence of complexity of the dispute on the approach to the presentation of evidence (P28.1).
- Competence of the tribunal mediates the influence of distribution of control on the approach to the presentation of evidence (P28.2).

Complex disputes are mostly associated with poor approaches to the presentation of evidence (Kangari, 1995; Risse, 2013). In sum, the complexity of the dispute influences the distribution of process control, approaches to the presentation of evidence, competence, and the perceived adequacy of the size of the tribunal. Hence:

- Complexity of the dispute influences the approach to the presentation of evidence (P29).

The above propositions suggest that arbitral effectiveness is influenced directly by perceived procedural fairness, perceived award fairness, award favourability, perceived quality of the decision-making process and perceived quality of treatment. The remaining five factors including the perceived adequacy of the size of the tribunal, competence of the tribunal, approach to the presentation of evidence, distribution of control and complexity of the dispute indirectly influence arbitral effectiveness through these direct factors.

2.10 Conceptual Framework

The dimensions of effective arbitration discussed in Section 2.4 above are concerned with cost, time or quality of the outcome. In this study, dimensions of arbitral

effectiveness were taken as the cost-effectiveness, time efficiency and quality the award. The outcome of arbitration is the award. Cost-effectiveness was conceptualised as the amount of money expended on the arbitration as a percentage of the claim award and counterclaim award, if any. Time efficiency refers to the number of months taken to resolve the dispute in comparison to existing standards. Time efficiency was evaluated by assessing actual duration in comparison to the duration disputants expected and the reasonableness of the duration.

Quality of the award refers to its acceptability to the disputants, extent to which the award motivates disputants' commitment to arbitration and the extent to which the award maintains business relationships. The extent to which the award maintains relationships is a consequence of the award validity, acceptability, satisfaction, and fairness. Based on organisational justice literature, these are attributes of outcome fairness and outcome favourability. In the context of arbitral effectiveness, the quality of the award was conceptualised to be its acceptability, the extent to which it maintained business relationships, and the extent to which the award motivated the disputants to use arbitration in resolving future disputes.

It was the thesis of this study that these three dimensions of arbitral effectiveness are influenced by ten main factors, thus distribution of control, complexity of the dispute, competence of the arbitrator, perceived adequacy of the size of the tribunal, perceived procedural fairness, approaches to the presentation of evidence, perceived quality of the decision-making process, perceived quality of treatment, award favourability and perceived award fairness. First, complexity of the dispute was conceptualised in terms of the number of parties and contract agreements, language and cultural differences among the participants, number of sittings, and the number of issues involved.

Second, distribution of control refers to the extent to which the disputants and the arbitrator can influence the process and the award. It was conceptualised in terms of the conduct of the parties, repeat player effect, arbitrators' use of conferred powers, nature of representation and the extent of the pre-action protocol. A disputant may achieve control over the award by making or accepting settlement offers that result in consent awards or by choosing arbitrators who are likely to rule in favour of the

disputant. A disputant may also achieve control over the process by choosing competent representatives, its delay in issuing instructions to their representatives, delaying or failing to pay such representatives, delaying to confirm the terms of reference or delaying payment of the tribunal's deposit. Such process control can also be achieved by capitalising on information gathered during the pre-action protocol or from experience in previous cases. This information may strengthen a party's case, granting that party greater process control. However, an arbitrator who understands such power imbalance among the disputants can balance such control by exercising the power conferred through the arbitration agreement.

Third, competence of the tribunal was conceptualised in terms of knowledge of the subject matter of the dispute, legal knowledge and knowledge of arbitration law and practice. It also included a set of skills entailing organisational and interpersonal skills and attitudes that develop with experience in the subject matter of the dispute, and experience in arbitration.

Fourth, quality of the decision-making process refers to the way the award is made or reached. Such quality was conceptualised in terms of how the tribunals decided the disputes based on facts and not personal biases, remained impartial and maintained consistency in its application of the rules. Fifth, quality of treatment refers to the manner of interaction during the resolution process. The construct was conceptualised in terms of how well the tribunal treated disputants by refraining from making improper remarks or comments, providing a well-reasoned award, and treating the disputants with politeness, respect, courtesy, and dignity. Sixth, the perceived adequacy of the size of the tribunal was conceptualised in terms of whether the number of arbitrators appointed was sufficient to resolve the dispute, given their competence.

Seventh, procedural fairness refers to how disputants react to the rules adopted in shaping the dispute resolution process. Procedural fairness was conceptualised in terms of how disputants perceived the procedures used as fair and satisfactory; how the tribunal tried hard to be fair, showed concern for disputants' rights, decided the dispute fairly and how easily the award was enforced. Eighth, the approach to the presentation of evidence means how disputants present their evidence in support of

or defence against the claim and/or counterclaim. Good approaches included meticulous documentation, the timely appointment of adequate experts and timely submission of expert reports and witness statements, number of experts and fact witnesses and choice of techniques for preparing and presenting evidence.

Ninth, award favourability, refers to the extent of wins or losses. An award was favourable to a disputant when the disputant was satisfied with and perceived the award to be favourable, particularly when the award was proportionally high in comparison with the claim or counterclaim size. A claimant evaluates the award to be favourable when the claim award is high in proportion to the claim size and the counterclaim award is low in relation to the counterclaim size. The reverse holds for the respondent. Lastly, award fairness (equivalent to outcome fairness) refers to the extent to which the award achieves distributive justice. Award fairness was achieved when the disputant perceived the award to be fair, expected, deserved and comparable to awards for similar disputes.

The conceptual model capturing all these variables and their relationships is illustrated in **Figure 2.2**. The model shows that the complexity of the dispute influences arbitral effectiveness through the other variables in the model. Disputants' desire for favourable outcomes prompts them to seek greater control over the process and the decision. The desired level of control increases with the complexity of the dispute, with more complex disputes attracting the need for greater control than less complex disputes. Such control not only influences how evidence is presented but also how parties perceive competence of the tribunal, depending on the way the tribunal handles the evidence. More complex disputes may also require larger tribunals than less complex disputes to bring in diversity, thus enhancing the tribunals' competence.

Competent arbitrators understand power balance among the disputants. They also understand how to evaluate the admissibility, relevance, weight, and materiality of the evidence presented. The tribunal evaluates the evidence presented in determining how the evidence supports that party's case and issues a split award or an award that may be favourable to one of the parties. Disputants receiving favourable awards are likely to conclude that both the awards and the procedures were fair and may have a

positive view of arbitral effectiveness. Similarly, disputants receiving unfavourable awards are likely to accept the awards if they perceive the awards and the procedures as fair. On the contrary, disputants receiving unfavourable awards are likely to resent if they view the awards and the procedures as unfair. These perceptions affect disputants' subsequent decisions on whether to comply with the awards voluntarily, to decline deference or to challenge the awards in court, affecting resolution time and cost. These perceptions also affect the relationship between the disputants and their support for arbitration as a method of resolving future disputes. Thus, disputants' perception of award and procedural fairness may influence arbitral effectiveness.

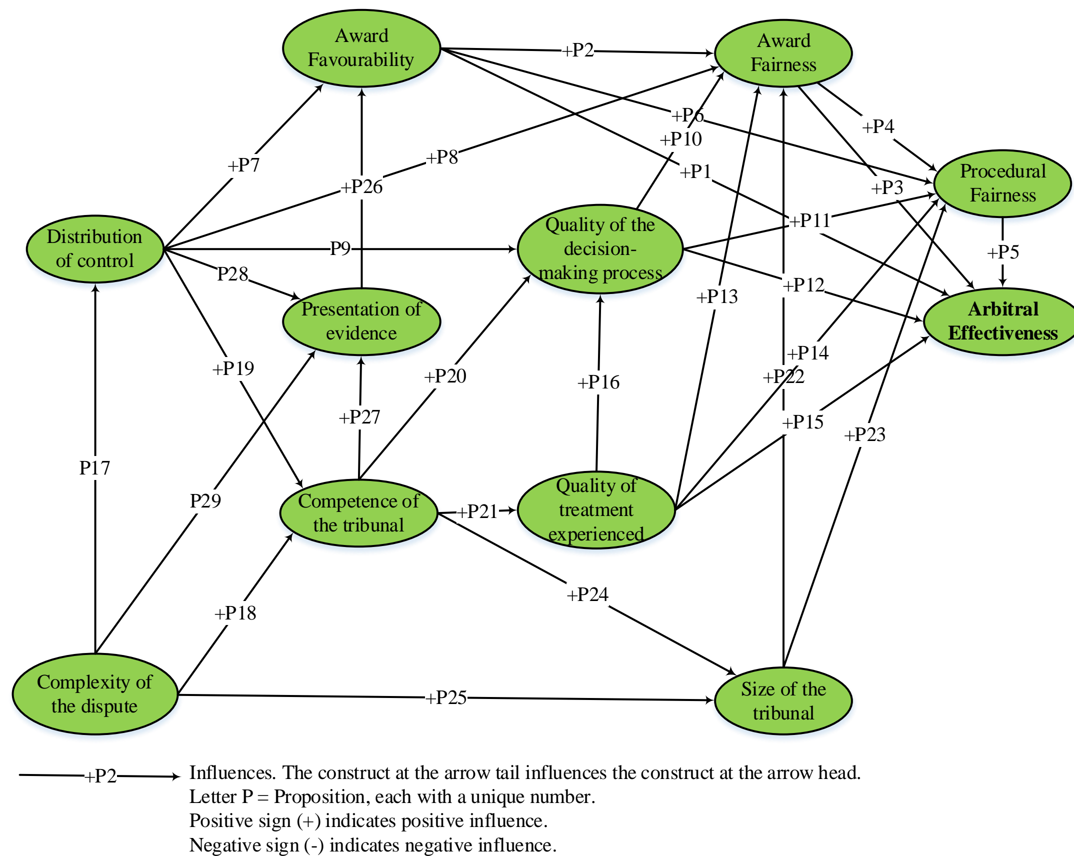

Figure 2.2: Conceptual model

The tribunal's competence may in turn influence perception of the quality of the decision-making process and disputants' perception of how they were treated. Competent tribunals provide concrete reasons in support of their decisions, increasing positive perception of the resolution process. In addition, competent tribunals treat parties equally, politely, with dignity, courtesy, and respect, enhancing

positive perception of the quality of treatment. This positive perception, in turn, influences disputants' perception of the quality of the decision-making process. Higher perception of the quality of treatment may engender higher perception of the quality of the decision-making process. These two constructs in turn influence perceived award fairness. Better quality of the decision-making process and treatment engender a higher perception of both award and procedural fairness, enhancing the chance of concluding the dispute resolution process. Thus, a positive perception of award fairness, quality of the decision-making process, quality of treatment and procedural fairness may positively influence arbitral effectiveness.

Relatedly, an arbitrator's competence positively influences perception of the adequacy of the size of the tribunal. The less competent the arbitrator is, the higher the chance of appointing a multi-member to handle the dispute, subject to the arbitration agreement. The aim is to ensure that disputants get fair awards and procedures, thereby avoiding perception of favouritism that may characterise tribunals consisting of a sole arbitrator. An award arising from a tribunal that is perceived to have favoured one disputant is likely to be challenged, escalating the time and cost of resolving the dispute. The consequence is fracturing of the relationship between disputants and discrediting of arbitration.

Based on the above discussion, it can be discerned that a study on the effectiveness of construction arbitration requires researchers to study disputants because they are directly affected by the process and its outcome. Arbitrators are also critical to the study because of their adjudication role in guiding disputants on various procedural matters and in resolving the dispute. Thus, their treatment of disputants and their final award has a role in determining disputants' perception of fairness. Party representatives are also actively involved in guiding disputants on the appointment of arbitrators, approaches to the presentation of evidence and whether to accept or reject the award.

2.11 Conclusion

In this Chapter, the researcher has reviewed literature relating to arbitral effectiveness, its effects and compared it to the effectiveness of litigation and other

ADR methods. The various factors influencing the effectiveness of arbitration have also been examined, paving the way for identification of the knowledge gap. To effectively address this gap, various perspectives depicting disputing behaviour were examined. Based on this theoretical framework, the study draws upon the dimensions of organisational justice perspective to frame the various theoretical constructs that have been developed into 53 propositions. These propositions have been conceptualised into a testable structural model.

The next Chapter explains the methodology used in this research.

CHAPTER THREE

RESEARCH METHODOLOGY

3.1 Introduction

The previous chapter has reviewed literature related to the problem under research. It identified the research gap evident in the previous literature. This Chapter presents the methodology for carrying out the empirical aspect of the study. In the second section following this introduction, the researcher compares the quantitative, the qualitative, the mixed research strategies, and their underlying philosophies. It also describes various research approaches. The third section provides a detailed procedure for the selection of cases and participants. The fourth section discusses the five methods of collecting case study and validation data. The fifth section describes the various variables of interest in the study and shows how they were measured. In the sixth section, the various methods of analysing the data are discussed. The seventh section covers validity and reliability, followed by ethical considerations in the eighth section. At the end of the Chapter is a conclusion, which recaps the issues covered.

3.2 Research Strategy and Design

3.2.1 Research Strategy and Philosophy

Choice of an appropriate research strategy depends on the theoretical orientation of the research. Bryman (2016) uses the term research strategy to refer to the "general orientation to the conduct of social research" (p. 38). Some research projects have an inductive orientation where "the researcher infers the implications of his or her findings for the theory that prompted the whole exercise" (Bryman, 2016, p. 21). Researchers who find relevance in this approach in many instances adopt the qualitative strategy, which entails collection and analysis of data in the form of words (Bryman, 2016; Creswell & Creswell, 2018). The qualitative strategy assumes an interpretivist and constructionist position which relies on the interpretation of the social world by analysing outcomes of the interactions among its

participants (Bryman, 2016; Maxwell, 2013). This strategy places emphasis on theory generation.

On the contrary, the quantitative strategy assumes a deductive approach where the researcher, on the basis of what is known about a phenomenon, deduces one or more hypotheses that must be tested empirically (Bryman, 2016). The quantitative strategy is highly prescriptive and uses numbered data to test objective theories that show relationships among variables (Creswell & Creswell, 2018). It assumes a positivist and objectivist position which takes the view that social phenomena as external facts beyond our reach or influence can only be studied by applying methods of the natural sciences (Bryman, 2016). Thus, this approach emphasises theory testing.

Notwithstanding the selected strategy, Bryman (2016) observes that the distinction between the quantitative and qualitative strategy is not as rigid and deterministic as their respective proponents have argued. This observation recognises that either strategy borrows some characteristics from the other. For example, qualitative research may be used for testing theories (Bryman, 2016; Creswell & Creswell, 2018; Maxwell, 2013; Miles et al., 2014) much as quantitative research can use an interpretivist position to tap into the meaning of a phenomenon using such techniques as respondent validation, data analysis and interpretation of findings (Bryman, 2016). In addition, qualitative research is frequently associated with the quantification of qualitative data, a characteristic that is inherent in quantitative research. These examples demonstrate the interdependent nature of the two strategies and explain why some researchers have opted for the mixed strategy.

The mixed strategy combines both the qualitative and quantitative strategies within a single project. Under this strategy, the researcher can prioritise either the quantitative or the qualitative strategy or attach equal weight to each (Bryman, 2016; Creswell & Creswell, 2018). Once the priority is established, the researcher exercises discretion in deciding the sequence – whether to start with the quantitative or qualitative strategy or to collect data concurrently. Whatever the researcher’s priority and chosen sequence, the researcher relies on one or more reasons for choosing the mixed research strategy. Some of the reasons outlined by Bryman (2016) and Creswell and Creswell (2018) include the need (i) to triangulate findings, (ii) to

capitalise on the strengths and weaknesses of each strategy, (iii) to help explain findings generated by each strategy and (iv) to develop the research instrument. Thus, the mixed strategy provides the researcher with an opportunity to collect, analyse and interpret findings arising from qualitative and quantitative data.

A proper understanding of the effectiveness of arbitration requires the researcher to interact with the disputants. Ineffectiveness of arbitration directly affects these disputants. The disputants are thus best placed to provide a holistic account of their experiences. Bryman (2016) and Creswell and Creswell (2018) agree that qualitative research relies on the meaning participants attach to the phenomenon. However, Bryman (2016) and Zikmund et al. (2010) caution that such studies may be affected by (i) the researcher losing focus through excessive immersion in the natural setting, (ii) the researcher's subjective interpretation and biased approach of considering the views of some of the participants but not others, (iii) its unstructured approach to inquiry which makes it difficult to replicate its findings, and (iv) non-probability sampling procedures that are not representative hence findings cannot be generalised to the population. Despite these shortcomings, qualitative research is the best approach to finding explanations of phenomena.

In this regard, considerations other than avoiding the quantitative strategy must guide the researcher's choice of qualitative strategy. Such a choice must take into account the research question (Bryman, 2016; Maxwell, 2013), values and practical considerations (Bryman, 2016). The qualitative strategy is considered the best strategy to address the question 'why' (Bryman, 2016) and to understand deeper meanings and gain insights on a phenomenon (Zikmund et al., 2010). Regarding practical considerations, choice of the research strategy must take into account the nature of the research topic and of the people being studied (Bryman, 2016). By its very nature, arbitration is a confidential process and deals with sensitive disputes that many disputants may not be willing to reveal to third parties.

Such reluctance renders it difficult to conduct research by way of procedures that require the collection of quantitative data. It requires an approach pegged on establishing relationships with the subjects who may be purposefully selected to provide the requisite data (Creswell, 2018; Maxwell, 2013). This method of selection

is inconsistent with quantitative research that requires probability-sampling techniques. Thus, in this study, the qualitative strategy was adopted not only to help in understanding why arbitration is an ineffective mechanism of dispute resolution but also for practical reasons.

3.2.2 Research Design

The qualitative research strategy requires a careful choice of the research design to ensure that the stated research objectives can be achieved. Research design refers to the framework for the collection and analysis of data (Bryman, 2016). It logically connects the data, research questions and conclusions (Yin, 2014). This connection requires the researcher to specify the procedures to follow during the research process. It forms the framework within which to evaluate the quality of the research findings. The research design is thus a critical component of the research process.

The procedures followed in this study are summarised in **Figure 3.1**. Generally, some preliminary literature review helped in identifying the research problem. This review was followed by an in-depth review of previous studies to develop the theoretical and conceptual framework. The conceptual framework guided the process of not only selecting cases and participants but also the development of the interview guides and the case study protocols.

A pilot study of three cases was then conducted to establish how well these instruments were functioning. The pilot study informed the revisions made to these instruments prior to the main fieldwork, which was conducted using five cases. Each transcribed version of main field interviews was sent back to its respective interviewee for comments. After incorporating feedback comments, the data was coded and analysed. Findings of this analysis guided the process of developing the validation interview guide.

The findings were then validated using five purposefully selected experts. Analysis of the validation data was crucial to the process of revising the structural model. Following the analysis, the conceptual model was revised, followed by a framework, which formed the foundation upon which to draw the conclusions and to write the final report.

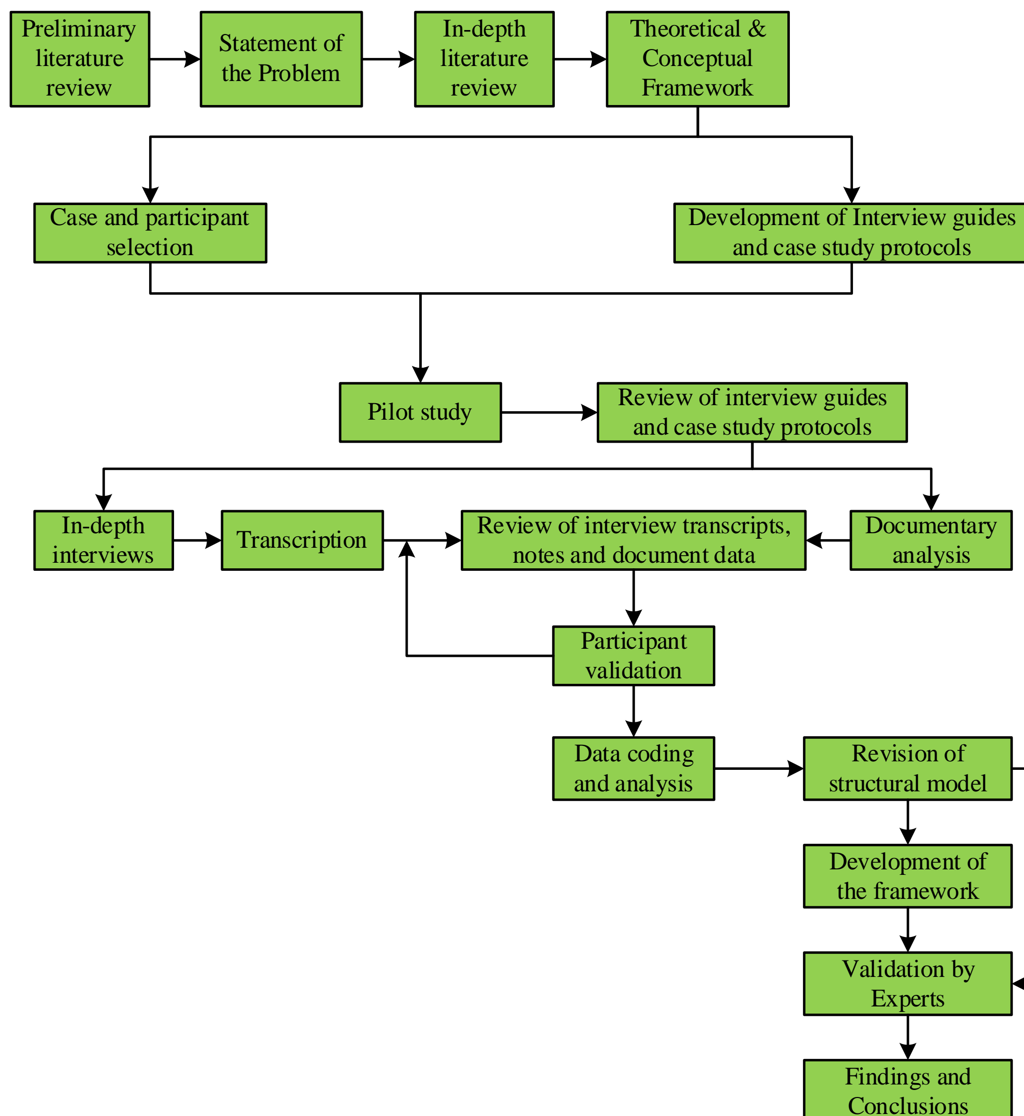

Figure 3.1: Research process flow

(Source: Own Concept, 2018)

Social research can be implemented using five main research designs. The experimental design involves manipulating the independent variable in a laboratory or field setting to establish the effect of the independent variable on the dependent variable (Babbie, 2016; Bryman, 2016; Creswell & Creswell, 2018). Manipulation makes the experiment the only research design in which the researcher exercises control over behavioural events during the research process (Yin, 2014). The experimental design is mainly associated with quantitative research (Bryman, 2016; Creswell & Creswell, 2018), where it is used for testing causal relationships between

variables (Bhattacherjee, 2012; Sekaran & Bougie, 2016), in an attempt to answer the research questions "how" and "why" (Yin, 2014). It is used as a yardstick against which to evaluate other research designs because of its strength in terms of internal validity and reliability (Babbie, 2016; Bryman, 2016). Thus, true experiments conducted in accordance with good research design practices are perfect research designs.

The cross-sectional design, longitudinal design, case study design and the comparative design are associated with both quantitative and qualitative research (Bryman, 2016). The cross-sectional design, also known as survey design, involves making quantitative or qualitative observations of a phenomenon on more than one case at a single point in time (Babbie, 2016; Bhattacherjee, 2012; Bryman, 2016). This design differs from the longitudinal study that makes similar observations but over an extended period. However, such long periods can affect representativeness of the sample through sample attrition (Bryman, 2016). The qualitative aspect of cross-sectional design involves an unstructured or semi-structured interview with several people. Thus, the cross-sectional design enables the researcher to generalise or to draw inferences to the larger population (Creswell & Creswell, 2018) and to use multiple perspectives or multiple theories in studying a phenomenon (Bhattacherjee, 2012).

Surveys are useful research designs for answering research questions focusing on "who", "what", "where", "how much" and "how many" (Yin, 2014). The cross-sectional design is useful to a researcher who seeks to describe a large population that cannot be observed directly (Babbie, 2016). This characteristic requires the researcher to employ robust sampling procedures that can aid in generalising the findings to the population. Overall, both cross-sectional and longitudinal designs enable the researcher to examine relationship patterns between variables.

The third form of research design is the case study. The case study design involves a detailed and intensive analysis of one case and may take the form of a longitudinal study. A case study "investigates a contemporary phenomenon in depth and in its real-world context" (Yin, 2014, p. 16). The real-world context must be bounded by time and activity and must provide the researcher with an opportunity to collect data

from multiple sources (Creswell, 2018; Creswell & Creswell, 2018). Having originated in psychology and business research (Creswell, 2018; Zikmund et al., 2010), the case study design seeks to answer research questions “how” and “why” (Yin, 2014) and may involve one case or multiple cases.

Bryman (2016) uses the term case study design to refer to single case studies and comparative design to refer to multiple case studies. The comparative design involves studying “two contrasting cases using more or less identical methods” (Bryman, 2016, p. 64). Such comparison can play a key role in understanding causality. Multiple cases provide the researcher with an opportunity to compare the studied phenomenon across contexts, but Bryman (2016) and Yin (2014) caution that findings arising from such comparative study should not be generalised to the population but generalised analytically to some theory. At the same time, studying multiple cases dilutes the depth of analysis that can be undertaken in one of the cases (Creswell, 2018). However, case study design “can capitalise on the role of theory development prior to data collection” (Yin, 2014, p. 37) which then guides the procedures for collecting and analysing data. This characteristic makes the case study ideal for carrying out both quantitative and qualitative research.

The choice of which research design to adopt is determined by three main factors. The first factor is the time dimension. Researchers can collect data at a single point in time or over an extended period. In this study, the data was collected at a single point in time. Hence, the study was not amenable to the time-consuming and costly longitudinal design. The second factor is the form of the research question (Bhattacherjee, 2012; Yin, 2014). This research sought to answer the research questions “how” and “why.” The best way of answering such questions is by using experimental and case study designs. The cross-sectional design was thus not suitable.

The final choice between experimental and case study designs is governed by the third factor, the extent of control over behavioural events (Yin, 2014). While experimental researchers can control relevant behaviour “directly, precisely and systematically,” case study researchers cannot (Yin, 2014, p. 12). Such control

requires researchers to be highly intrusive, increasing the possibility of psychological damage to the subjects (Babbie, 2016). Unfortunately, this psychological damage is one of the consequences of emotional stress as a subset of the hidden costs of ineffective arbitration discussed under Section 2.5.1 above.

The foregoing argument leaves the case study and the comparative design as the most feasible designs. While the case study design is limited in terms of its scope of representativeness, its proponents "do not delude themselves that it is possible to identify typical cases that can be used to represent a certain class of objects" (Bryman, 2016, p. 62). However, Bryman (2016) opines that researchers are often in a position to generalise by drawing on findings from comparable cases investigated by others.

In addition, the case study design has been touted as ideal for theory testing and theory generation (Bryman, 2016; Yin, 2014). Ideally, case studies test theory based on analyses of quantitative data. However, explanatory case studies can test theories based on analysis of qualitative data, provided the researcher develops a theoretical framework and a systematic research design, and conducts an independent evaluation of potential biases and methodological rigour of the case study (Johnston et al., 1999). Case study designs suit researchers seeking to establish patterns of relationships among well-delineated constructs (Miles et al., 2014). Nevertheless, such researchers must endeavour not to be too restrictive in their research designs.

Research problems that seek to establish relationships among constructs address the research question "how." The case study design is thus the best design for studies seeking to answer "how" and "why" research questions under research conditions where the researcher cannot manipulate behavioural events and where the number of variables far exceeds the number of data points (Yin, 2014). This characteristic calls for multiple methods of data collection to yield the much-desired convergence. Case study research design has been used in similar studies such as Adler et al. (1983); Chaphalkar et al. (2015); Colvin (2011); Hill (2003); Lind et al. (1990); Torgbor (2013); Welsh (2004) and Wissler (2004). The case study research design, therefore, has broader application and hence was the ideal approach.

However, this study entailed the collection and analysis of data from more than one case. As demonstrated later in Section 3.6, both within the case and cross-case analysis were critical to answering the research questions. Thus, a modified form of the case study, the comparative design was adopted.

3.3 Case and Participant Selection Procedures

3.3.1 The Construction Industry of Kenya

The construction industry plays a key role in spurring economic growth. Other than providing construction facilities for the various sectors (Hillebrandt, 2000), it creates employment opportunities and demand for goods required in the industry but produced in the manufacturing sector, such as cement, paint and steel. It also creates demand for services required in the industry but offered by the service sector, for example, construction loans. For this reason, the industry has interlinkages with other sectors, creating interdependency relationships that affect the way these other sectors operate if the industry is not run efficiently. One of the ways of achieving such efficiency is to ensure that many of the disputes it generates (Fenn et al., 1997) do not stall growth in these other sectors.

Demand for such efficiency has catapulted the industry to adopt standard contracts in implementing the numerous projects it undertakes. In Kenya, for example, the industry relies on several main standard forms of construction contracts. The Joint Building Council (1999) standard contract is the most widely used building contract in the private sector while the Public Procurement Oversight Authority (2007) standard contract is mainly restricted for use in public building contracts. The Kenya Association of Building and Civil Engineering Contractors (2002) standard subcontract supports the JBC contract in executing subcontract agreements.

However, most civil engineering construction projects and some complex building projects rely on the globally recognised International Federation of Consulting Engineers (1999) standard contract for construction, now in its second edition (International Federation of Consulting Engineers, 2017). A number of other public projects funded by multilateral development banks use the International Federation of Consulting Engineers (2005) standard contract. These latter two

standard contracts are supported by the International Federation of Consulting Engineers (2011) standard subcontract in implementing subcontract agreements based on the FIDIC standard contracts. The common thread in all these standard forms of contract is a dispute resolution clause that requires referral of all arising disputes to arbitration for terminal resolution.

The foregoing discussion suggests that the industry relies heavily on arbitration in resolving the high volume of disputes it generates. In addition, this researcher's extensive experience in the industry, spanning almost 20 years in Kenya and the East African region, and having gained the much-desired exposure to understand how the industry operates, offered an opportunity to study how the multiplicity of factors interact in influencing the effectiveness of arbitration. In this regard, the construction industry of Kenya was chosen because of the relationship already established by the researcher, and the extensive knowledge so far acquired in the way the industry operates and how its disputes are resolved.

3.3.2 Case Selection

A key decision that guides case study research design is the choice between a single case and multiple cases. A single case design can cover a critical case, an extreme case, a common case, a revelatory case or a longitudinal case (Yin, 2014). On the contrary, multiple case designs entail an intensive examination of at least two cases (Yin, 2014). The number of cases to study is at the discretion of the researcher, but the level of anticipated uncertainty and the researcher's sense of the strength and importance of rival explanations guide this choice. Multiple case designs can thus be used to compare or to contrast cases and to develop a better understanding of causality (Bryman, 2016; Miles et al., 2014). Yin (2014) cautions that multiple cases create a false impression of sampling logic and may require considerable time and money. However, such multiple case designs provide more compelling and robust evidence than single-case designs. Thus, multiple cases were chosen to provide rich and robust evidence for accepting, modifying, or rejecting the theoretical propositions developed after reviewing past research.

In Kenya, a typical arbitration should be registered at the High Court to be enforceable. A party that is not keen to honour the terms of the award may apply to the court to set aside the award. These are everyday circumstances that characterise most arbitrations. According to Yin (2014), a common case "captures the circumstances and conditions of everyday situation…because of the lessons it might provide about the social processes related to some theoretical interest" (p. 52). Common cases are also referred to as representative, typical or exemplifying cases (Bryman, 2016). Hence, this study capitalised on the advantages of the multiple case design in choosing common cases from the list of cases concluded at the High Court of Kenya.

Arbitration is a private process whose proceedings are conducted in confidence. The proceedings focus on the contractual relationship between the disputants and how such relationships were fractured. However, the successful party must register the award in the High Court of Kenya for recognition and enforcement, unless the other party opts to comply with the award voluntarily. In addition, a party that wishes to execute the registered award must secure an execution decree from the High Court. A disgruntled party may opt to challenge adoption of the award or its execution in the same court. Thus, the court provided the most comprehensive list of disputes arising from arbitration.

This researcher considered all contractual disputes determined by the High Court in Nairobi since 2014 because of two reasons. First, disputants should easily recall events arising from recently determined disputes. Stretching participants' memories far into the distant past may negatively affect the accuracy of responses (Bhattacherjee, 2012; Bryman, 2016). Studies in cognitive psychology have shown that 20 percent of personal events were irretrievable after one year while 60 percent were irretrievable after five years (Wagenaar, 1986). Thus, cases concluded in the distant past were likely to be affected by inaccurate responses because of memory lapses.

Second, this approach had been used in previous studies including Kangari (1995); Lipsky and Seeber (1998) and Stipanowich and Lamare (2014), that covered a period of three years preceding the survey dates. Based on these studies, a three-year period

was considered reasonable hence only disputes whose rulings were delivered since 2014 were included as target cases.

The most comprehensive database of cases determined by the courts in Kenya rests with the National Council for Law Reporting (Kenya Law). The Council posts judgements of these cases on its website http://www.kenyalaw.org. An advanced case search conducted on the website on 29 September 2017 for all cases containing the word “arbitration” returned 1,407 cases with judgements delivered between 1 January 2014 and 29 September 2017. Out of all these cases, the High Court at Nairobi (Milimani Commercial Courts: Commercial and Tax Division) had handled 244 cases. Cases handled by this court were considered because of the proximity to their litigants, who were likely to be based in Nairobi where this research was conducted. Additionally, the High Court at Nairobi (Milimani Commercial Courts: Commercial and Tax Division) is the only court containing rulings arising from litigation of commercial disputes.

The content of these rulings was analysed to identify case rulings containing subject matters relevant to the construction industry. The analysis was carefully conducted to select only cases arising from arbitration. The analysis process established that 40 cases dealt with subject matters relevant to the construction industry. Some cases containing the word “arbitration” dealt with applications to stay legal proceedings and requests to refer the dispute to arbitration. Other cases sought injunctions or interim measures of protection on matters that were the subject of arbitral proceedings. **Table 3.1** summarises the categories of these cases. Evidently, most of the cases were filed to recognise and enforce and/or to set aside the award.

Table 3.1: Summary of arbitration cases in construction

Case details	Number of cases
Recognition, enforcement, setting aside, execution or stay of execution	24
Stay of legal proceedings and referral to arbitration	7
Removal of arbitrator	2
Injunction and interim measures of protection	7
TOTAL	40

An understanding of the interaction of the various factors influencing the effectiveness of arbitration requires researchers to consider the entire life cycle of arbitration cases. To establish whether a case before the court dealt with a matter that had gone through the entire life cycle of arbitration, the rulings were analysed to establish whether the cases dealt with matters arising from a final award. Sixteen cases were excluded because they addressed matters relating to the stay of legal proceedings, removal of the arbitrator, injunctions, and interim matters of protection. Three cases were also excluded because they dealt with interim awards and preliminary rulings while two were excluded because they dealt with matters that were the subject of international arbitration. Additionally, three cases were excluded because their arbitrators were dead. Thus, only 16 cases for the recognition, enforcement, setting aside, execution or stay of execution of final awards arising from domestic arbitration of contractual disputes in construction were eligible candidates for case selection. These criteria lent the process to purposeful selection to achieve cases that are critical for testing theories and cases "with whom the researcher can establish the most productive relationships" (Maxwell, 2013, p. 99).

Content of the remaining 16 cases was further analysed to determine the final list of candidate cases with which to establish further contact. Names of the parties were identified, and a further search conducted online to establish their contact details. Where no contact details were available online, efforts were made to check names of the contractors on the National Construction Authority (NCA) online register to establish whether they were duly registered. Case files at the court registry were perused to extract further contact details. Cases with missing contact details for either of the parties and for the arbitrator were excluded. Similarly excluded were cases where most of the participants were unwilling to participate.

At the end of the selection process, ten cases were eligible for inclusion in the final selection. Three of these cases were earmarked for the pilot study while the remaining seven cases were reserved for the main study. The three cases were selected because of the prior relationship existing between the researcher and some of the pilot study participants. The participants were then contacted, seeking their consent to participate in the research. In one of the cases, the arbitrator and the claimant declined to participate. In another case, the arbitrator and respondent

declined to participate. Incidentally, the same arbitrator handled both cases. Telephone numbers for the respondent in the former case and for the claimant in the latter case did not go through. These cases were dropped, leaving five cases for the main study. The five cases fall within the range of five to ten cases recommended by Miles et al. (2014) and Yin (2018). Consistent with Yin (2018), at least three cases and two cases were earmarked for literal and theoretical replication, respectively.

3.3.3 Participant Selection

In typical arbitration cases, claimants submit their statements of claim against which respondents file their statements of defence. Each of the parties may involve advocates in preparing these documents, and when hearings are envisaged, may choose to be represented by such advocates or other persons of their choice. The advantage of being represented by advocates is that they can also be used to seek court intervention on matters where such intervention is required. The pleadings from each side are usually accompanied by evidence to support each party’s case. Such evidence may be presented in the form of documents, such as letters, photographs, contracts, statements, and opinions. Fact witnesses may prepare statements while experts do opinions. The parties or the tribunal may appoint experts to provide an opinion on a technical matter. Therefore, it is evident that a typical arbitration has several participants, including the claimant, the respondent, the arbitrator, advocates or other representatives, witnesses, and experts.

Some of these participants, such as experts and witnesses, are peripheral to the process. Thus, they are not actively involved in the entire arbitration process. They may not be able to provide concrete information on all the events relevant to the research question. However, claimants, respondents, arbitrators, and party representatives are critical to the process and they were therefore targeted as the source of data required for this study. Thus, these participants constituted the units of observation in this study.

Another set of participants was required for validation. This aspect of the research sought to gain an in-depth understanding and confirmation of the findings arising from the cases. Thus, it required experts with a deep understanding of the arbitral

process. In this study, five participants were purposefully selected to participate in the validation, based on their extensive experience in arbitration. These participants included two quantity surveyors, two architects and one advocate, all who had not participated in the pilot or the main study.

3.3.4 Unit of Analysis

The objective of arbitration is to resolve the dispute between the parties. Once the dispute is resolved, the award is delivered to each party. The way each party reacts to this award determines the effectiveness of the resolution process. Parties who are satisfied with the outcome and the process generally react positively and vice versa. However, while the general perception of the effectiveness of arbitration in the public domain is embedded in the parties who participated in the process, such perception is based on the outcome and process of the arbitration case. Therefore, the arbitration case was the most suitable unit of analysis for this study.

3.4 Data Collection Procedures

The case study design adopted for this study provides a wide choice of the methods to be used for data collection. However, choice of the appropriate data collection technique to use at any given time depends on the research questions, cultural research situation and practical considerations (Fellows & Liu, 2015; Maxwell, 2013). One of the ways of enhancing construct validity of qualitative research, such as case studies is triangulation (Creswell, 2018; Maxwell, 2013; Yin, 2014). Triangulation requires the researcher to use more than one method of data collection or more than one source of data (Creswell & Creswell, 2018; Yin, 2014). The variety of methods of data collection and the multiple sources used in this study aimed at satisfying the much-desired construct validity criteria.

The qualitative case study design embraces several data collection methods. The first method is participant observation. Under this method, the researcher becomes immersed in a group for an extended period of time, makes behavioural observations, listens to conversations, collects documents and asks questions (Bryman, 2016; Zikmund et al., 2010). Participant observation is contextual and requires the

researcher to devote considerable time in the natural setting (Yin, 2014). Consequently, it may require researchers to employ more than one observer, to deploy surveillance equipment in collecting real-time data, especially for geographically dispersed sites (Cooper & Schindler, 2013; Yin, 2014), thus increasing the cost of data collection. Babbie (2016) adds that participants may become too native and lose their research focus. Participant observation can also be affected by reflexivity and bias arising from the participant's manipulation of events (Yin, 2014). In arbitration, disputants' refusal to grant consent or revocation of such consent for researchers to continue participating in the proceedings may affect the process of data collection.

The second method of collecting qualitative data is the interview. Interviews can augment observational data to address questions of why those observations are made (Babbie, 2016; Bryman, 2016). In qualitative research, both semi-structured and unstructured interviews can be useful techniques. Unstructured interviews lack a planned sequence of questions while semi-structured interviews are characterised by an interview guide to which other questions can be added (Bryman, 2016). Semi-structured interviews are useful in studies that begin with a clear focus, studies that use more than one interviewer and studies that involve multiple cases (Bryman, 2016). Interviews are generally flexible and can be used to gather rich, detailed and insightful answers (Bryman, 2016; Yin, 2014).

However, interviews require plenty of time to record and transcribe. Bryman (2016) and Maxwell (2013) caution that recording may disorient interviewees, affecting their responses. Responses to interviews may also be affected by bias arising from poor research design, poor recall and reflexivity (Yin, 2014). Despite these shortcomings, interviews provide the best account of unrecorded past events (Bryman, 2016; Maxwell, 2013) and can be a rich source of data if conducted intensively (Maxwell, 2013). Thus, interviews are useful when collecting data from arbitrations that have already been concluded. For such arbitrations, researchers cannot experience the activity for themselves and have to ask those who experienced the phenomenon (Stake, 2005). Having developed a theoretical framework, semi-structured interviews, therefore, constituted a critical data collection method for the multiple cases involved in the study. An interview guide was designed for each

category of participants being the parties, party representatives and arbitrators to ensure that the questions were properly aligned to collect the right information in the most effective manner. These interview guides are contained in **Appendix I**, **Appendix II** and **Appendix III**.

The third method of data collection is documentation. Documents include an array of visible and relevant materials that have been preserved for analysis but not produced specifically for the purpose of the study (Bryman, 2016). Such documents may be personal, official state documents, official private documents, mass media excerpts and virtual documents. Qualitative information from such documents can be collected by qualitative content analysis of underlying themes (Bryman, 2016). Documents are useful for verifying information arising from interviews but they can be difficult to retrieve or access and can reflect some inherent biases that can only be verified by interviewing (Yin, 2014). Qualitative analysis of documents thus constituted a critical source of data for verifying some of the information arising from the case study interviews. This process helped in checking for bias in the data thus enhancing reliability (Miles et al., 2014). In this study, court files and awards were examined to extract such data as contact details, cost, number of hearings, length of submissions, timing of payment of arbitrators' advance, scope of document requests, number of parties, number of contract agreements, claim and award values and sizes of the tribunals.

The last two methods, archival records and physical artifacts had little relevance to this study. Archival records are useful for quantitative case studies while physical artifacts can provide useful insights into the cultural and technical operations of a group (Yin, 2014). However, the main challenge in attempting to use these two methods was data access. Thus, these two methods were not deployed in this study.

3.5 Operationalisation of Constructs

Studying the effectiveness of arbitration requires an analysis of the interactive effect of several variables. The conceptual framework discussed under Section 2.10 above identified eleven latent variables to be considered in this study. **Table 3.2** shows these variables and their surrogates. The table has been provided to demonstrate how

the various concepts were operationalised to enhance construct validity (Yin, 2014). As the table shows, some of the latent variables were measured using more than one indicator. Only one latent variable, perceived adequacy of the size of the tribunal was measured using a single indicator. Distribution of control attracted the highest number of indicators being 30. More details about how these surrogates were measured can be found in **Appendix IV**.

Some variables that were not included in the matrix but were found useful for analysis include:

1. Category of the interviewee. This variable classified responding disputants into two categories: claimant and respondent (for parties) and party representative for the claimant and party representative for the respondent. This classification helped in establishing the degree of convergence in the responses between the two categories of disputants and that of their representatives.
2. Choice of arbitration type between documents-only procedure, hearing, and a combination of the two forms.
3. Clarity of arbitration clauses and rules.
4. Choice of *ad hoc* versus institutional arbitration.
5. Repeat player effect, measured by the number of previous arbitrations in which the disputant or representative has been involved.
6. Experience of the arbitrator, measured by the number of years, categorised as less than ten and more than ten years.

Table 3.2: List of variables in the study

S.No.	Variable	Conceptual definition	Operational definition			Source
			Factor	Surrogate	Sub-surrogate	
1	Arbitral effectiveness (Effectiveness)	The extent to which arbitration fulfils disputants' aspirations in terms of the time, cost, and satisfaction with the award.	Cost-effectiveness (CEF) – Ratio of cost of resolution to the award value.	Percentage of the cost to the award value		Adams (1965); Folger and Cropanzano (2001); Gebken II (2006)
				Expected cost		Self-developed
				Reasonableness of the cost		Lind et al. (1990)
			Time efficiency	Deviation from an established standard of six months from the date of signing the terms of reference to the delivery of the final award.		Fortese and Hemmi (2015); Gebken II (2006); Risse (2013); Rivkin and Rowe (2015); Stipanowich (2012); Welser (2014)
				Expected time		Self-developed
				Perceived reasonableness of the actual duration.		Tyler and Blader (2000)
			Quality of the award	Award acceptability	Award challenge.	Colquitt (2001); Gross and Black (2008); Holt (2008); Stipanowich (2012); Wiezel (2011)
					Compliance with the award	Burch (2010); Kazemi et al. (2015); Lind and Tyler (1988); Shestowsky (2008); Shestowsky and Brett (2008); Tyler (2000)
				Referring future disputes to arbitration		Brockner and Wiesenfeld (1996); Lind and Tyler (1988); Skitka et al. (2003); Tyler (2000)
				Maintenance of relationships.		Cheung (1999); Cheung et al. (2002); Gebken II (2006); Helfand (2015); Kun (2014); Lind and Tyler (1988); Lu et al. (2015); Stipanowich and Lamare (2014)

Table 3.2 *(cont'd)*

S.No.	Variable	Conceptual definition	Operational definition: Factor	Operational definition: Surrogate	Operational definition: Sub-surrogate	Source
2	Perceived award fairness	The extent to which the award achieves distributive justice.	Award value relative to what was expected.			Aibinu (2007); Lind et al. (1990); Tyler and Blader (2000)
			Award value compared with what the disputant perceived it deserved.			Aibinu (2007); Tyler and Blader (2000)
			Perceived fairness of the award.			Aibinu (2007); Tyler and Blader (2000)
			Award compared with outcomes for similar disputes resolved in the past or at that time.			Aibinu (2007)
3	Perceived award favourability	The extent of wins or losses	Award as a percentage of the claim or counterclaim.			Aibinu (2007)
			Perceived level of favourability of the award.			Adams (1965); Aibinu (2007); Gross and Black (2008); Harmon (2003); Tyler and Lind (1992)
			Satisfaction with the award.			Adams (1965); Aibinu (2007); Gross and Black (2008); Harmon (2003); Tyler and Lind (1992)
4	Distribution of control	The extent to which a party can influence the process and outcome of the arbitration.	Nature of party representation.	How the party was represented.		Cheung and Suen (2002); Colvin (2011); Gregory and Berg (2013); Newhall (2012); Phillips (2003); Stipanowich (1988, 2012); Torgbor (2013)
				Whether the proceedings were affected by a party's delay or failure to issue instructions or to pay its representative.		Newhall (2012); Torgbor (2013)
				Whether the proceedings were affected by unwarranted delays, postponement and adjournments requested by party representatives.		Gregory and Berg (2013); Torgbor (2013)
			Conduct of the disputants	Length of submissions.		Bates (2012); Rees (2015)
				The timing of payment of arbitrator's advance.		Frécon (2004); Welser (2014)

Table 3.2 *(cont'd)*

S.No.	Variable	Conceptual definition	Operational definition: Factor	Operational definition: Surrogate	Operational definition: Sub-surrogate	Source
				The scope of document requests.		Bates (2012); Rees (2015)
				Wilfully misstatement of facts.		Kreindler and Dimsey (2014)
				Availability of arbitrators, counsel, and experts.		Park (2014); Risse (2013); Rivkin and Rowe (2015); Torgbor (2013)
				Perceived conflict of interest.		Park (2014)
				Whether a disputant wilfully withheld evidence.		Kreindler and Dimsey (2014)
				Compliance with deadlines set by the tribunal to respond to its communications and comments on drafts.		Kreindler and Dimsey (2014)
				Producing documents when required.		Kreindler and Dimsey (2014)
				Signing terms of reference.		Kreindler and Dimsey (2014)
				Revisiting matters already decided by the tribunal.		Kreindler and Dimsey (2014)
				Challenge to the timing of the claim and counterclaim dispute.		Gebken II (2006)
				Challenges to jurisdiction.		Frécon (2004); Torgbor (2013)
				The extent of court intervention.		Torgbor (2013)
				Use of senior management in the resolution process.		Cheung et al. (2000); Cheung et al. (2010); Gebken II (2006); Lipsky and Seeber (1998); Stipanowich and Lamare (2014)
				The timing of settlement offers		Helfand (2015); Kreindler and Dimsey (2014); Kun (2014); McIlwrath (2008); Risse (2013)
			Repeat player effect.			Choi et al. (2014); Colvin (2011); Helfand (2015); Klement and Neeman (2013); Rutledge (2008)
			The degree of arbitrator's use of conferred powers	Limiting interruptions during hearings.		Cresswell (2013); Frécon (2004); Torgbor (2013)
				Limiting delays, postponement, and		Cresswell (2013); Frécon (2004); Torgbor (2013)

Table 3.2 *(cont'd)*

S.No.	Variable	Conceptual definition	Operational definition: Factor	Operational definition: Surrogate	Operational definition: Sub-surrogate	Source
				adjournments.		
				Limiting debate by lawyers.		Cresswell (2013); Frécon (2004); Torgbor (2013)
				Limiting the number of hearings.		Cresswell (2013); Frécon (2004); Moza and Paul (2017); Torgbor (2013)
				Time allowed for final submissions.		Cresswell (2013)
				Enforcement of deadlines.		Cresswell (2013); Frécon (2004); Torgbor (2013)
				Issue and enforcement of sanctions.		Cresswell (2013); Frécon (2004); Torgbor (2013)
				Control over the sequential exchange of written submissions.		White & Case and Queen Mary, University of London (2012)
			The extent of the pre-action protocol	Whether any amicable settlement mechanisms were explored prior to reference.		Cheung et al. (2002); Cheung et al. (2000); Gebken II (2006); Stipanowich and Lamare (2014)
				The extent to which amicable settlement mechanisms strengthened disputant's case.		Self-developed
5	Complexity of the dispute	Ease of resolving the dispute	Number of parties			Cheung et al. (2002); Odoe (2014); Redmond (2016); Stipanowich (2010); Wiezel (2011)
			Number of contract agreements			Hinchey (2012); Overcash and Gerdes (2009); Redmond (2016); Shin (2000)
			Number of sittings			Harmon (2004)
			Nature of the cause			Choi et al. (2014); Frécon (2004); Gluck (2012); Hinchey (2012); Hinchey and Perry (2008); Phillips (2003) Pilot study
			Language differences			Welser (2014)
			Cultural differences			Fortese and Hemmi (2015); Gluck (2012); Odoe (2014); Park (2014); Wiezel (2011)
6	Competence of the arbitrator	Set of knowledge, skills and experience embedded in the arbitrator, and which are the	Knowledge	Specialisation in the subject area of the dispute.		Fahy (2012); Hobbs (1999); Stipanowich (1988); Stipanowich and Lamare (2014); Wiezel (2011)

Table 3.2 *(cont'd)*

S.No.	Variable	Conceptual definition	Operational definition: Factor	Operational definition: Surrogate	Operational definition: Sub-surrogate	Source
		minimum standard required to resolve the dispute.		Legal knowledge.		Odoe (2014)
				Knowledge of the law and practice of arbitration.		Welser (2014)
			Skill set	Functional skills.	Ability to identify and assess issues.	Rivkin and Rowe (2015); Torgbor (2013); Welser (2014)
					Ability to resolve the identified issues.	Rivkin and Rowe (2015); SPIDR Commission on Qualification (1989); Torgbor (2013); Welser (2014)
					Deciding the dispute based on concern for time and cost.	Bates (2012); Davison and Nowak (2009); MacCoun et al. (1988); Newmark (2008); Overcash (2015); Park (2010); Stipanowich (2010)
					Listening attentively.	SPIDR Commission on Qualification (1989)
					Ability to speak clearly.	SPIDR Commission on Qualification (1989)
					Proactivity in managing the case.	Cresswell (2013); Newhall (2012); Risse (2013); Rivkin and Rowe (2015)
					Schedule of hearings.	Risse (2013); Stipanowich (2010)
				Interpersonal skills.	Ability to understand power imbalances.	SPIDR Commission on Qualification (1989)
					Sensitivity to strongly felt values of the disputants.	SPIDR Commission on Qualification (1989)
					Ability to deal with underlying emotions.	SPIDR Commission on Qualification (1989)
					Maintaining confidentiality	SPIDR Commission on Qualification (1989); Watkins (1992)
					Affability	Pilot study
			Attitudes			Gross and Black (2008); Hacking (2011); Stipanowich (2004)
7	Quality of the Decision-making process				Deciding the dispute based on facts and not personal biases.	Aibinu (2007); Tyler and Blader (2000)
					Deciding the dispute without favouritism.	Aibinu (2007); MacCoun et al. (1988); Tyler and Blader (2000)
					Deciding the dispute	Colquitt (2001)

Table 3.2 *(cont'd)*

S.No.	Variable	Conceptual definition	Operational definition			Source
			Factor	Surrogate	Sub-surrogate	
					truthfully.	
					Consistency in the application of rules.	Leventhal (1980); Leventhal et al. (1980); Tyler and Blader (2000)
8	Quality of treatment-experienced				Refraining from improper remarks or comments.	Bies and Moag (1986); Colquitt (2001)
					Award reasoning.	Colquitt (2001); Gross and Black (2008); Holt (2008); Stipanowich (2012); Wiezel (2011)
					Treating disputants politely, with dignity, courtesy, and respect.	Brekoulakis (2013); Colquitt (2001); Helm et al. (2016); Klement and Neeman (2013); Park (2011)
9	Perceived adequacy of the size of the tribunal	Number of arbitrators constituting the tribunal.	Whether the tribunal consisted of a sole arbitrator or more than one arbitrator.			Giorgetti (2013); Harmon (2004); Hinchey (2012); Holt (2008); Park (2011); Stipanowich (1988)
10	Procedural fairness	Disputants' perception of the extent to which the methods used in resolving the dispute achieve desired justice.	Fairness of the procedure.			Aibinu et al. (2011); Colquitt (2012); Harmon (2003); Lind and Lissak (1985); Lind and Tyler (1988); Thibaut and Walker (1975); Tyler and Blader (2000)
			Satisfaction with the procedure.			Aibinu (2007); Gross and Black (2008); Lind and Lissak (1985)
			Whether the arbitrator tried hard to be fair.			Aibinu (2007); Tyler and Blader (2000)
			Whether the dispute was decided fairly.			Aibinu (2007); Tyler and Blader (2000)
			Ease of award recognition, enforcement, and execution.			Muigua (2015a); Torgbor (2013)
			Concern for the disputants' rights			Tyler (1988)
11	Approach to the presentation of evidence	The extent of proof.	Meticulousness of documentation.			Kangari (1995); Risse (2013); Stipanowich (2009); Stipanowich (1988, 2012); Torgbor (2013)
			Number of experts and fact witnesses.			Jones (2012)

Table 3.2 *(cont'd)*

S.No.	Variable	Conceptual definition	Operational definition			Source
			Factor	Surrogate	Sub-surrogate	
			Method of appointing experts.			Ennis (2013); Galloway (2012)
			The timing of the expert appointment.			Ennis (2013)
			Techniques for preparing and presenting expert reports and witness statements.			Risse (2013)
			The timing of expert reports and witness statements.			Ennis (2013); Jones (2012)
			Method of exchanging expert reports and witness statements.			Ennis (2013); Jones (2012)

3.6 Data Analysis Strategy

The data in this study came from multiple sources and was collected using different methods. Because it relies on data in the form of words rather than numbers, qualitative research generates huge data corpus (Bryman, 2016; Maxwell, 2013). Analysis of this data requires careful planning and control to ensure that the techniques chosen for analysis not only fit the data collected but also answer the research questions, in addition to addressing any validity threats to the conclusions arising from the study (Maxwell, 2013). Unfortunately, qualitative research lacks prescriptive rules for carrying out data analysis (Bryman, 2016; Maxwell, 2013; Yin, 2014).

One of the key characteristics of qualitative research is its iterative nature. This characteristic means that both data collection and analysis are carried out concurrently (Bryman, 2016; Creswell & Creswell, 2018). The aim is to ensure that researchers have an opportunity to modify their proposed data analysis techniques to suit the nature of data collected. Hence, there is a need to develop a preliminary framework that can be used to guide such an analysis.

3.6.1 Case Data Analysis

The starting point in determining which technique best suits case study research design rests on the meaning of a case study. The definition by Creswell (2018) highlights the procedural guidelines that govern the case study design. One of the critical steps in a case study is that it "reports a ***case description*** and ***case themes***" (Creswell, 2018, p. 96; emphasis in original). These themes must emanate from a process that identifies clear thematic patterns arising from the researcher's careful analysis of qualitative data.

Multiple case designs require the researcher to approach the data analysis process in two stages. The within-case analysis provides a detailed description of each case and the themes within that case while cross-case analysis uses thematic analysis to establish theme recurrence across the cases (Creswell, 2018). Thus, techniques chosen must be capable of expounding the themes within and across the cases. In this

study, both within-case and cross-case analysis were critical to understanding themes emerging from the cases.

The process of analysing case data involves three-stages. First, it requires the researcher to reduce the data using coding procedures. These codes are then used as a basis for categorising the data to facilitate comparison (Bryman, 2016; Maxwell, 2013; Sekaran & Bougie, 2016). Unfortunately, coding results in data fragmentation which can significantly affect its contextual interpretation as required of case studies (Bryman, 2016; Maxwell, 2013).

Coding requires the researcher to undertake a qualitative content analysis of each case data. Such qualitative content analysis entails establishing a set of categories and determining the frequency of occurrence of each category (Silverman, 2014). This process forms the basis for subsequent analysis.

During the second stage, the data is displayed to show patterns and relationships (Maxwell, 2013; Sekaran & Bougie, 2016). A detailed description should be provided for each case (Creswell, 2018), followed by pattern matching, time-series analysis and logic modelling to discern the patterns and relationships in recurring themes (Yin, 2014). The final stage involves drawing conclusions by explaining observed patterns and relationships or by comparing and contrasting (Sekaran & Bougie, 2016). This stage can make use of such techniques as explanation building and cross-case synthesis to demonstrate "how" and "why" those patterns and relationships exist (Yin, 2014). These five data analysis techniques are described next.

Pattern matching is the most basic technique for case data analysis. The technique requires the researcher to compare an empirically derived pattern to a predicted pattern (Bhattacherjee, 2012; Trochim, 1989). In multiple case studies, this comparison can also be achieved by establishing whether a pattern found in one case is replicated in other cases (Miles et al., 2014). Pattern matching is widely used in quantitative studies, however, it can be utilised in qualitative studies "as a rubric for categorising data" (Trochim, 1989, p. 365). Thus, pattern matching can be used as a springboard for the thematic analysis of qualitative data.

While explanatory studies require patterns to be related to the dependent and the independent variables, descriptive studies relate observed descriptive patterns to theoretical descriptive conditions (Yin, 2014). For explanatory studies, relating patterns to dependent variables requires the study to have multiple non-equivalent dependent variables. The initial proposition is questioned if the results do not show the entire pattern as predicted (Yin, 2014). Nevertheless, relating patterns to rival independent variables requires mutually exclusive rival explanations of independent variables. The pattern must establish an explanation that is acceptable to the exclusion of the rival explanations. Hence, internal validity is strengthened when the researcher establishes a similarity between the patterns.

In explanation building, the researcher analyses case data by building an explanation of "how" and "why" something happened. This technique requires theoretically significant propositions and compares the empirical findings against the proposition, revising the proposition as appropriate and comparing case data against the revision (Yin, 2014). Such revisions are then compared with data from subsequent cases to counter plausible or rival explanations. Thus, the final explanation may not have been fully articulated at the beginning of the study. However, the researcher may be influenced by unwarranted selective bias, the result of which explanations might gloss over some critical data.

In time-series analysis, the researcher examines changes in a variable over a period of time (Babbie, 2016). It is mostly associated with quantitative data but can also be used for analysing qualitative data. Just like pattern matching, time-series analysis requires theoretically significant propositions (Yin, 2014). Time series analysis may be simple, complex, or chronological. A simple time-series analysis involves one dependent or independent variable while a complex time series analysis involves multiple variables. A chronological time-series analysis may be simple or complex. It aims at comparing the sequence of events with that predicted by some explanatory theory. This technique was not appropriate for this study because the study was not concerned with trend analysis, which is mostly associated with longitudinal designs.

In logic models, the researcher stages events in a cause-effect-cause-effect pattern over an extended period of time (Yin, 2014). The qualitative approach to logic

modelling compares empirically observed patterns with theoretically predicted patterns to affirm, reject or modify the original pattern. This analysis is followed by quantitative data analysis of several cases using path analysis to affirm, reject, or modify the original pattern. Other variables are added to the quantitative model iteratively to explain why the sequence was affirmed, rejected, or modified. While this study involved several variables in a complex web of interrelationships, it was not amenable to logic modelling because quantitative data was not collected.

The final technique is cross-case synthesis. It seeks to aggregate findings from multiple cases. Yin (2014) recommends the use of tables to display categorical data from which the researcher develops an argumentative interpretation. These categories form the basis upon which themes can be extracted and patterns of correspondence among the categories established (Creswell, 2018). Cross-case synthesis was the most appropriate technique in multiple case designs such as the one contemplated in this study. Thus, it was used together with thematic analysis, pattern matching and explanation building.

3.6.2 Validation

The data generated during the validation stage was qualitative in nature. Qualitative data can be analysed in four main ways: grounded theory, analytic induction, content analysis and narrative analysis. Firstly, grounded theory is a qualitative data analysis technique that derives, systematically gathers and analyses concepts from data through the research process (Bryman, 2016). The method is most suitable for exploratory studies (Babbie, 2016). Secondly, the process of analytic induction seeks universal explanations of a phenomenon through the collection of data until no cases inconsistent with a hypothetical explanation of the phenomenon are found (Babbie, 2016; Bryman, 2016). Thirdly, content analysis involves searching recorded human communication for themes relating to specific predetermined categories (Babbie, 2016; Bryman, 2016; Zikmund et al., 2010). Finally, narrative analysis seeks to provide accounts of previous events in order to develop an understanding of what people make sense of the events (Bryman, 2016). However, the choice of which method to use depends on the research approach adopted.

The case study approach adopted for this study called for analysis techniques that seek to obtain explanations about the effectiveness of arbitration. Since the study started with a theoretical proposition, grounded theory was not appropriate. Secondly, the challenge of determining how many experts are needed to confirm the validity of the proposition (Bryman, 2016) made it difficult to use analytic induction. Nonetheless, narrative analysis could not apply because the nature of the validation envisaged in this study did not seek to understand events as those occurring during the arbitration process. Rather, it sought to understand and make sense of the findings arising from the case data analysis. Hence, qualitative content analysis was a useful analytical tool to assist in extracting themes from the validation interview transcripts. Thematic analysis was then used to categorise recurring themes arising from the explanations obtained from these transcripts (Bryman, 2016).

3.6.3 Synthesis

Achievement of the aim required careful synthesis of the findings. To recap, the aim was to develop a framework for the effective arbitration of contractual disputes. Such a framework could only be developed by understanding how the factors influence arbitral effectiveness. Information required to develop such a framework emerged from a synthesis of data obtained from the cases and the validation. Findings arising from these two analyses were then discussed using the explanation building approach, which formed the basis upon which the framework was developed and refined.

3.7 Validity and Reliability

Critics of the qualitative strategy have argued that its lack of prescriptive rules makes the approach inferior to the quantitative strategy. This critique rests on the widely held notion that qualitative research must demonstrate how it deals with threats to validity and reliability in the same manner as quantitative research does. When it fails to do so, qualitative research is regarded as too subjective, difficult to replicate, not generalizable and lacking in transparency (Bryman, 2016). Conversely, some qualitative researchers opposed to validity adherents argue that it is “borrowed from quantitative research and therefore based on epistemological frames incongruent with

qualitative values" (Ravitch & Carl, 2016, p. 186). However, to counter these arguments, several criteria have been suggested to enhance the validity and reliability of qualitative research.

As this research was based on case study design, the researcher addressed threats to validity and reliability predominantly based on criteria recommended by Yin (2014). Some of the criteria including triangulation and specification of constructs have already been interspersed in various paragraphs under Sections 3.4 and 3.5 above. This section highlights additional criteria. First, at the end of each interview, key observations were captured in the contact summary form (**Appendix V**) to enhance confirmability (Ravitch & Carl, 2016). A case study protocol (**Appendix VI**) and a case study database were crucial to enhancing the reliability of the findings. The case study protocol ensured that the researcher remained focused on the topic and sought to develop measures aimed at addressing problems to be faced during the study (Yin, 2014). The database consisted of field notes, interview transcripts and a set of case study documents collected during the fieldwork, which were indexed and safely stored. In addition, to make it easier to trace evidence to the findings, this chain of evidence was maintained and safely stored as discussed under Section 3.8. Reliability, also known as dependability, was also enhanced through clearly defined constructs and research questions that guided the entire research design (Miles et al., 2014).

Second, to enhance construct validity, each interview transcript was first checked against recordings and field notes before sending back to its respective interviewee for comments. The aim of this approach, also known as participant or member validation, was to enhance the credibility of the study (Bryman, 2016; Maxwell, 2013; Ravitch & Carl, 2016). Feedback from these participants was carefully reviewed and incorporated into the final transcript before analysis.

Third, threats to internal validity were addressed by using the explanation-building approach. According to Yin (2014) explanation building is a useful case data analysis technique for explanatory studies. Thus, it was used to help in explaining why arbitration is considered ineffective and how the various factors influence arbitral effectiveness.

Finally, threats to external validity were addressed by using thick descriptions and theory as the foundation for this qualitative research. Since this qualitative case study was concerned with testing theory rather than generating theory, a sound theoretical framework was developed to form the basis upon which the research was founded. Effectively, findings were interpreted within the established theoretical framework. However, because the study was predominantly qualitative, multiple cases were considered to achieve the much-desired replication logic (Yin, 2014). Aside from theory, thick descriptions were employed to enhance transferability (Miles et al., 2014; Ravitch & Carl, 2016). The findings were also compared with previous researchers for robustness (Miles et al., 2014).

3.8 Ethical Considerations

The concept of ethics has gained widespread attention in the research community. This is largely due to the very nature of research as a field of inquiry. When such an inquiry is conducted, the researchers must pay attention to the impact of their chosen research designs not only on the participants but also on the contextual setting in which the research is conducted. Thus, researchers must pay attention to any harm that is likely to be caused to participants, lack of informed consent, invasion of privacy and any deception involved (Bryman, 2016; Miles et al., 2014). These transgressions are interrelated, hence measures aimed at countering ethical violations as proposed in this section are intended to address them as such.

The effectiveness of arbitration is a sensitive concept: it touches on the integrity of arbitrators, parties, party representatives, witnesses and experts involved in the process. Information relating to the effectiveness of arbitration is highly confidential and may not be readily divulged to persons or entities that were not part of the process. The confidential nature of arbitration places a duty upon all participants of arbitration to ensure that the proceedings remain only known to the participants. For such information to be divulged to external persons, participants require assurance that such information would be used only for the purpose for which it was sought. Any research that involves such areas of study is likely to invade the privacy of the participants involved. When dealing with such topics, maintaining confidentiality and ensuring sufficient disclosure to the study participants are as important (Babbie,

2016; Miles et al., 2014) as ensuring that the research does not put participants at risk (Creswell & Creswell, 2018). Hence, measures were put in place to assure participants that their responses would be treated with strict confidentiality.

To achieve this, it was necessary to assure the participants that data to be collected was intended for academic purposes only. Therefore, a letter of invitation to participate in the study was prepared with a clear statement that the data to be collected would not be analysed individually but would be aggregated to enable the researcher to make inferences (**Appendix VI**). A key disclosure ingredient of the letter that was intended to assure the participants of the importance of this research was a statement explaining how findings of the research would help in enhancing the effectiveness of arbitration as a dispute resolution method. The research was also authorised by the National Commission for Science, Technology & Innovation (**Appendix VII**). The researcher also sought informed consent from all participants prior to data collection (Fellows & Liu, 2015). All data collected was secretly coded and pseudonyms used (Babbie, 2016) to ensure that its inclusion in the thesis and in any published findings did not provide any trace to its origin. For instance, all claims, counterclaims, and awards were categorised in multiples of Kenya Shillings 50 million to minimise chances of traceability. To avoid unauthorised access, the researcher undertook to ensure that all data was safely stored in the Department of Construction Management, Jomo Kenyatta University of Agriculture and Technology.

One critical aspect of ethical practices of research is deception during the writing phase. Creswell and Creswell (2018) caution researchers against temptations to suppress, falsify or invent findings to meet their own or their audiences' needs. This deception is particularly typical of projects funded by agencies that have a vested interest in the outcomes of the research (Bryman, 2016). Such agencies may desire to influence the content of the research report by demanding draft copies of the research report before its final dissemination. In addition, researchers may orient their literature review toward their preferred inclination (Babbie, 2016).

While it is acknowledged that this research was partly funded, efforts were made to ensure that no funding agency restricted the content of this research report and any

publications arising from it beyond the ethical provisions included herein. The researcher also ensured that the literature contained in this report is as balanced as possible and reflects the true picture of what has been reported in research works on this subject. Finally, the researcher endeavoured to ensure that the works cited herein reflect a true picture of what the study indicates as having been stated by the authors of those respective works.

3.9 Conclusion

The qualitative research strategy was found to be the most appropriate to answer the research question. The strategy was selected because of practical considerations revolving around data access. It was the best strategy for studies on sensitive topics such as the effectiveness of arbitration, which require the researcher to establish meaningful relationships that would yield data required to address the research question.

The various approaches to qualitative inquiry were considered. After considering the merits and demerits of the various research designs, the case study research design was found to be the most appropriate approach to answer the research question. Since this researcher had already developed a theoretical framework, a comparative case study design was chosen because of its strength in theory testing.

Multiple case study design was chosen to provide findings that are more robust. In this regard, five cases were purposefully selected from the list of arbitration cases decided by the Milimani Commercial Courts Commercial and Tax Division of the High Court in Nairobi. Participants were then contacted to seek their consent to participate in the study.

The Chapter also justified the choice of interviews and documentation for case data collection. The rationale for choosing validation interviews was discussed.

Since this qualitative study started with a theoretical proposition, the eleven constructs were operationalised into 88 factors, surrogates, and sub-surrogates.

The data analysis strategy involved analysis conducted at three levels. Case data analysis focused on strategies for analysing data arising from the cases. Qualitative

content analysis, pattern matching, and cross-case synthesis were the most appropriate data analysis techniques. The explanation building approach was then selected to help in establishing convergence. Finally, qualitative content analysis and thematic analysis were crucial to analysing validation data.

The next Chapter presents analyses the data and presents the results.

CHAPTER FOUR

ANALYSIS OF DATA

4.1 Introduction

The previous chapter outlined the various methods used in carrying out this research. In this Chapter, the focus shifts to the analysis of empirical data emerging from the fieldwork. The Chapter is structured into ten sections. The second section following this introduction describes the various cases that were analysed. The profiles of the study participants are described in the third section. The fourth section explores the preliminary themes arising from the analysis while the fifth section examines the various dimensions of arbitral effectiveness. The various factors influencing the effectiveness of arbitration are described in the sixth section. The seventh section explains the relationship between the effectiveness of arbitration and its influencing factors. A synthesis of the framework for arbitration of contractual disputes is presented in the eighth section while validation of the structural model and the framework are presented in section nine. The five objectives are addressed in the fifth to the ninth section. The researcher makes extensive use of content analysis and thematic analysis to identify and extract themes from the data. Finally, the conclusion is that the effectiveness of arbitration is influenced by factors revolving around award favourability, distribution of control, approaches to the presentation of evidence, the competence of the tribunal and complexity of the dispute. The Chapter ends with a conclusion in the final section.

4.2 Case Description

A total of thirteen interviewees distributed across five cases participated in this research, as shown in **Table 4.1**. The table indicates code names of these cases and participants as used throughout this Chapter.

Table 4.1: List of abbreviations representing various participants

Category of Participant	Case 1	Case 2	Case 3	Case 4	Case 5
Claimant			CM3		CM5
Claimant's Representative	CR1	CR2	CR3	CR4	CR5
Respondent				RS4	
Respondent's Representative	RR1	RR2		RR4	
Arbitrator	AB1		AB3		

Table 4.2 summarises the various characteristics of these cases. Rounded off to the nearest ten million, claims ranged between KSh 10-370 million while counterclaims ranged between Ksh 10-360 million. Final claim awards amounted to 31-139 percent of the claim sizes and ranged between Ksh 10-340 million. The tribunals dismissed two of the counterclaims while in one case, the tribunal awarded less than Ksh 50 million, which was approximately five percent of the counterclaim size.

Each case involved two parties in dispute, had one contract agreement on the subject matter of the dispute, relied on CIArb Kenya Rules that were clear across all the five cases, and was conducted on *ad hoc* basis. Given that they all required both documents and hearings, preliminary meetings were crucial mainly for introductions and housekeeping while prehearing conferences were held to confirm compliance. Additionally, post-hearing written submissions were filed in all cases except for respondents in Cases 2 and 3. Nonetheless, all cases, except Case 5, required a sole arbitrator to resolve the dispute. A multi-member tribunal handled Case 5.

The nature of the cause of the disputes in three cases involved both quantum and contract interpretation of the issues in dispute while one involved contract interpretation, thus calling for hearings. However, one case involved a dispute over quantum only, but hearings were still held. All cases, except Case 3, took more than six months to conclude.

Table 4.2: Summary of case characteristics

S.No.	Characteristics	Case 1	Case 2	Case 3	Case 4	Case 5
1	Size of the tribunal	Sole arbitrator	Sole arbitrator	Sole arbitrator	Sole arbitrator	Multi-member tribunal
2	Nature of the dispute	Quantum and Contract interpretation	Quantum and Contract interpretation	Quantum	Quantum and Contract interpretation	Contract interpretation
3	Claim size (Ksh million)	50 – 100	350-400	100-150	<50	50 – 100
4	Counterclaim size (Ksh million)	Nil	<50	Nil	<50	350-400
5	Claim award (Ksh million & % of the claim size)	50 – 100 139%	300-350 91%	50 – 100 58%	<50 100%	<50 31%
6	Counterclaim award (Ksh million & % of the counterclaim size)	Not applicable	Nil	Not applicable	Nil	<Ksh50 5%
7	Actual duration taken (months)	33.3	33.7	5.9	22.8	51.7

Case 1

Case 1 involved a dispute over a contractual claim of between Ksh 50-100 million arising from a project involving construction of an office block. This case was concluded after more than 33 months. The claim succeeded, following the tribunal's award that exceeded the claim size. This award was issued about one year after concluding the hearings. After the delivery of the award, the respondent challenged the award on grounds of excess jurisdiction. The matter remained unresolved at the court for five months, at the end of which the court varied the award. The arbitrator and party representatives for both the claimant and the respondent participated in the study.

Case 2

Case 2 involved a dispute over a contractual claim size of between Ksh 350-400 million and a counterclaim of less than Ksh 50 million, both arising from a civil engineering project. After concluding the hearings, the arbitrator awarded the

claimant approximately 91 percent of the claim size. The counterclaim, however, failed. The award was issued more than thirty-three months from the date the arbitrator was appointed but less than three months after the date of the last sitting. Following delivery of the award, the respondent challenged the award based on the tribunal's conduct. The application was dismissed five months later. The claimant's and respondent's representatives participated in the study.

Case 3

Case 3 involved a dispute over a contractual claim of between Ksh 100-150 million arising from a housing project. Six months later, the arbitrator awarded the claimant approximately 58 percent of the claim size. This award was issued three months after concluding the hearings. Following delivery of the award, the claimant successfully applied for adoption and enforcement of the award, which was granted less than one month from the application date. Two years later, the respondent challenged the award on grounds of *locus standi*. The court heard and dismissed the application after six months. The arbitrator, claimant and claimant's representative participated in the study.

Case 4

Case 4 involved a contractual claim of less than Ksh 50 million and a counterclaim of similar size, both arising from a housing project. After close to two years, the arbitrator issued a claim award equivalent to the claim size. However, the arbitrator dismissed the counterclaim. The final award was issued almost eleven months after concluding the hearings. Following delivery of the award, the claimant applied to the court for enforcement. The court heard and allowed the unopposed application three months later. The respondent, claimant's and respondent's representatives participated in the study.

Case 5

Case 5 involved a contractual claim of between Ksh 50-100 million and a counterclaim of between Ksh 350-400 million arising from a housing project. After almost 52 months, the tribunal awarded the claimant and the respondent 31 percent and five percent of their claim and counterclaim sizes, respectively. This award was issued more than seven months after concluding the hearings. Following delivery of

the award, the respondent applied to the court to set aside part of the award on grounds of excess jurisdiction and public policy. The court heard and dismissed the application ten months later. The claimant and claimant's representative participated in the study.

4.3 Participant Characteristics and Profiles

Out of the targeted twenty-five participants, thirteen interviewees participated. As **Table 4.3** shows, these participants included two arbitrators, three parties (disputants) and eight party representatives. In terms of professional distribution, most of the participants (69 percent) were advocates of the High Court of Kenya, three (23 percent) were construction professionals while one (8 percent) was an accountant. All the party representatives, except one, were advocates. Each interview lasted approximately one hour. These interviews were conducted on diverse dates between May-November 2018.

Impressively, all the claimants' representatives participated in the study. However, a few arbitrators were involved because the arbitrators in Cases 4 and 5 were unresponsive while the arbitrator in Case 2 had passed on. In Case 3, the respondent, who had represented himself in the proceedings, had also passed on. Given the sensitive and confidential nature of arbitration in general, the respondents in Cases 1 and 5 declined to participate, so did the respondent's representative in Case 5. Claimants in Cases 1 and 2 were unreachable while in Case 4, the Claimant referred the researcher to its party representative. Nonetheless, the data represents a good mix of the targeted participants, covering arbitrators, parties, and their representatives.

Majority of the party representatives (75 percent) had extensive experience in their respective fields, spanning more than ten years. In addition, most of the party representatives (88 percent) had some knowledge and experience in arbitration while 63 percent had experience in representing disputants in construction disputes. However, two party representatives (25 percent) had less than ten years' experience in their fields. Whereas RR1 had handled two other arbitrations, he did not have any experience in construction disputes. On the other hand, CR1 had no experience in arbitration; neither had he handled any construction dispute.

Table 4.3: Summary of participant profiles

S.No.	Participant Code	Case	Profession	Participant category	Experience (Years)
1	AB1	Case 1	Construction professional	Arbitrator	>20
2	AB3	Case 3	Advocate	Arbitrator	10-20
3	CM3	Case 3	Construction professional	Claimant	10-20
4	CM5	Case 5	Advocate	Claimant	10-20
5	CR1	Case 1	Advocate	Claimant's representative	<10
6	CR2	Case 2	Construction professional	Claimant's representative	>20
7	CR3	Case 3	Advocate	Claimant's representative	10-20
8	CR4	Case 4	Advocate	Claimant's representative	10-20
9	CR5	Case 5	Advocate	Claimant's representative	10-20
10	RR1	Case 1	Advocate	Respondent's representative	<10
11	RR2	Case 2	Advocate	Respondent's representative	10-20
12	RR4	Case 4	Advocate	Respondent's representative	>20
13	RS4	Case 4	Accountant	Respondent	>20

The two arbitrators had extensive experience in handling construction disputes. Notably, one of the arbitrators (AB3) was an advocate of the High Court of Kenya and had handled several arbitrations, some of which involved construction disputes. Finally, the three parties had no experience in arbitration. Thus, they relied on the expertise of their experienced counsels.

Another set of participants was crucial to the validation phase of the study. These participants were code-named VE1, VE2, VE3, VE4 and VE5, where VE stands for Validation Expert. VE1 and VE4 were quantity surveyors with VE4 also doubling up as an advocate, VE3 and VE5 were architects while VE2 was an advocate. All these experts had more than twenty years of experience in their respective primary professions and extensive experience in arbitration.

4.4 Preliminary Analysis

4.4.1 Participants' Sentiments on Arbitral Effectiveness

The three measures of arbitral effectiveness considered in this study include cost-effectiveness, time efficiency and quality of the award. One way of discerning the general perception of participants in qualitative research is by examining their sentiments. Positive sentiments suggest satisfaction while negative sentiments

suggest dissatisfaction. **Table 4.4** displays case-by-case auto-coded positive and negative sentiments for the entire dataset. Generally, there were more negative sentiments than positive sentiments across all cases. These negative sentiments imply that participants in the cases had negative perceptions of the effectiveness of construction arbitration.

Table 4.4: Case by case sentiments for the entire dataset

Case	Positive	Negative
Case 1	47%	54%
Case 2	43%	57%
Case 3	37%	63%
Case 4	38%	62%
Case 5	20%	80%

As the table reveals, Case 5, in which only the claimant and its representative participated, had the highest proportion of negative-positive sentiments (80:20) while Case 1, in which the arbitrator and the party representatives participated, had the lowest (54:47). Interestingly, Case 4 in which the respondent and the party representatives participated had a similar proportion of negative-positive sentiments to Case 3 in which the arbitrator, claimant and claimant's representatives participated. Similar observations can be made of Cases 1 and 2. Thus, the arbitrators' participation in Cases 1 and 3 does not have a significant impact on the sentiments.

The relative distribution of these sentiments across the various surrogates of arbitral effectiveness is displayed in **Table 4.5**. Generally, there were more negative than positive sentiments on arbitral effectiveness in all cases except Case 1, with Case 4 generating the highest proportion of negative sentiments. Nonetheless, most of the sentiments across the cases arose from the quality of the award.

Results show that the distribution of these sentiments varied from case to case. For instance, Case 1 generated a higher proportion of positive-negative sentiments on cost-effectiveness and quality of the award. However, participants had a negative perception of time efficiency as reflected in the higher proportion of negative-

positive sentiments. This finding suggests that participants were more satisfied with the cost performance and the quality of the award than with time performance.

Table 4.5: Distribution of sentiments across measures of arbitral effectiveness

Factor	Sentiment	Case 1	Case 2	Case 3	Case 4	Case 5
Arbitral effectiveness	Positive	9	5	6	1	2
	Negative	8	8	10	12	3
Cost effectiveness	Positive	1	1	1	0	0
	Negative	0	1	3	6	0
Time efficiency	Positive	1	2	3	1	0
	Negative	2	3	3	3	0
Quality of the award	Positive	7	2	2	0	2
	Negative	6	4	4	3	3

The rest of the cases, which generated more negative-positive sentiments, displayed a slightly different pattern. For example, participants in Cases 2, 3 and 5 seem to have been more dissatisfied with the quality of the award while participants in Case 4 appear to have been more concerned about the cost-effectiveness. Participants in Cases 2 and 3 were neutral on cost-effectiveness and time efficiency, respectively. There were no sentiments on cost-effectiveness and time efficiency arising from Case 5.

However, in proportional terms, cost-effectiveness generated a considerably higher ratio of negative-positive sentiments while the quality of the award generated the least. This spread suggests that participants were more agreed on their perception of the quality of the award than they were about procedural efficiency.

4.4.2 Themes from the Collected Data

One method of generating preliminary themes is by using word frequency searches and word clouds (Thomas, 2016). A word frequency search was simultaneously conducted among all participants' data to give insights into the 1000 most used words, each with a minimum of three letters, with exact matches. **Figure 4.1** shows the word cloud generated to amplify the most frequently used words. The frequency search revealed that the ten most frequent words included "arbitrator," "think,"

"parties," "time," "one," "court," "arbitration," "award," "claimant" and "respondent."

Figure 4.1: Word frequency cloud

(Source: Field Data, 2018)

These words suggest the most critical themes to the participants. Indeed, these words imply that participants' perception of the effectiveness of arbitration had more to do with the role of the arbitrator and the parties, the process, and its outcome. Significantly, the intervening role of the court in the arbitral process was central to the participants' perception of arbitral effectiveness, perhaps because the disputes were eventually taken to court. In addition, these words suggest that participants were more concerned about time efficiency than they were about the quality of the award but less concerned about cost-effectiveness. These findings suggest that out of the three dimensions of arbitral effectiveness, a framework for effective construction arbitration should first address time performance.

4.5 Analysis of the Dimensions of Arbitral Effectiveness

4.5.1 Cost-effectiveness

The first dimension of arbitral effectiveness is cost-effectiveness. In this study, cost-effectiveness was measured using six surrogates: cost as a percentage of the claim,

cost as a percentage of the counterclaim, cost as a percentage of the claim award, cost as a percentage of the counterclaim award, actual cost in relation to expectation and reasonableness of the cost incurred. **Table 4.6** is a comparative summary of these costs. Taken as a percentage of the claim size, the cost to each party ranged between 0.4 percent for the respondent in Case 2 to 25.2 percent for the claimant in Case 3. However, the cost as a percentage of the counterclaim ranged between 2.8 for Case 5 to 27.2 percent for Case 2. Essentially, the lower proportions of cost relating to Case 2 can be attributed to the large size of the claim.

Table 4.6: Cost as a percentage of the claim, counterclaim and award sizes

Surrogate	Disputant	Case 1	Case 2	Case 3	Case 4	Case 5
Cost as a percentage of the claim size	Claimant	7.8	1.3	25.2	8.1%, excl. legal fees	13.4
	Respondent	7.0	0.4	N/A	19.7	N/A
Cost as a percentage of the counterclaim size	Claimant	N/A	27.2	N/A	11.8%, excl. legal fees	2.8
	Respondent	N/A	8	N/A	28.7	N/A
Cost as a percentage of the claim award	Claimant	5.6	1.5	23.2	8.1%, excl. legal fees	42.6
	Respondent	5.1	0.5	N/A	19.7	N/A
Cost as a percentage of the counterclaim award	Claimant	N/A	∞	N/A	∞	54.1
	Respondent	N/A	∞	N/A	∞	N/A

However, taken as a percentage of the claim award, the cost ranged between 0.5 percent in Case 2 to 42.6 percent in Case 5. Additionally, taken as a percentage of the counterclaim award, the cost was 54.1 percent in Case 5, the only case in which the counterclaim partially succeeded. A comparison of the cost as a percentage of the claim and of the claim award suggests that the claim in Case 5 was exaggerated. Indeed, it is the only case in which the tribunal awarded less than 50 percent of both the claim and counterclaim (see **Table 4.2** above).

Perhaps the costs incurred in Cases 2 and 4, where the tribunals did not award any sums on counterclaims, could have been lower had the respondents not presented these counterclaims. The cost of arbitration in these two cases ranged between 8-28.7 percent of the counterclaim values. Thus, the counterclaims had a negative impact on the cost of arbitration in both cases.

Results show that claimants incurred higher costs compared to respondents. For example, the cost as a percentage of the claim was 7.8 percent and 1.3 percent for the claimants while similar costs for the respondent were 7 percent and 0.4 percent in Cases 1 and 2, respectively. Similar observations were made of the cost as a percentage of the claim awards. This finding suggests that claimants spent considerable resources in researching and preparing their documents to increase their chances of securing favourable awards.

The above analysis focused on absolute costs as incurred by the disputants. To discern whether the costs were effective, parties and their representatives were asked how much they expected to spend on the arbitration. Their responses were compared to the actual costs incurred and summarised in **Table 4.7**. Five participants (45 percent) in four cases indicated that the actual cost incurred exceeded what they initially expected. For instance, CR2 indicated that the claimant incurred 1.5 percent of the claim award, three times the expected amount of 0.5 percent. In addition, CR3 reported the claimant spent 23.2 percent of the claim award compared to the expected 4.6 percent. Two participants in Cases 2 and 4 revealed that their costs were within expected values while two party representatives in Cases 4 and 5 were not aware of their client's expected costs.

Table 4.7: Summary of responses on cost expectation

Case	Actual cost exceeded the expected cost	Actual cost less than or equal to the expected cost	Not aware
Case 1	1	0	0
Case 2	1	1	0
Case 3	1	0	0
Case 4	2	1	1
Case 5	0	0	1

In addition to the expected costs, parties and their representatives were asked to rate the reasonableness of the actual cost incurred. **Table 4.8** reveals that participants felt that the cost incurred was not reasonable in three cases but reasonable in two of the cases. One of the participants in Case 2, RR2 felt that this cost was reasonable but considerably higher than that incurred under litigation while four participants, RR1,

CR2, CM5 and CR5 felt that the cost incurred grew because of the time spent in the arbitration.

Table 4.8: Excerpts of responses on reasonableness of the cost incurred

Case excerpts	
Reasonable	**Not reasonable**
"When I look at the amount which was eventually awarded of Ksh [>300] million and also given that it had taken a long time to do the work, it was reasonable" (CR2). "But my take is comparing to litigation which we are accustomed to, it was expensive. Because the government doesn't pay anything when we go to court. We file our documents for free, we do everything for free" (RR2). "I would say it was fair given the time spent on the arbitration. It took quite long, and fees grew depending on how long the matter took" (CM5). "In terms of money cost between the two, it makes sense. The only cost they lost on is time, opportunity cost" (CR5).	"It was slightly on the higher side particularly considering that this was an arbitration; it could have been much lower. If the whole process could have been conducted faster, the cost would have come down considerably. But because of the long time it took, I would say the costs were rather on the higher side" (RR1) "I think it was on the higher side. In fact, looking at the breakdown, most of the costs involve award writing which we had no control over" (CR4).

One surprising observation is that the participants in Case 5 felt the cost incurred, which was 42.6 percent of the claim award, was reasonable, although no sentiments were recorded against the case, as shown in **Table 4.5** above, perhaps because the participants were unaware of the budgets. These participants may have assessed their cost based on the duration of 51.7 months taken to resolve the dispute. Notably, CR4 expressed concerns over the cost incurred on award writing, which he stated was beyond control, having taken 10.7 months, almost half the overall duration. Finally, both RR1 and CR4 felt that their costs were "*on the higher side*." Considering both absolute and relative costs, the above analysis suggests that Cases 2 and 5 were cost-effective while Cases 1, 3 and 4 were ineffective.

4.5.2 Time Efficiency

The second dimension of arbitral effectiveness is time efficiency. In this study, time efficiency was measured using three surrogates: actual duration against expected duration, and reasonableness of the duration taken. **Table 4.9** summarises case-by-case findings and participants' excerpts. Generally, the duration taken to conclude all the five cases exceeded the duration participants expected (see also **Table 4.2**).

Majority of the participants expected the cases to take less than six months. However, CM3 and participants in Case 5 expected their cases to take more than six

months. Participants were generally split on the question of the reasonableness of the time taken. Whereas participants in Cases 1 and 5 felt that the duration was unreasonable, Case 2 participants were satisfied with the duration of 33.7 months taken to handle the large case. This finding on Case 5 surprised because no sentiments were generated against the case on time efficiency, as earlier observed in **Table 4.5**. Additionally, contradicting responses were observed among participants in Cases 3 and 4.

Notably, two participants, CR1 and RR4 related time performance of arbitration to that of litigation. While CR1 felt that there was no difference between the two methods, RR4 observed that his case, whose claim and counterclaim were less than Ksh 50 million each, had performed better than it would have had it gone for litigation. Strangely, the case took 22.8 months to resolve against RR4's expected duration of six months. The long duration taken in Case 4 was attributed to the counterclaim belatedly introduced by the respondent.

Although the general feeling is that the time performance of these cases should have been better, case outcomes on this parameter were mixed. The above analysis indicates that the time performance of Case 2 was efficient because the duration taken, which was satisfactory to the participants, appears to match the size of the case. In addition, Case 3 was efficient because given its size; it took less than six months to conclude. However, Cases 1, 4 and 5 were inefficient because not only did their respective participants feel they delayed, but also the duration taken for each does not seem reasonable given the sizes of the claims.

Table 4.9: Excerpts of responses on time efficiency

Case	Expected Duration	Reasonableness of the time taken: Reasonable	Reasonableness of the time taken: Unreasonable
Case 1	"Six months" (RR1). "Three months" (CR1). "Less than six months" (AB1).		"It was unreasonably long... So, I think both the arbitral tribunal and the parties make it take unreasonably long because of non-compliance" (RR1). "Because really of the slow pace of conducting the proceedings. It took long. You see arbitration is supposed to expedite the process of litigation. It is an alternative to litigation and that's why it's being promoted especially for commercial transactions so that people will get to resolve their disputes faster, people get back to their businesses so that you don't incur a lot of losses or shut down. But when it takes more or less the same time it takes in court, then the purpose is defeated" (CR1).
Case 2	"I think in my own wild imagination, I thought this would be pretty fast. I really thought that possibly within six months, we would be done" (CR2). "Six months" (RR2).	"I think it was reasonable time from the date of beginning to the date when it ended" (CR2). "Time was reasonable…" (RR2).	
Case 3	"I expected it to take like a minimum of three months depending on the schedule of the arbitrator" (CR3). "Two to three years" (CM3). "Actually, when I look at it, I thought it's a matter that would take two days or three days or four days…So I had a day for that, for the preliminary meeting. I expected the claimant to take two days, by this I mean 9-4pm, and then depending on the evidence, I expected the respondent to take two days and there would be another day. So, five full working days would have been sufficient for the full hearing…Because as you see, this is an arbitration I'm seeing which can take four consecutive dates. It's possible to finish it in a week" (AB3).	"It was reasonable in the circumstances" (CR3).	"It took so long. It's the reason why people don't want to go to arbitration, to go to this legal process. It can take five to six years to finish your case" (CM3).
Case 4	"About a month, but not running continuously" (CR4). "About six months" (RR4)	"If you compare it with the normal court processes, you can say it was expeditious, completely expeditious" (RR4).	"It took slightly longer than expected…The respondent delayed the process of filing the documents when it made an application to amend its defence by introducing a counterclaim. This interfered with the timetable as initially agreed" (CR4).
Case 5	"Six to twelve months" CM5). "Six months to 1.5 years" (CR5).		"It took five years; it took too long" (CR5. "I would say it was fair. But it took a long time" (CM5).

4.5.3 Quality of the Award

The final dimension of arbitral effectiveness is the quality of the award. Such quality was measured in terms of the finality of and compliance with the awards, the extent to which the awards encouraged disputants to maintain their business relationships and whether the awards encouraged the disputants to refer future disputes to arbitration. Excerpts of participants who responded to each of these measures are shown in **Table 4.10**.

Three awards were outrightly challenged in court. In these cases, respondents were unwilling to comply with the awards. The only exception is Case 3 where the parties disagreed on how it was to be executed even after agreeing to adopt the award by consent. The court was thus involved in assisting the parties through the execution process, suggesting a lack of willingness to comply with the award. In fact, by opting to challenge the adopted award two years later, the respondent was expressing its sustained reluctance to comply. The other exception was Case 4 where the respondent did not oppose the application to adopt the award but also failed to honour the orders after adoption. These findings suggest that the respondents did not agree and were not willing to comply with the outcomes.

On the question of how arbitration sustains business relationships, pattern-matching analysis revealed frosted relations between the disputants in at least four cases (Cases 2, 3, 4 and 5). However, in Case 1, while CR1 was willing, RR1 remained indifferent because he felt that the claimant was simply exercising his contractual right. Although his neutrality leaves it open for the respondent to award future contracts to the claimant, the respondent's reluctance to participate in the arbitration casts doubt on such a possibility. On the contrary, in Case 2, whereas CR2 was willing because he felt that the respondent "*will not repeat the mistake*"; RR2 felt the claimant "*should be blacklisted*." It will thus be difficult for the respondent, a public entity that initiates several construction projects, to award similar projects to a willing claimant.

Table 4.10: Excerpts of responses on the quality of the award

Surrogate	Case excerpts
Maintenance of business relationships	*Neutral* "…I would leave it to them because the way the claimant presented the dispute; I think it was perfectly within their right...So I wouldn't be the person to tell my client not to do. It's within their choice…" (RR1). *Sustained relations* "Yes, because the problem at the end of the day was not the problem of the client, but of the respondent because they were misadvised mostly by the quantity surveyors" CR1). *Frosted relations* "In fact, our take is that he should be blacklisted from any further contracts with the government" (RR2). "No, there was a lot of infighting between the respondents and everyone wanted a piece of the cake. So, we wasted a lot of time in court filing application after application. They were disorganised, there were a lot of shenanigans" (CR3). "The respondent contested the award by applying to the high court to set it aside. Even after the high court dismissed the setting aside application and issued an enforcement decree, the decree was not honoured and has not been honoured to date" (CR4). "That one is blacklisted" (RR4). "Their [counter] claim was manufactured...so I wouldn't advise them to engage with them in any other project" (CR5).
Referring future disputes to arbitration	*Confidence in arbitration* "Arbitration if you ask me, deals with merits of the dispute, the proper issues in dispute…when you now go to court…you are not going to get a QS sitting as a judge. You are not going to get an architect sitting as a judge…But if you really want to understand the actual dispute, it is better to resolve at the level of arbitration...But the bottom-line is that I would still recommend arbitration as the best way of resolving construction claim disputes like the one we did" (RR1). "I think if we went through the court process, we would still be in court because there is still an avenue go to the court of appeal or to the supreme court. Although it delayed, we cannot compare it to the court process" (CR1). "For the reason that there was justice finally toward the party obtained only through arbitration" (CR2). "Yes, but if the administration is properly managed. Maybe through the centre where we have case managers, the issues of integrity are really looked into, I do not have any problem with arbitration as an ADR" (RR2). "Because it's a quicker way to solve disputes...It's fairer and arbitrator's award is not subjected to appeal, the arbitrator's award is final and it moves the economy, the business the entrepreneurs involved are able to resolve the disputes quite fast and satisfactorily without a lot of animosity and the delays that we get at the courts" (CR3). "I think if you have a dispute, go for arbitration. That's your right. If there is a dispute, you go to arbitration. It's your right to tell the client to pay. If they refuse, then you go to court" (CM3). "Even though things didn't pan out the way we expected, arbitration is still the way to go" (CR4).

Table 4.10 *(cont'd)*

Surrogate	Case excerpts
	"The only reason is because the arbitrators are experts in the industry, the process is expeditious. If you give me an option of a court and arbitration, I will go to the same process" (RR4).
	"In principle, yes, but the arbitrator is very important and the advocate on the other side…Of course, if they are intent on having the matter resolved, we'll resolve it in a very short period of time. If you agree in principle to go to arbitration, in own context if it was possible to make that determination alongside the determination of who is going to be the arbitrator, that will be good. Problem is we agree first to go to arbitration and to agree on arbitrator" (CR5).
	Hesitance
	"Rubbish, waste of time. It's a waste of time. Okay, I'm saying out of experience because you see this case, it was just a case where gangsters just put their heads together and did a kangaroo court" (RS4).
	Depends
	"It depends on the nature of the dispute. Arbitration is expensive if you are willing to spend" (CM5).

Finally, there was overwhelming confidence in arbitration in all cases. Participants cited various reasons, including expertise (Cases 1 and 4), finality (Cases 1 and 3), speed (Cases 1, 3 and 4) and justice (Case 2). However, two participants, RR2 and CR5 were conditionally willing to refer future disputes to arbitration. Their concerns in both instances were associated with the arbitrator selection. These sentiments also appeared to have influenced RS4's reluctance. Thus, getting the right arbitrator was central to their thought process.

In sum, while participants generally preferred to refer future contractual disputes to arbitration, resolution of the disputes in the five cases was not finalised during the arbitration proceedings. Parties resorted to the courts to enforce, challenge and/or execute the awards, leaving the disputes unresolved beyond the reference. Thus, unsuccessful parties were unwilling to comply with the awards and could only be compelled by the courts.

Additionally, the disputes appear to have strained the business relationship that previously existed between the disputants. An award that is not voluntarily complied with or is challenged does not foster good business relations and does not encourage participants to use arbitration as a forum for resolving similar disputes is essentially a poor award. Although most participants still preferred arbitration as a means of resolving construction disputes, the above findings suggest that each of the awards in the five cases was of poor quality. The reason for this conclusion is that it defeats the

aim of effective arbitration to prefer a forum where business relationships are strained and compliance with and/or finality of the award is not guaranteed.

4.5.4 Overall Effectiveness of the Cases

A summary of the findings of the analysis is contained in **Table 4.11**. The last column in the table makes inferences on findings arising from the three measures to determine how effective the cases were. Consistent with the principles outlined in Miles and Huberman (1994), outcomes of cost-effectiveness, time efficiency and quality of the award were transformed into arbitral effectiveness based on a five-point scale: most ineffective, moderately ineffective, least ineffective (or least effective), moderately effective and most effective.

Table 4.11: Summary of findings on arbitral effectiveness

Case	Cost-effectiveness	Time efficiency	Quality of the award	Arbitral effectiveness
Case 1	Ineffective	Inefficient	Poor	**Most ineffective**
Case 2	Effective	Efficient	Poor	**Least ineffective**
Case 3	Ineffective	Efficient	Poor	**Moderately ineffective**
Case 4	Ineffective	Inefficient	Poor	**Most ineffective**
Case 5	Effective	Inefficient	Poor	**Moderately ineffective**

The table reveals that two cases were cost-effective; two were time-efficient but all produced poor quality awards. The outcome of the arbitral process should be as good as the process for arbitration to be effective. In this regard, Case 2 was determined to be ineffective despite having been cost-effective and time efficient. However, it was the least ineffective because of its relatively good performance on these two surrogates.

Conversely, Cases 1 and 4 were the most ineffective because they not only produced poor quality awards but were also cost-ineffective and time inefficient. In fact, the respondent declined to be interviewed in Case 1 because it did not desire to be reminded about the matter, having lost at the arbitration. The counterclaim may have influenced the performance of Case 4, but it had little impact on Case 2, whose sheer claim size may have determined its performance.

Meanwhile, Cases 3 and 5 were moderately ineffective because they performed well on time efficiency and cost-effectiveness, respectively. The moderate performance of Case 5 can be attributed to the counterclaim award while that of Case 3 can be attributed to the fact that the claim was not contested. Overall, the five cases were determined to be ineffective.

The factors that influenced this ineffectiveness are considered in the following sub-sections.

4.6 Analysis of Factors influencing the Effectiveness of Arbitration

4.6.1 Award Favourability

The four surrogates of award favourability include claim award as a percentage of the claim size, counterclaim award as a percentage of the counterclaim size, favourability of and satisfaction with the award. The claim awards exceeded the claim size in Case 1 (**Table 4.2** above). The claim award in Case 4 was equivalent to the claim size. However, the claim award in Cases 2 and 3 exceeded 50 percent of the claim size while that of Case 5 was less than 50 percent. The claim awards were thus favourable to claimants in four cases.

The second indicator measured the counterclaim award as a percentage of the counterclaim. There were no counterclaims in Cases 1 and 3. Nonetheless, the tribunals dismissed counterclaims in Cases 2 and 4. However, the award on counterclaims in Case 5 was less than 50 percent of the counterclaim value. Counterclaim awards were thus unfavourable to the respondents in these three cases.

Participants were asked about the perceived favourability of the awards and their satisfaction with the awards. Results of the analysis for participants' responses to the closed-ended questions are presented in **Table 4.12**.

Table 4.12: Summary of responses on award favourability

Indicator	Response Options	Case 1	Case 2	Case 3	Case 4	Case 5
Favourability of the claim award	Favourable to the claimant	2	2	2	3	1
	Unfavourable to the claimant	0	0	0	0	1
Favourability of the counterclaim award	Not Applicable	2	1	1	0	0
	Unfavourable to the respondent	0	0	0	3	1
	Split	0	0	0	0	1
Satisfaction with the claim award	Dissatisfied	1	1	0	2	0
	Satisfied	1	1	2	1	2
Satisfaction with the counterclaim award	Not Applicable	2	1	1	0	0
	Satisfied	0	1	0	1	2
	Dissatisfied	0	0	0	2	0

All cases returned consistent results on the question of favourability of the claim awards, indicating that the awards were favourable to the claimants. The only exception was Case 5 where the two participants contradicted each other, with CM5 indicating that the claim award was favourable while the CR5 felt that the claim award was split (**Table 4.13**).

All participants in Cases 4 and 5 felt that the counterclaim awards were unfavourable to the respondent. However, the participants' responses in Case 5 drew a pattern like that on the favourability of the claim award. Thus, the awards were unfavourable to the respondent in Case 4 but split in Case 5.

The pattern of responses on the question of satisfaction with the claim and counterclaim awards was consistent across all the five cases. Cross-case analysis revealed that claimants were generally satisfied with the claim and counterclaim awards while respondents were not. Notably, the response from RR1 suggests that the arbitrator overstepped his mandate, which could have formed the basis for the ensuing award challenge. One exception was CR1 who though satisfied, observed that the respondent got less than what it expected.

The above results suggest that parties who received favourable awards were generally satisfied with the outcomes while those receiving unfavourable awards were generally dissatisfied. However, participants' responses appear to have been bipolar, irrespective of the quantum of the awards. Thus, the quantum in relation to the claim and counterclaim sizes does not seem to be a significant consideration.

Nonetheless, these findings suggest that the awards were favourable to the claimant in Cases 1, 2, 3 and 4 but split in Case 5.

Table 4.13: Excerpts of perceptions on award favourability

Indicator	Excerpts
Perceived level of award favourability	*Claim award favourable to the claimant*
	"They got more than what they wanted, they wanted over Ksh 70 million and they got slightly over Ksh 100 million (RR1).
	"I think it was not split, but I think it was a reasonable award on both sides because when I eventually gave this to my client, he didn't feel like he had been denied justice. He was okay with it. When the respondent chose to take it to court to test it, I think the court also found that the award was fair. And so rather the court sustained the award, did not set it aside. So, I think that the award, therefore, could possibly not be faulted by either side" (CR2).
	"It was favourable to the claimant and unfavourable to the respondent" (RR2).
	"What we asked for, we got" (CR3).
	"Totally favourable to the claimant…" (RR4).
	"The claimant was given what he presented. He got what he wanted. He wanted anticipated profits which he got" (RS4).
	"We got all the orders that we needed" (CM5).
	Split claim award
	"We partly succeeded" (CR5).
	Counterclaim award unfavourable to the respondent
	"The award on the counterclaim did not match the counterclaim presented. The [counter]claim was dismissed" (CR5).
Satisfaction with the award	*Claimant generally satisfied with the claim award* "I was satisfied, but not very. Because we did not get all that we wanted" (CR1).
	"We just took the award" (CM3).
	"We got a satisfactory award" (CR4).
	"We got what we wanted" (CM5).
	Respondent generally dissatisfied with the claim award "The arbitrator not only decided what was placed before him but he went and dealt with issues which were not subject of the claim and which were brought in much later after the hearing had been done by way of written submissions. So, the claim was expanded post the hearing. So, we were particularly not very happy with that" (RR1).
	"Completely dissatisfied" (RR2).
	"There was no fairness" (RS4).
	Claimant generally satisfied with the counterclaim award "They were given what they deserved" (CM5).
	Respondent generally dissatisfied with the counterclaim award "I was not satisfied with the dismissal. Just feeling there was bias. As far as I am concerned, there was a case of bias" (RR4).
	"There was no award" (RS4).

4.6.2 Award Fairness

Perceived award fairness was assessed using four measures: award in comparison to expectation, to what the participant considered he deserved and to outcomes for

similar disputes, and perceived fairness of the award. Results of the analysis are displayed in **Table 4.14**.

Participants' responses to the four measures varied across the five cases. Within-case analysis revealed that participants in Cases 1, 2 and 4 generated diametrically opposed responses on the four measures. However, participants in Case 1 agreed that the awards compared favourably with outcomes for similar disputes. Cases 3 and 5 returned positive responses across the four measures.

Table 4.14: Summary of responses on perceived award fairness

Indicator	Response Options	Case 1	Case 2	Case 3	Case 4	Case 5
Claim award when compared with your expectations	Much worse than expected	1	1	0	2	0
	Much better than expected	1	0	0	0	1
	About what was expected	0	1	2	1	1
Counterclaim award when compared with your expectations	Not Applicable	2	1	1	0	0
	About what was expected	0	1	0	1	2
	Much worse than expected	0	0	0	2	0
Claim award in relation to what the party deserved	Much more than deserved	1	1	0	1	0
	As much as deserved	1	1	1	1	2
	Much less than deserved	0	0	1	1	0
Counterclaim award in relation to what the party deserved	Not Applicable	2	1	1	0	0
	As much as deserved	0	1	0	1	2
	Much less than deserved	0	0	0	2	0
Fairness of the claim award	Not fair at all	1	1	0	2	0
	Fair	1	1	2	1	2
Fairness of the counterclaim award	Not Applicable	2	1	1	0	0
	Fair	0	1	0	1	2
	Not fair at all	0	0	0	2	0
Claim award compared with outcomes for similar disputes	Not Applicable	0	0	1	0	1
	As in other disputes	2	1	0	1	0
	Much worse than in other disputes	0	1	0	2	0
	Much better than in other disputes	0	0	1	0	1
Counterclaim award compared with outcomes for similar disputes	Not Applicable	2	1	1	0	1
	As in other disputes	0	1	0	1	0
	Much worse than in other disputes	0	0	0	2	0
	Much better than in other disputes	0	0	0	0	1

Pattern-matching analysis of the excerpts revealed that claimants' teams gave consistently positive ratings while respondents' teams gave consistently negative ratings on their perceptions of the fairness of the claim and counterclaim awards (**Table 4.15**). For instance, claimants' teams indicated that outcomes compared favourably with outcomes in similar disputes, were deserved, were about or better

than expected and were fair while respondents felt otherwise. However, despite observing that the award compared favourably with outcomes for similar disputes, RR1, whose client lost, expressed concerns that the arbitrator had overstepped his mandate. These findings suggest that participants' perception of award fairness may have been guided by the degree of award favourability, which could have determined award acceptability.

Table 4.15: Excerpts of responses on perceived award fairness

Indicator	Excerpts
Claim award compared with outcomes for similar disputes	*Much better than in other disputes* "I think slightly better than in other disputes because I think they understood this case very well which I had my own misgivings whether they were not going to understand it because these guys really twisted things in the process of presenting their case" (CR5).
	As in other disputes "The only challenge we had with this one is that the arbitrator, I think, went overboard to decide matters which were not placed before him" (RR1).
	"I think that in terms of this particular arbitration, because it went through a big test, it went through the High Court, first of all being tested in the first suit which was filed earlier and the arbitrator's position was sustained. And then now the award itself also being tested in court and again the court then granting the orders...And then even after this had been made, the claimant went to court for a decree over the sums awarded, and again we obtained the decree. So, this really means that this particular matter had gone through all full level of testing and sustained. The arbitrator's position was sustained" (CR2).
	"I was happy with the outcome" (CR4).
	Much worse than in other disputes "It is actually one of the cases that informed us to start thinking of having our own arbitration centre" (RR2).
	"Because in the other one, we had two arbitrators. And they were not appointed by any association. Each party appointed its own arbitrator. So, the award was joint. That one was very satisfactory… Everybody was satisfied. In this one, we had a single arbitrator" (RR4).
	"We expected the arbitration process to be more thorough, more professional and the arbitrator to be more balanced and impartial, which we didn't see. It was worse than our courts of law. You can argue a case in court, present evidence and even the judgement is much better than what we saw in this one" (RS4).
Counterclaim award compared with outcomes for similar disputes	*Much better than in other disputes* "Because we claimed for the consequential loss and my advice to the client was 'I am not sure you are going to get that consequential loss' because at the stage when the termination occurred I don't think they were going to get that, but it was put there anyway. So, since that part was dismissed, I wasn't surprised…" (CR5).
	As in other disputes "I have also since also prosecuted many other arbitrations with similar principles and almost every arbitrator I have prosecuted with similar principles agreed with me. So, I think that what was awarded by this arbitrator, therefore, was reasonable and could easily stand the test of other arbitrators" (CR2).
	"We got the result that we wanted" (CR4).
	Much worse than in other disputes "In fact, I was very disappointed" (RR4).

Table 4.15 *(cont'd)*

Indicator	Excerpts
Claim award value compared with what the disputant perceived it deserved	*Much more than deserved* "They claimed that specific figure which on the part of the respondent was already exaggerated and the arbitrator eventually awarded much more than they claimed" (RR1). *As much as deserved* "Well, he was compensated for the loss. We can't say 100 percent, but some justice was done" (CR1). "Looking at the arguments of the Arbitrator" (CR2). "Because there was not much of a defence anyway" (CR3). "It was fair enough" (CM5). "Because it was dismissed. Because as far as I am concerned, there was nothing to be given to them" (CR5). *Much less than deserved* "The dismissal of the counterclaim was not fair. The developer had good reasons why he was not happy." (RR4). "The award is called anticipated profit. We have not even made a profit. It's the cause of our losses" (RS4).
Counterclaim award value compared with what the disputant perceived it deserved	*As much as deserved* "Dismissing the counterclaim was the right thing to do" (CR4). "It was fair enough" (CM5). *Much less than deserved* "We didn't mind even if they awarded us half of what we claimed. But ignoring totally was mischievous. It was outright contempt which adds up to what I have just said about the whole award" (RS4).
Claim award value relative to what was expected	*Much better than expected* "On a scale of 1-10, I would say satisfaction was 7. Because he granted 70 percent of what we claimed" (CR1). "Each party was given what it deserved" (CM5). *About what was expected* "The award was less than what we had claimed but not far off from…Arbitrator awarded…reduced our claim by about Ksh 90 million or thereabout. It was, you know, a fair measure in terms of the percentage on our claim. That was acceptable, looking at the reasons he put down in the award" (CR2). "It was perfect" (CR3). "The final award is not exactly what we wanted; it is a bit less than what we expected but we just accepted" (CM3). "Our claim was for loss of profit on account of termination of the contract. The other claim was for an outstanding certificate that the architect had prepared, but the Employer had not paid. The loss of profit had also been assessed by the project quantity surveyor" (CR4). "We had asked for something more, we didn't get all that we had asked for because part of it was consequential which the arbitrator did not award, they only awarded the primary sums, which for me was reasonable" (CR5). *Much worse than expected* "Because this is something, we challenged in the high court successfully. He went overboard and even decided on what was not pleaded … So, he went overboard in my view. I can authoritatively say so because we successfully challenged that in the high court" (RR1). "It was completely unexpected. Legal issues were not taken care of. Our view was that the claim was statute-barred. In our view he misconducted himself. It was unethical to have been allowed" (RR2). "The quantum, I found the amount awarded to be excessive. It was more than what we expected. It was worse…" (RR4). "The award was below our expectations. It is not something we would expect. It was not done fairly" (RS4).

Table 4.15 *(cont'd)*

Indicator	Excerpts
Counterclaim award value relative to what was expected	*About what was expected* "The counterclaim…came out zero because there was no merit in the counterclaim" (CR2). "Because the counterclaim was an afterthought, a diversionary tactic" (CR4). "The final award matched the value of work done on the ground" (CM5). "The [counter]claim was manufactured, and I think the arbitrators got what the [respondent] was trying to do and I think they explained it in the award" (CR5). *Much worse than expected* "We were not awarded anything; we lost the counterclaim" (RR4). "The arbitrator did not mention in his ruling anything about our side of the claim" (RS4).
Perceived fairness of the claim award	*Fair* "Because the arbitrator more or less agreed with the claim and also the evidence that was there, which was given by the parties, we consider that he evaluated them professionally to a good conclusion" (CR1). "I think that in my view it was representative of what the parties should have been paid at that time… So, I guess the award was reasonable at the time… So, it was fair at the time it was issued" (CR2). "It was fair to us" (CR4). "We wanted possession of the site, and we got it" (CM5). *Not fair at all* "That's why we went to the high court to set it aside" (RR1). "The reason is obvious; the arbitrator was not actually an arbitrator. He was just coming there to preside over what he had already decided" (RS4).
Perceived fairness of the counterclaim award	*Fair* "My client was generally happy with the outcome" (CR4). "The parties were reimbursed monies spent on site. Each party was given interest" (CM5). *Not fair at all* "It was unfairly dismissed" (RR4). "There was no award, there was not even mention" (RS4).

4.6.3 Procedural Fairness

Procedural fairness was assessed using six factors. **Table 4.16** shows results of the participants' response to the closed-ended questions. In Case 1, participants agreed on four factors: fairness of and satisfaction with the rules and procedures, the extent to which the tribunal tried to be fair and the extent to which the tribunal showed concern for disputants' rights. However, they differed on how fairly the dispute was decided and on the ease of recognising, enforcing, and executing the award. This pattern was replicated in Cases 3, 4 and 5.

Table 4.16: Summary of responses on perceived procedural fairness

Interview Question	Response Options	Case 1	Case 2	Case 3	Case 4	Case 5
How would you describe the procedure and rules applied in assessing the dispute	Very fair	2	1	2	3	2
	Not fair at all	0	1	0	0	0
How satisfied were you with the procedure and rules applied in assessing and deciding the dispute	Very satisfied	2	1	2	3	2
	Very dissatisfied	0	1	0	0	0
To what extent did the tribunal try to be fair in the process of handling the dispute	Tried very hard	2	1	2	3	2
	Not at all	0	1	0	0	0
How fairly was the dispute decided	Not fair at all	1	1	0	2	0
	Very fairly	1	1	2	1	2
How would you describe the court process of recognising, enforcing, and executing the award	Very difficult	1	0	1	1	1
	Very easy	1	2	0	1	1
To what extent did the tribunal show concern for disputants' rights	Not Applicable	0	0	0	0	1
	To a great extent	2	1	2	3	1
	Not at all	0	1	0	0	0
	Summary					
	Not applicable	**0**	**0**	**0**	**0**	**1**
	Positive attributes	**10**	**7**	**10**	**14**	**10**
	Negative attributes	**2**	**5**	**1**	**3**	**1**

Case 2 presented a different pattern. The two participants agreed on the ease of recognising, enforcing, and executing the award only, a process that is normally conducted outside the arbitration. These participants' pattern of responses to the question of how fairly the dispute was decided were consistent with that of participants' response in the other four cases. However, their diametrically opposed responses on the perception of the fairness of and satisfaction with procedures, the extent to which the tribunals tried to be fair and the tribunal's concern for disputants' rights, while consistent with their responses on how fairly the dispute was decided, contradicted the pattern of responses in the other four cases. In fact, RR2's dissatisfaction with the procedure may have arisen from the flexible approach adopted by the arbitrator in dealing with procedural gaps, which the representative felt favoured the claimant. Consequently, his proposal for institutional arbitration appears to cast doubt on the integrity of arbitrators in *ad hoc* arbitrations:

> "…for us to take this arbitration forward and for parties to feel that their cases are well taken care of in terms of integrity, we thought we needed a centre where those issues of the procedure are open, are transparent, we have case managers who are constantly monitoring, we are benchmarking with other international centres" [RR2].

Both claimants' and respondents' teams were split on the question of the ease of award recognition, enforcement, and execution. Nevertheless, they agreed that the process is complicated because of the long duration taken to deal with applications for enforcement and challenges thereto (**Table 4.17**). However, some participants, for instance in Cases 1, 2 and 5 felt that consolidation made it easy to handle the opposing applications.

Pattern matching analysis revealed consistent responses between claimants' and respondents' teams on the question of how fairly the disputes were decided. Results show that claimants returned positive responses while respondents returned negative responses. A similar pattern was evident on the question of the extent to which the tribunals tried to be fair. The only exceptions were Case 2 in which the award outcome appears to have influenced RR2's final assessment and Case 4 in which RR4 returned positive ratings despite having lost.

These findings suggest that participants, irrespective of their perceptions of award favourability, were satisfied with the form of arbitration, being documents and hearings and with the rules and procedures used, being the rules of the Chartered Institute of Arbitrators (Kenya Branch) and the various hearing techniques. They were also satisfied with the extent to which the tribunals tried to be fair and the tribunals' concern for disputants' rights. However, the extent of award favourability seems to influence their perception of how fairly tribunals decided the disputes. Nonetheless, perception of the ease of award recognition, enforcement and execution was split between claimants' and respondents' teams. Overall, the high proportion of positive-negative attributes across the six indicators suggests that perception of procedural fairness was generally good in Cases 1, 3, 4 and 5 but average in Case 2 because of the relatively balanced proportion.

Table 4.17: Excerpts of responses on perceived procedural fairness

Indicator	Excerpts
Ease of award recognition, enforcement, and execution	*Difficult* "…I wouldn't say it is easy because it is a legal process and requires the involvement of lawyers. In fact, if anything, the claimant, who after the hearing had fired his lawyers, engaged them when it came to the time of enforcing the award and dealing with our application to set aside. That in itself demonstrates it is not a simple process…As a lawyer you have to be very creative, you have to think outside the box in order to come up with sound reasons and grounds to challenge an arbitral award. So, it is a fairly technical process. Enforcing is not difficult but the difficulty with enforcing is that it is never smooth. The trouble is you anticipate the other side will be opposing it. Another thing is the timeline because you need to do it within a specific period of time. The other side also, if they have to challenge, must do so within a specific time. So the legal technicalities make it not a very easy process…unless the other party is willing to comply, part of the reasons why we are going to the high court to recognise as an order of the court is to facilitate compulsion, compelling the other party to comply. It is never that smooth. As you are thinking of enforcing, you are also thinking of the other side, that they are not likely to comply. So, I need an order of the court to push them and that order of the court needs to be obtained within a specific period of time" (RR1). "When you go to court it's a bit tedious because it takes a little bit of time" (CR3). "It was too long. It took long. In terms of grasp, they grasped the issues but in terms of time, they took a long time because it took more than a year to deal with the application to set aside and the one for enforcement" (CR5). *Easy* "Of course, the process of enforcing is fairly straightforward, you make an application, and the court decides. But the difficulty arises when the other side is challenging. In this one, there was an application to enforce and an application to set aside. In this case, the judge said he was hearing the applications at once. That became easy" (CR1). "Because all we have to do is to go to court and get the, like in this case, the party had applied for setting aside. And the court allowed that in the same cause we could also apply for enforcement. So that as soon as one lapsed, the other one took over" (CR2). "Easy because it is just an application filed in court. It is not complicated" (RR2). "The procedure is fairly straightforward. The challenge is the duration it takes to have the enforcement proceedings go through the motions. This is a systemic problem because there is no special division of the court to deal with arbitration matters. They are handled just like any other civil matters" (CR4). "Very easy because the claimant just filed the matter in the commercial court. The process is not difficult. To enforce the award is simple" (RR4).
Fairness of the rules and procedures	*Fair* "I think the rules are fairly balanced. They were fair because of course then along the way similarly parties created their own rules, you know, either when a situation arose to agree again which way to go, like the timelines and so forth…" CR2). "He gave the parties an opportunity to present their cases" (CR4). "I think the procedures were not different from court procedure and I think they were okay" (RS4). "We got an opportunity to hear their case and to present our response" (CR5). *Not Fair* "It favoured one side" (RR2).

Table 4.17 *(cont'd)*

Indicator	Excerpts
How fairly the dispute was decided	*Not fair at all* "He went overboard in the delivery of the award. He gave the claimant more than what they had prayed for" (RR1). "The only reason I can say is he was part of the team. It is very difficult when a quantity surveyor gives evidence before another quantity surveyor, is giving evidence in favour of the claimant, who is a quantity surveyor these are parties of the same professional body. It carries a lot of weight" (RR4). "Am saying that because he awarded against us. You need to read our argument and you read the applicant's, and the judgement. When we took it to court, they were shocked that an arbitrator can make such judgement" (RS4). *Fairly* "I think again it was fair because it was based on the documents" (CR2). "I can say medium" (CM3).
How the arbitrator showed concern for the disputants' rights	*To a great extent* "I don't think there is a time he would make a decision before hearing both parties. And on other occasions, before the other party appeared, he communicated. 'Confirm with them. Are you people now comfortable?' He appreciated the right for each of the parties to be present during the hearing" (RR1). "I think representation because he felt that parties needed to be represented. And so, he gave them the time and freedom to decide when they could be available for proper representation" (CR2). "He copied every communication to both sides. He also accorded equal time to each side to present its case" (CR4). "He had no problem. He did not violate anybody's rights" (RR4). *Not at all* "He denied us the right to be heard" (RR2). "They didn't show. There was no issue on that" CR5).
How the arbitrator tried hard to be fair	*Not at all* "They could show that they were fair but, in the end, one could see they were not fair" (RR2). *Tried very hard* "He listened to both sides. He gave them as much room as possible to ventilate. But then once they agreed, he put the agreements in writing. And so, he was fair to them in this way that he allowed them to decide and what they decide, he then committed, he kept to that agreement the parties had reached" (CR2). "He listened to both parties. He went through both parties' pleadings, and he referred to every document in the arbitration when making the award" (CR3). "I think he tried to understand why the dispute arose. He didn't come with a predetermined mind" (CR4). "As far as I am concerned, he looked fair" (RR4).
Satisfaction with the procedure	*Satisfied* "I was. The only thing, of course, is that when it comes to emerging situations like in this case where a party leaves, then I realised that the rules do not quite deal with those situations. The rules deal with very straightforward arbitrations rather than complicated arbitrations. So that where you have a party like in this case a party comes and attends, and then walks out, it meant we needed to do research on the spot to demonstrate that these proceedings were now inter parte, not ex parte. But the rules had not said that. So, it meant we had to convince the arbitrator to then agree with us and create that as a procedure. And so, the rules may not be sufficient to deal with complicated arbitrations or complications in arbitrations" (CR2). "Arbitration rules are fairly flexible. There is latitude for parties to agree on how to proceed" (CR4). "There were no negative comments on the procedure and rules" (CM5). *Dissatisfied* "We were not satisfied" (RR2).

4.6.4 Distribution of Control

Distribution of control has two components: process control and outcome control. This sub-section seeks to establish the extent to which process control was distributed between the parties and the arbitrator. Distribution of such control was measured using five surrogates: nature of party representation, conduct of the disputants, degree of arbitrators' use of conferred powers, extent of pre-action protocol and repeat player effect.

(a) Nature of party representation

This surrogate was measured using six indicators: how the parties were represented, knowledge of the law and practice of arbitration, knowledge of construction disputes, parties' delay or failure to issue instructions to or to pay their representatives, and unwarranted delays, postponement and adjournments requested by party representatives.

In all the cases, attorneys represented the disputants. In Case 2, however, an attorney and a construction industry professional represented the claimant while in Case 3, the respondent, who was also an attorney, was self-represented. Thus, each case was represented by at least one attorney.

Participants were asked to assess party representatives' knowledge in the law and practice of arbitration and in construction disputes. **Table 4.18** displays the case-by-case results of this assessment.

Table 4.18: Summary of party representatives' knowledge of construction disputes and in the law and practice of arbitration

	Knowledgeable in the law and practice of arbitration		**Knowledgeable in construction disputes**	
Case	To a great extent	Not at all	Not at all	To a great extent
Case 1	3	0	2	0
Case 2	2	0	0	2
Case 3	3	0	1	2
Case 4	2	1	1	2
Case 5	2	0	1	1

Results show most of the participants felt that the representatives were knowledgeable in the law and practice of arbitration. There were two exceptions. In Case 4, RS4 observed that the representatives were not knowledgeable at all (**Table 4.19**).

Secondly, in Case 1, CR1 admitted that he had not been involved in any other arbitration matter, but he had represented clients challenging arbitral awards in court. Thus, CR1 must have capitalised on the knowledge gained through such challenges. Even though CR3 had handled other arbitrations previously, he remarked that arbitration was easier than litigation.

The response to the question of knowledge of construction disputes was different. While more participants in three cases (Cases 2, 3 and 4) felt that the representatives were knowledgeable, all participants in Case 2 felt that the representatives were knowledgeable. Case 1 participants felt that the representatives were not knowledgeable at all while the two participants in Case 5 were split. Instructively, Case 1 was characterised by representatives who had not handled any construction dispute previously. Indeed, the arbitrator corroborated this observation. In addition, the claimant and the arbitrator in Case 3 noted that representatives relied on experts in construction. The respondent's representative in Case 2, in which the respondent's experts were in-house, made similar observations.

Participants were also asked whether the proceedings were affected by (i) a party's delay or failure to issue instructions to or to pay its representative and (ii) unwarranted delays, postponement and adjournments requested by party representatives. The case-by-case responses to these questions are summarised in **Table 4.20**. Whereas Cases 3 and 4 were not affected by delays associated with parties' failure to issue instructions or to pay their representatives, Case 1 was. Participants in Cases 2 and 5 were split on whether the two issues were manifest in the proceedings. However, Case 4 was characterised by unwarranted delays while Cases 1 and 3 were not.

Table 4.19: Excerpts of responses on party representatives' knowledge of construction disputes and of the law and practice of arbitration

Surrogate	Case excerpts
Representatives' knowledge of the law and practice of arbitration	*Knowledgeable* "I think I had done two [arbitrations]...I had worked for three years interacting with matters arbitration" (RR1). "...I had done many cases to do with challenging arbitration awards and that had given me a lot of experience in knowing basically what to be done" (CR1). "They were competent lawyers" (AB1). "...I can't remember but...maybe four arbitrations, not as an Arbitrator, but as party representative...I had certainly been involved in many of them. Then I preferred not to sit as Arbitrator. I basically represented parties" (CR2). "The counsel who was handling it had enough knowledge to deal with it" (RR2). "The advocate was very conversant with arbitration and the claimant also had a QS for the project who was quite knowledgeable on the claims that they were making. Because the director of the claimant was not very knowledgeable on the various heads of claims, so the main witness was the QS" (AB3). "I had done two other arbitrations before. One a contractual dispute, the other a construction dispute…It's way easier than being in the lower courts" (CR3). "...I had worked elsewhere where I had handled the five arbitrations" (CR4). "I had done several arbitrations...I was reasonably experienced" (RR4). "As Counsel, I think eight arbitrations, as an Arbitrator four, I'm doing the fourth" (CR5). *Not knowledgeable* "I was involved in another arbitration; they were running concurrently" (CR1). "They are not well versed. There are things, which they rely on ourselves to explain. They didn't know so much about the dealings of arbitration" (RS4).
Representatives' knowledge of construction disputes	*Knowledgeable* "…attended a training on resolution of construction claims" (RR1). "They tried their best" (AB1). "At the time, I was a registered [construction industry professional]...I had done a lot of construction claims courses…I think by the time I got involved with this, I had by that time really identified myself with disputes in the construction industry ...I had been by and large in the field of dealing with disputes [for close to twenty years]" (CR2). "Both the advocates and the QS were quite knowledgeable" (AB3). "I had done one. But it's nothing different from other contracts that we do" (CR3). "This was not the first construction dispute I was handling" (CR4). "...I had done one major one...That was quite a big project, so I had some experience in terms of arbitration" (RR4). "That was my third construction dispute and I have done JBC contract courses" (CR5). *Not knowledgeable* "I must admit I had not done any construction dispute. But I had attended some training. I wouldn't say I was very knowledgeable in matters construction…So I would say it's slightly above average" (RR1). "I had not done any construction dispute, not before an arbitrator. In challenging in the high court, yes, but in dealing with the substance, NO…I had to have a QS on my side all the time" (CR1). "Not quite but we had our witnesses who were experts, engineers, quantity surveyors from the ministry" (RR2). "We had a quantity surveyor who explained from the professional side" (CM3).

Table 4.20: Summary of responses on delays arising from the nature of party representation

Case	Circumstances when the proceedings were affected by a party's delay or failure to issue instructions or to pay its representative		Circumstances when the proceedings were affected by delays, postponements and adjournments requested by party representatives that were not warranted	
	No	Yes	No	Yes
Case 1	1	2	2	1
Case 2	1	1	1	1
Case 3	3	0	3	0
Case 4	3	0	1	2
Case 5	1	1	1	1

Some of the excerpts on delays associated with the nature of party representation are displayed in **Table 4.21**. Evidently, Case 3, whose claim was not contested, was not affected by any such delays, perhaps explaining why it took the shortest time. However, Cases 1 and 2 were characterised by delays in relaying instructions to the respondents' representatives. This delay was attributed to the need for the respondent to arrange to get the right witness in Case 1 and the need for the respondent to issue instructions to file responses in Case 2.

Case 1 was also affected by lateness on the claimant's part, which strangely, CR1 termed as genuine. Delays in Case 2 were attributed to the fact that the case was being handled by a busy representative who travelled extensively. Case 4 was also affected once by one adjournment because one representative had travelled. However, the schedule was not adversely affected. Case 5 was affected once by an adjournment caused by miscommunication between the party representatives. Thus, Cases 1 and 5 were the most affected by unwarranted delays, postponements, and adjournments.

Table 4.21: Excerpts of responses on delays associated with party representatives

Surrogate	Case excerpts
Circumstances when the proceedings were affected by a party's delay or failure to issue instructions or to pay its representative	*Not at all* "This one was smooth sailing" (AB3). "None on our side but I don't know about the other side" (CR3). "At least I did not experience that" (CR4). "This one we complied. We paid the arbitrators and the lawyers never complained. You know lawyers sort out with their own clients. There was no problem with that" (RR4). "Counsel on the other side somehow had an interest in the respondent's company. So, there was no shortage of instructions. He could instruct himself and proceed" (CR5). *Yes* "...I would say the architect is a very essential witness. So, it's upon the client to get in touch with the architect to prepare a witness statement in conjunction with a lawyer. So that took a little while on the part of the respondent" (RR1). "Especially from the respondent's side" (CR1). "Availability of instructions. The ministry did not issue instructions, so we were not able to file our responses within reasonable time, within the time given by the arbitrator" (RR2).
Circumstances when the proceedings were affected by delays, postponements and adjournments requested by party representatives which in your considered opinion were not warranted	*Not at all* "I would say there would be genuine reasons. Especially from the counsel, there was some willingness to move the case forward on both sides. If the main advocate was not there, he would send somebody to hold brief" (CR1). "Until the very last one. The rest of them were okay" (CR2). "There was no adjournment" CR3). "I think this one, both parties were looking forward to a quick finalisation. There was no delay" (RR4). *Yes* "Number one, even to start from the very basic, lateness…That in itself delays the proceedings…Number two, non-compliance by the lawyers. We agree that we file witness statements within 14 days, and we take a date to appear before the arbitrator for a mention. We go for the mention, partial compliance by one side or non-compliance by both. Actually, that in my view is the cause of the delay in that arbitration: non-compliance by the lawyers and their clients" (RR1). "Especially from our side, counsel had quite a number of other matters, some abroad. So, there were quite a number of adjournments that were sought" (RR2). "Only on one occasion when we agreed to vacate the date" (CR4). "I think there were one or two occasions. They were merited because the lawyer had commitments out of town. We thought it was genuine" (RS4). "The first hearing was adjourned, and my client was compelled to pay adjournment fees...because of miscommunication between ourselves and the respondent's counsel. We had expressed our reservations to start because they hadn't done some things, they had not complied with some directions and I thought we had an understanding on the issue. I had spoken to them and I thought we had agreed. Then I appeared there without my witness and counsel came there with people he said were his witnesses. He had not filed statements and after back and forth, he said we did not agree any such a thing. Anyway, long, and short of it is the matter was adjourned because of that. And I think that is part of why this matter delayed for a long time" (CR5).

A summary of the outcomes relating to representation is provided in **Table 4.22**. In column 4 of the table, these outcomes have been interpreted in terms of how the knowledge of arbitration and construction disputes and delays associated with party representation determined distribution of process control between the parties in

dispute. Essentially, claimants were in control of the process in Cases 1, 2 and 3 because they had representatives who were knowledgeable in arbitration. Where such representatives were not knowledgeable in construction disputes, they relied on experts. While the respondent and its representatives in Case 3 did not participate in the study, the conclusion that the claimant was in control of the process was reached because the claim was not defended.

Additionally, process control was balanced in Case 4 because the representatives were knowledgeable in both arbitration and construction disputes. Although there were a few adjournments occasioned by the claimant's representative, he made use of his knowledge of arbitration to ensure that the adjournments did not negatively affect the proceedings, as observed by RR4.

Finally, the respondent was in control of the process in Case 5. Despite the respondent and its representative having declined to participate, it was clear that the respondent's representative manipulated the process in its favour, having orchestrated a costly adjournment to the claimant. It is thus possible that the respondent's representative had some knowledge of arbitration which he utilised in this case.

(a) Conduct of the parties

Conduct of the parties was measured using seventeen surrogates. To simplify the analysis, these surrogates were partitioned into three categories – document-related conduct, conduct associated with the constitution of the tribunal and settlement-related conduct. Document-related conduct consisted of three indicators: length of submissions, volume of documents requested and failure to produce documents. Results of the closed-ended questions for these indicators are displayed in **Table 4.23**.

Table 4.22: Summary of outcomes on the nature of party representation

Case	Representative	Knowledge of arbitration	Knowledge of construction disputes	Delay or failure to issue instructions or to pay its representative	Unwarranted delays, postponements and adjournments requested by party representatives	Distribution of control
Case 1	Claimant's	Knowledgeable	Used experts	No	Yes	**Claimant in control**
	Respondent's	Knowledgeable	Not knowledgeable	Yes	No	
Case 2	Claimant's	Knowledgeable	Knowledgeable	No	No	**Claimant in control**
	Respondent's	Knowledgeable	Used experts	Yes	Yes	
Case 3	Claimant's	Knowledgeable	Used experts	No	No	**Claimant in control**
	Respondent's	-	-	-	-	
Case 4	Claimant's	Knowledgeable	Knowledgeable	No	Yes	**Balanced**
	Respondent's	Knowledgeable	Knowledgeable	No	No	
Case 5	Claimant's	Knowledgeable	Knowledgeable	No	Yes	**Respondent in control**
	Respondent's	-	-	-	-	

Table 4.23: Summary of responses on document-related indicators

Indicator	Response options	Case 1	Case 2	Case 3	Case 4	Case 5
Length of submissions made by the other party	Not Applicable	1	1	1	0	0
	Reasonable	2	1	1	1	0
	Lengthy	0	0	0	1	2
Length of your submissions	Not Applicable	1	0	0	0	0
	Reasonable	2	2	2	1	0
	Lengthy	0	0	0	1	2
Length of submissions made by the parties	Not Applicable	2	0	0	0	0
	Reasonable	1	0	1	0	0
The volume of documents requested from the other party	Not Applicable	1	0	0	0	0
	No document requests	1	1	2	2	1
	Reasonable document requests	1	0	0	1	0
	Numerous document requests	0	1	0	0	1
Volume of documents requested by the parties	Not Applicable	2	0	1	0	0
	No document requests	1	0	1	0	0
Volume of documents requested by the other party	Not Applicable	1	0	0	0	0
	No document requests	1	1	1	2	1
	Reasonable document requests	1	0	0	1	0
	Numerous document requests	0	1	0	0	1
Circumstances when a party failed to produce documents when required	No	3	1	3	2	1
	Yes	0	1	0	1	1
	Summary					
	Not applicable	**8**	**1**	**2**	**0**	**0**
	Positive conduct	**13**	**6**	**11**	**10**	**3**
	Negative conduct	**0**	**3**	**0**	**3**	**7**

The high proportion of the summarised positive-negative conduct suggests that all cases, except Case 5, were generally characterised by positive conduct that fostered progress in the proceedings. Notable negative conduct in Case 5 included lengthy submissions, numerous document requests and failure to produce required documents.

The summarised excerpt of responses from participants is provided in **Table 4.24**. The matrix reveals that there were no submissions from respondents in Cases 2 and 3. Participants in Case 1 did not have any concerns regarding submissions. However, party representatives' responses regarding their submissions in Case 4 were rather contradictory, with RR4 having observed that they were lengthy while CR4 felt that they were short. It is perhaps the difficulty experienced in trying to disprove

allegations, as noted by CR5 in Case 5, that both RR4 and CR5 found the submissions to be lengthy.

Pattern matching analysis revealed three cases (Cases 1, 2 and 3) had no issues on the question of failure to produce documents when required. For instance, CR1, RR1 and CR2 observed that all requested documents were availed. However, in Case 4, whereas there was no request for additional documents, some required documents were not produced timeously. Thus, the respondent did not have an immediate chance of repudiating statements when alleged and could only do so once such documents were availed. Finally, it appears that some documents were never produced in Case 5 as observed by CR5, but there is no evidence that such failure affected the schedule.

The second cluster of conduct relates to the constitution of the tribunal. This cluster had five indicators: timing of payment of the tribunals' advance and its effect on the schedule, challenges to the tribunal, challenges to the tribunals' jurisdiction and signing of the terms of reference. A summary of the frequencies of responses is displayed in **Table 4.25**. The high proportion of the summarised positive-negative conduct suggests that there was good conduct in all cases, except Case 2. Notably, there was no instance of negative conduct in Case 3 because the claim remained non-contested.

Table 4.24: Excerpts of responses on document-related conduct

Indicator	Case excerpts
Length of submissions	*Brief* "They were just adequate" (CR2). "The documents prepared by the lawyers were okay" (AB3). "They were reasonably short" (CR4). *Lengthy* "The submissions are made by the lawyers, and the lawyers use the same techniques, whether in arbitration or the court. Very lengthy…In response to the long submissions by the other party" (RR4). "Because of the way the claim had been framed and they were trying to manufacture things and we were trying to go out of our way to try and disprove every point" (CR5). *Not applicable* "They didn't make any submissions" (CR2). "They made none" (CR3).
Producing documents when required	*Failed to produce* "The submissions only but I think the rest of the documents were there, were put in place, just the closing submissions" (CR2). "There were occasions where it was agreed they table in the next meeting. There were cases where they mentioned and when they were challenged or even there were occasions where we would clarify but we didn't have the documents…Some were not even crucial some were just to support an argument" (RS4). "There are some documents which were referred to but never produced" (CR5).
Scope of document requests	*No document requests* "They filed supporting documents" (RR1). "No. Rather not ordering for discovery. I think if there was any, parties basically just disclosed their own documents. There was no need for discovery. Parties disclosed their own documents" (CR2). "We basically had everything we needed" (CR4). "They did not request but occasionally denied that certain instructions had been issued to the claimant. Under those circumstances, we produced the relevant instructions to prove our case" (CR4). *Numerous document requests* "That is part of what delayed the whole process. It was very extensive on both sides. Once you have a manufactured claim, you have to go push for certain things, which your client does not have. But they know they are in possession of the other side. So, we had that back and forth in trying to push for some documents" (CR5). *Reasonable document requests* "Because we requested specific documents" (CR1).

Table 4.25: Summary of indicators on the constitution of the tribunal

Indicator	Response Options	Case 1	Case 2	Case 3	Case 4	Case 5
When parties made payment for the tribunal's advance	One party paid late	3	1	0	1	0
	Early or on time	0	1	3	2	2
How did the timing of payment of the arbitrators' advance affect the schedule	Delayed the resolution process	2	1	0	1	0
	No effect	1	0	3	1	2
	Accelerated the resolution process	0	0	0	1	0
Was any member of the tribunal challenged for any reason	No	3	1	3	3	2
	Yes	0	1	0	0	0
When parties signed the terms of reference for the tribunal	All parties signed on time or in time	3	0	3	1	0
	Never signed	0	1	0	0	0
	One party signed late	0	1	0	0	0
	Signed late	0	0	0	0	1
Circumstances when a party challenged the tribunal for lack of jurisdiction	No	3	1	2	3	2
	Yes	0	1	0	0	0
	Summary					
	Positive conduct	**10**	**3**	**14**	**11**	**8**
	Negative conduct	**5**	**6**	**0**	**2**	**1**

A detailed view of these conduct outcomes is shown in **Table 4.26**. Results indicate that none of the cases experienced challenges to jurisdiction. Similarly, none of the cases, except Case 2, were characterised by challenges to the tribunals. Incidentally, as CR2 pointed out, the challenge in Case 2 appears to have been initiated after the award was issued. Thus, none of the proceedings was affected by any challenge.

However, Cases 1, 2 and 4 were affected by delayed payment of arbitrators' advance, which also delayed the schedule. In these three cases, the arbitrators were reluctant to proceed without the deposit. The rest, however, proceeded smoothly. Finally, only Case 5 was affected by delayed agreement on the tribunal's terms of reference.

The last cluster consisted of nine settlement-related indicators. A summary of the findings is displayed in **Table 4.27**. These findings indicate that only Case 1 was balanced in terms of positive and negative conduct. The remaining cases experienced a higher proportion of positive conduct. Incidentally, Case 3 had the highest proportion of positive-negative sentiments, perhaps because the claim was not defended. Notably, there were no attempts to amicably settle the disputes during the proceedings. Nevertheless, these findings suggest that parties were eager to resolve the dispute.

Table 4.26: Excerpts of responses on indicators associated with the constitution of the tribunal

Indicator	Case Excerpts
Challenges to the tribunal	*Challenged* "Because we did not participate in his appointment. So initially when we came on board, we challenged." (RR2). *Not Challenged* "…there was no challenge…" (CR1). "…the challenge came in after he had already published the award" (CR2).
Effect of arbitrator's advance payment	*Delayed resolution process* "The arbitrator was not going to proceed without having laid his hand on the deposit from both sides" (RR1). "It delayed because sometimes we would wait for them to do the payment and that would take long. And to shorten the process, we would be forced to pay on their behalf. So that really contributed partly to the delay" (CR1). "There was delay because initially when they ask for a deposit and you don't pay, they first of all delay it, until the other party pays" (RR2). "That is when we mobilised him to commence the proceedings" (RR4). *No effect* "It did not affect because they paid on time. I told them to pay before the hearing and they paid before the hearing" (AB3). "It proceeded timeously at the beginning" (CR5).
Signing terms of reference	*Both parties signed early or on time* "They signed on time. Because after the first preliminary meeting, it was a very cordial meeting and they signed, and they paid the deposit" (AB3). "We had no problem with the terms of reference" (RR4). *Never signed* "I think only the claimant signed. We never signed because we had challenged the arbitrator" (RR2). *One party signed late* "I think there was like one-week delay consulting the client on the terms. The delay affected both parties" (CR5).
Timing of payment of arbitrator's advance	*One party paid late* "…my client thought the figure suggested was rather on the higher side. The other side rushed and paid their bit. So after dilly-dallying, eventually we had no choice but to pay…So payment of the deposit of the arbitrator's fees, there was a problem…If you look at it in the context of the arbitral proceedings, the respondent paid late…"(RR1). "The Respondent delayed" (AB1). "The other party, I don't think they did…I think my client had to pay for them" (CR2). "He asked for it, but you know government at times has a problem with payments" (RR2). *Paid early or on time* "My client actually used to pay promptly. Whenever there was a request for payment, he would pay…" (CR1). "…For the deposit, both of them paid on time before the hearing" (AB3). "The first deposit was paid before commencement of the process" (RR4). "…we made the payments before the first sitting" (RS4). "The parties were eager to kick off the process" (CR5)

Table 4.27: Summary settlement-related indicators

Indicator	Response Options	Case 1	Case 2	Case 3	Case 4	Case 5
Wilful misstatement of facts	Yes	2	0	0	2	2
	None	1	2	3	1	0
Respondent's challenge to the timing of the notification of the claim dispute	No	2	1	3	2	2
	Yes	1	1	0	1	0
Claimant's challenge to the timing of the notification of the counterclaim dispute	Not Applicable	3	1	1	0	0
	No	0	1	0	2	2
	Yes	0	0	0	1	0
Tribunal's availability for hearings	Readily available	3	2	3	3	2
	Hardly available	1	1	0	0	1
Representatives' availability for hearings	Readily available	2	1	3	3	1
	Hardly available	1	0	1	1	0
Experts' availability for hearings	Readily available	2	1	0	0	0
	Hardly available	0	1	2	2	2
Withholding evidence	No	3	1	3	3	0
	Yes	0	1	0	0	1
Failure to comply with deadlines set by the tribunal to respond to its communication	No	1	0	2	2	1
	Yes	2	2	1	1	1
Revisiting an issue already decided by the tribunal	No	2	0	3	2	1
	Yes	1	2	0	1	1
Settlement offers made and accepted	No settlement offers were made	3	2	3	3	2
Use of senior management in the resolution process	Not at all	2	0	0	0	1
	To a great extent	0	2	2	3	1
Extent of court interference	To a great extent	3	1	0	0	0
	Not at all	0	1	3	3	2
	Summary					
	Not Applicable	**3**	**1**	**1**	**0**	**0**
	Positive conduct	**16**	**14**	**24**	**23**	**12**
	Negative conduct	**16**	**11**	**7**	**12**	**11**

Interview excerpts were scrutinised to establish how participants responded to these settlement-related indicators. Consistent with the principles outlined by Miles et al. (2014), these indicators were further partitioned into two sets to ease the analysis process. The first set consisting of three indicators that suggest parties' willingness to resolve the dispute is shown in **Table 4.28**. Disputants' willingness to resolve the dispute is a first step towards achieving effective arbitration.

Table 4.28: Excerpts of responses suggesting disputants' willingness to resolve

Indicator	Case excerpts
Availability of arbitrators, counsel, and experts	*Hardly available* "On the side of the government at times because of exigencies of duties sometimes we were not available. For the claimant, because it was their claim, the other side was readily available" (RR2). "We had fights about that, court diaries and other diaries, holiday diaries conflicting with the tribunal and counsels' diaries" (CR5). *Readily available* "…the arbitrator was ordinarily available" (RR1). "He was because every time he used to give the dates; he would invite us" (CR1). "The dates were agreed upon mutually. Any request to change an agreed date was communicated" (AB1). "It was very easy for him [arbitrator]" (CR2). "Again they [respondents] were okay except now at the very end like I indicated, what happened was that counsel who was handling the matter had to travel" (CR2). "Because we fixed a date, and it took off. And it was concluded on that date" (AB3). "They were available except on one occasion when the respondent's representative was unavailable" (CR4). "Every time we took a date, we never adjourned the case" (RR4).
Compliance with deadlines set by the tribunal to respond to its communications and comments on drafts	*Complied* "Compliance was not a problem" (RR4). *Did not comply* "Failure to file witness statement within the timeline, that really delayed the whole process. Then there was also late identification of the witnesses because the initial claim as presented by the claimant and as responded by the respondents, somewhere along the way I think our client thought we needed to call the architect. They took longer to identify a witness" (RR1). "…the arbitrator gave timelines which would be agreed before, say produce this document within like 15 days and you would find they have not complied. So, you have to be invited back and time is extended so such circumstances were there" (CR1). "Like in this case when the respondent was asked to file its submissions, the respondent did not...So that meant that the arbitrator had to decide what to do" (CR2). "…counsel who was dealing had also other matters…I think she was dealing with other matters in the African court. And you see our office at times is not efficient in terms of correspondences from the registry sometimes they don't get counsel, so they delay" (RR2). "I think there was one or two occasions. There were some documents which they requested for more time. I think they were getting them from the bank" (RS4). "Filing of submissions, I think we asked for extension of time" (CR5).
Use of senior management in the resolution process	*Senior management not used* "I think the best time I appreciated that they made use of senior management is after the award...I think it hit them that they really needed to make a decision when they were served with the award…Before that, I could candidly say that it was left to a select few" (RR1). *Senior management used* "He did because we had access to the senior management at settlement meetings" (CR2). "People were involved at very high levels. They did not attend but provided instructions and all" (RR2). "We attended a few but the lawyers kept us informed" (CM3). "The Managing Directors on the claimant's part and on the respondent's part attended the proceedings" (CR4). "The directors did it at the highest level. They could not have referred to another level. The directors never missed the proceedings" (RR4). "They attended the proceedings and testified also" (RS4). "The directors were witnesses for the respondent and our sides we had the senior managers, general managers who appeared as witnesses" (CR5).

All indicators associated with the availability of the participants have been clustered together in the first row. Findings indicate that no cases had issues with the arbitrators' availability. However, Cases 2 and 5 experienced problems with the availability of party representatives. Regarding compliance with deadlines, claimants' representatives in two cases (Cases 1 and 5) reported that their cases were characterised by extensions of time requested to comply with deadlines. Indeed, RR1 corroborated this observation as shown in **Table 4.21** above. In Case 2, the arbitrator had to act when the respondent failed to file its submissions on time.

The third indicator sought to establish whether disputants made use of senior management in the resolution process. Findings suggest that senior management was actively involved in all cases, except for the respondent in Case 1. Perhaps senior management for this respondent was so confident of winning the arbitration that they did not find it necessary to get involved in the proceedings. The resultant award, which was unfavourable to the respondent, forced them to get involved. Their minimal involvement implies that the claimant was probably more eager to resolve the dispute.

The second set of settlement-related conduct consisted of five indicators that suggest disputants' distractive conduct. Distractive conduct is behavioural in nature and denotes conduct that generally prevents reasonable steps towards resolution of the dispute. Interview excerpts for this group are indicated in **Table 4.29**. None of the cases was affected by challenges relating to the notification of the claim and counterclaim disputes. However, results show that the court interfered with arbitration in Case 1 by reviewing the award and in Case 2 by delaying the enforcement of the award. Participants in the rest of the cases reported that the court facilitated arbitration. Additionally, participants reported instances of misstatement in Cases 1, 4 and 5. Such misstatement revolved around pleadings in Cases 1 and 5, and evidence in Cases 1 and 4. Given that both representatives in Case 1 reported cases of misstatement, it appears that Case 1 was characterised by such misconduct on the claimant's and the respondent's part.

Evidence suggests that revisiting matters already decided by the tribunal manifested in all cases except Case 3. The contentious issues that were revisited include the

appointment of the arbitrator and his terms in Cases 1 and 2 and presentation of evidence in Cases 4 and 5. The general feeling in Case 2 was that the respondent should have participated in the appointment of an arbitrator selected by an independent institution. Moreover, whereas the respondent in Case 1 did not have issues with the arbitrator's appointment, it was not convinced with the request for payment of the deposit, arguing that the request contravened their earlier agreement. However, in Cases 4 and 5, parties were irked by repetitions in the presentation of oral testimonies particularly on issues that the tribunal had already adjudicated.

Case data also revealed that evidence was withheld in Case 5. This case was characterised by several instances of crucial email messages that the claimant had withheld from the respondent. Thus, the tribunal had to order discovery. A curious observation in Case 3 is why the respondents attended the proceedings but never tendered their defence. However, there were no related incidences in the rest of the cases.

In sum, these findings suggest that claimants must have had an upper hand in the proceedings. Most of the settlement-related issues were against respondents. For example, availability of party representatives in Case 2; failure to comply with deadlines in Cases 1, 2 and 5; failure to defend in Case 3 and inadequate involvement of senior management in the resolution process in Case 1. These behaviours suggest the respondents were reluctant to resolve the disputes in the affected cases. Additionally, misstatement of facts in Cases 1, 4 and 5; revisiting issues in Cases 1, 2, 4 and 5 and withholding evidence in Case 5 suggest behaviours that tended to distract the arbitration process. Thus, it appears the claimant had a crucial advantage and was eager to settle in all the five cases.

Table 4.29: Excerpts of responses suggesting distractive conduct

Indicator	Case excerpts
Challenges on the timing of the claim or counterclaim dispute	*Challenged* "We felt that it was an afterthought, but not because it was time-barred" (CR4). *Not Challenged* "There is no preliminary objection that was raised at any point" (AB1). "I think the claimant had already anticipated a challenge from the respondent. So, the claimant took care of it earlier in time" (CR2). "It was not defended. The objection would come later on in the high court after I had rendered the hearing" (AB3). "We didn't challenge the timing, it came, and we said we are not going to appeal" (RS4).
Extent of court intervention	*Did not interfere* "I think there is a time we went to court to stop him from releasing the award and the court gave us orders but later on we agreed that the award could be released and a notice be issued for the parties when it is ready" (RR2). "In this case, I would not say there was interference by the court…the court actually facilitated" (AB3). "The court never interfered. In fact, it helped in enforcement" (CR4). "They did not, they facilitated because they dismissed the application for setting aside and they allowed us to enforce and adopted for enforcement" (CR5). *Interfered* "The court reduced the award. The court interfered with the amount. That is interfering with the arbitration process. Actually, he did not have jurisdiction to do what he did" (CR1). "The court changed the award, the quantum" (AB1). "… I think that the anxiety of looking at the possibility that the court could order that the arbitrator be removed after he published his award…And so the fact that the issue stayed in court for two years plus, deciding on whether the arbitrator should be removed at all, when in fact the arbitrator had wound up this case…And that is then I think where there wasn't much support to arbitration. The court interrupted the enforcement of the award" (CR2).
Misstatement of facts	*Misstated* "…at the time of closing submissions, I would say the claimant misstated because the claim they presented from the beginning now transformed into a much bigger claim in terms of what they did in their written and closing submissions" (RR1). "I remember the evidence from the quantity surveyor was misstatement and lies and they were very contradictory to the documents which he himself was producing" (CR1). "For example, when they alleged that instructions had not been given to the claimant" (CR4). "The [counter]claim was manufactured, they misstated that they had financial capacity to execute the project…They had no capacity to execute and they misstated it despite the fact that we had site minutes which continuously raised those issues…" (CR5).
Revisiting matters already decided by the tribunal	*Revisited* "Like the issue of cost, the arbitrator's fees. I think it was revisited but nothing formal was filed…The deposit request, we thought, was not in tandem with what he had told us earlier, so we revisited this issue" (RR1). "I do remember that we had to deal with the issue of *res judicata* quite a bit before the arbitrator had to determine this issue" (CR2). "Yes, because when we came on board, we challenged his appointment. He overruled us but even when we were doing our final submissions, we still raised that issue" (RR2). "Especially when you bring witnesses, you find that we revisit the same issue, so you argue again. There were such [occasions] when an issue [that] had been exhaustively discussed is revisited because the witness is making his presentation" (RS4). "Mostly it was on objections to examination, cross-examination on certain issues where it has been raised with this witness and a ruling has been made on that issue and a subsequent witness comes with the same issue, raises the same issue and the same objection is raised..." (CR5).

Table 4.29 *(cont'd)*

Indicator	Case excerpts
Withholding evidence	*Not withheld* "All the evidence we required in terms of documents was there" (RR1). "I think the parties were co-operative in that particular one" (CR2). "My only issue in this matter is why the director of the respondent appeared and never gave evidence. So, I don't know whether they were withholding. They could have been withholding because why would they attend an arbitration, and they don't want to give evidence" (AB3). *Withheld* "There are some emails you see a thread of communication on an issue. What they would do is pick a particular email, lift it up, delete the other things. You see if you look at it isolated it's out of context. You may think it refers to that, maybe it refers to that if you bring the entire context. So, they did that severally. That's why we had to demand. You see the problem with my client, they had changed their system and some information email whatever was lost. So, we had to do discovery to try and get the entire thread of emails which they were refusing to give us until we forced the issue at least in one case. The others we didn't get but at least in one case we got" (CR5).

A summary of all the three clusters of indicators is provided in **Table 4.30**. The last column in the table makes inferences of the distribution of control arising from the three clusters. Generally, there was good conduct by the claimants, which granted them process control in all cases, except Case 5. Although the claimant in Case 5 was eager to resolve the dispute, the challenges it found with the lengthy submissions from the respondent and the consultations over the arbitrator's terms of reference can be seen as conduct that tilted process control to the respondent.

Table 4.30: Summary of conduct outcomes

Case	Disputant	Document related	Tribunal constitution	Settlement-related	Distribution of process control
Case 1	Claimant	No document issues	Satisfied	Eager to settle	**Claimant in control**
	Respondent	No document issues	Dissatisfied	Not eager	
Case 2	Claimant	Satisfied	Satisfied	Eager to settle	**Claimant in control**
	Respondent	Dissatisfied	Dissatisfied	Not eager	
Case 3	Claimant	No document issues	No issues	Eager to settle	**Claimant in control**
	Respondent	No document issues	No issues	Not eager	
Case 4	Claimant	Satisfied	No issues	Eager to settle	**Claimant in control**
	Respondent	Satisfied	No issues	Not eager	
Case 5	Claimant	Dissatisfied	Delayed	Eager to settle	**Respondent in control**
	Respondent	Satisfied	Satisfied	Eager to settle	

(b) Repeat player effect

Repeat player effect was measured by asking the parties and their representatives the number of previous arbitrations. Analysis of the results revealed that parties in Cases

2, 4 and 5 were generally inexperienced. Given that the claimant in Case 4, respondents in Cases 3 and 5 and both parties in Cases 1 and 2 were not interviewed, it is not clear which party commanded experiential advantage over the other. Thus, it is difficult to establish the extent to which this factor determined the degree of process control.

(c) The degree of arbitrator's use of conferred powers

The arbitrator's use of conferred powers was measured by asking participants a series of questions covering ten surrogates. A summarised list of responses is displayed in **Table 4.31**. The table, however, excludes responses to three questions - the time allowed for final submissions, whether such time was adequate and the method of exchanging written submissions. These questions have been excluded because they will be used to explain other indicators. For instance, issues of the time allowed for final submissions and its adequacy is relevant to explain the extent to which the arbitrators limited delays, postponements, and adjournments. Similarly, the question of the method of exchanging written submissions precedes and will be used to explain the extent to which the tribunals exercised control over such exchange.

Results show mixed perceptions on the arbitrators' use of conferred powers. Whereas Case 1 participants were equally split in their responses, there was notable use of conferred powers in Case 2. In the rest of the cases, there was perception of the tribunals' inadequate use of those powers. This finding suggests that there was minimal intervention by the tribunals in the proceedings, thus party autonomy was critical to determining the time and cost of resolution, but the decision control on the award remained vested in the tribunal.

Generally, all cases adopted the sequential approach for exchanging submissions, the rationale being to give each party a chance to see the other party's case before responding. This format, which is common in litigation, worked well in Cases 1, 4 and 5. However, there were no submissions by respondents in Cases 2 and 3.

Table 4.31: Summary of responses on arbitrator's use of conferred powers

Indicator	Response Options	Case 1	Case 2	Case 3	Case 4	Case 5
Circumstances when the tribunal limited interruptions during the hearings	No	0	1	3	3	2
	Yes	3	1	0	0	0
Extent to which the tribunal limited delays, postponements, and adjournments	Limited	2	2	0	0	1
	Did not limit	1	0	3	3	1
Extent to which the tribunal limited debate by party representatives	Limited	1	2	0	0	0
	Did not limit	2	0	2	3	2
Extent to which the tribunal limited the number of hearings	Did not limit	3	0	2	3	2
	Limited	0	2	0	0	0
Extent to which the tribunal enforced deadlines	Flexibly enforced	2	0	0	0	1
	Did not enforce	1	0	1	2	0
	Strictly enforced	0	2	1	1	0
Extent to which the tribunal issued and enforced sanctions	Issued but did not enforce at all	2	0	0	0	0
	Did not issue	1	1	2	3	1
	Issued and strictly enforced	0	1	0	0	1
Extent to which the tribunal exercised control over the sequential exchange of written submissions (if used)	Not Applicable	1	0	0	0	0
	Strictly controlled.	2	2	0	2	1
	No control at all	0	0	0	1	0
	Summary					
	Not applicable	**1**	**0**	**0**	**0**	**0**
	Used powers	**10**	**12**	**1**	**3**	**4**
	Did not use powers	**10**	**2**	**13**	**18**	**8**

Additionally, parties were allowed more than two weeks to file their final submissions in Cases 1, 2, 3 and 5. However, disputants in Case 4 were given two weeks only. Participants in all cases, including the respondent's representative in Case 2, reported that the time allowed for filing these final submissions was adequate, thus there was no need for the tribunal to intervene. Strangely, the claimant's representative in Case 5 reported that the time allowed was adequate yet he requested for extension of time, as illustrated in **Table 4.28**.

To carry out more in-depth analysis, the above indicators were partitioned into two groups: tribunals' disciplinary actions and suppressive actions. Tribunals' disciplinary actions determine the extent to which the tribunals corrected transgressions. This group consists of three indicators: control over the sequential exchange of written submissions, enforcement of deadlines and issuance and enforcement of sanctions. Participants' verbatim responses are summarised in **Table**

4.32. Party representatives in all the cases where both parties made written submissions generally adhered to the agreed guidelines on final submissions. Consequently, there was no need for the tribunal to intervene in controlling further submissions. However, the arbitrator in Case 2 had to intervene when it became apparent that the respondent was unlikely to file its submissions. This intervention was part of the strategy to curtail indiscipline in the proceedings, which, unfortunately, the respondent's representative felt deprived them of justice. In contrast, the flexible approach by the tribunal in Case 1 appears to have impressed the party representatives.

Intricately linked to the issue of deadlines is the question of sanctions. The sanctions issued in Case 5, which appears to be the only case where sanctions were issued and enforced, streamlined the proceedings. Thus, the additional cost incurred by the claimant, in this case, may have encouraged the claimant to adhere to subsequent deadlines.

The second group consists of indicators suggesting tribunals' suppressive actions. Suppressive actions aim at preventing excesses. This group consists of four indicators relating to how the tribunal limited debate, interruptions, delays, and the number of hearings. Excerpts of participants' responses to these actions are provided in **Table 4.33**. Although party representatives tried to stick to the issues, the respondent in Case 4 felt that some of the debate was unnecessary and that the arbitrator did not intervene when required. Largely, the tribunals also limited delays, postponements, and adjournments in Cases 1, 2 and 5, for instance by ensuring that parties agreed on timelines and by following up on compliance and issuing orders for directions. Unfortunately, the respondent's representative in Case 2 felt such action denied them a chance to present its case.

Table 4.32: Excerpts of responses on perception of tribunals' disciplinary actions

Indicator	Case excerpts
Control over the sequential exchange of written submissions	*Controlled* "…So, I think parties followed ground rules. It was controlled" (RR1). "I think he controlled this by allowing oral highlighting. He gave 21 days, 21 days, and 7 days for the claimant to respond to any issue. Then you come for oral highlighting. So that one restricted parties from going endlessly with those written submissions. Although the timelines were not complied with, but that format was followed" (CR1). "…he [arbitrator] allowed the full period to run as much as the respondent was not present, he was still granted that right, and that the arbitrator still let that period to run before he could make his ruling" (CR2). "The advocates were disciplined" (CR4). "…in our case we didn't go beyond three..." (RS4). "It stopped any further submission, but it allowed oral submissions when we appeared to highlight the submissions on some preliminary point we were arguing about" (CR5). *Not required* "The parties were civilised" (AB1). "The environment was not hostile at all so there was no problem. There was no need" (RR4).
Enforcement of deadlines	*Flexibly enforced* "He tried to enforce but I found him fairly flexible" (RR1). "I think from my observation, he intended to try to make the environment not to be like the court environment. So, he tried to contrast the strict nature of the court and the flexibility which the arbitration should be. He was trying to balance and also, he was trying to be fair to the parties" (CR1). *Not enforced* "This was a very friendly arbitration. The lawyers got on very well. It was a very nice one" (RR4). *Not required* "Only submissions delayed. Participants adhered to timelines hence there was no need to enforce" (AB1). "…I was not required to enforce. There was no need to enforce because they observed" (AB3). "Generally, deadlines were adhered to" (CR4). *Strictly enforced* "He did enforce because remember when the respondent failed to meet the deadlines, the arbitrator kept those deadlines. And so, he issued orders for directions and kept those orders" (CR2). "Very strict and in his strictness, there was miscarriage of justice" (RR2).
Issuance and enforcement of sanctions	*Issued and enforced* "Because he closed the case prematurely" (RR2). "Apart from the first adjournment, where they were told to pay adjournment fees for the entire, I think was three days, which had been blocked, I think it never arose" (CR5). *Issued but not enforced* "He would understand the reason why somebody had not complied" (CR1). *Never issued* "There were no sanctions, he just went ahead to decide" (CR2).

Table 4.33: Excerpts of responses on perception of tribunals' suppressive actions

Indicator	Case excerpts
Limiting debate by party representatives	*Did not limit* "We agreed on the timetable and everyone performed within the timelines" (AB1).
	"He was intimidated. I remember some arguments by the lawyers, and I could see he didn't like it, but he could not stop it. There are occasions you could see the lawyer's argument is irrelevant, emotional and does not add any value or is digressing. But he would let it go. He would just sit there and listen" (RS4).
	Limited "He tried, he controlled" (RR1).
	"I think what the arbitrator did was to allow the parties to stick to the issues. First of all, defining the issues, then asking the parties to limit themselves to the issues. So that is the way the arbitrator assisted the parties to limit their arguments" (CR2).
	Not required "…the advocates were fairly to the point. So, there was no need to limit" (CR1).
Limiting delays, postponements, and adjournments	*Did not limit* "It was not necessary" (CR4).
	"In our case, there were no undeserved adjournments. We never fought over any adjournments" (RR4).
	"He was flexible. He was a bit democratic" (RS4).
	Limited "He tried limiting the delays by putting in place timelines within which to file the documents and insisting on timelines on the claimant and the respondent. Number two, giving us dates to appear and confirm compliance. So, he tried but eventually, I don't think he really achieved much" (RR1).
	"He tried to limit by letting the parties to agree to the timelines" (CR1).
	"…I guess he did limit because of the fact that he gave orders…The orders were clear and timely. So, by so doing he then limited" (CR2).
	"It actually denied us a chance to present our views, citing that we had taken long, he was not going to give an adjournment. So, he went ahead to close the case and wrote an award which we are still contesting" (RR2).
	"Sometimes the tribunal had to be harsh on time" (CR5).
Limiting interruptions	*Did not limit* "I think this arbitrator was very patient with the parties. So, he didn't quite interrupt too much what the parties were doing. And I think also both counsels were good. They tried to stick to their lines" (CR2).
	"The arbitration was conducted in a cordial way unlike the way I have seen in some litigation cases" (CR4).
	"This one is a very patient arbitrator, very patient. He gave everyone [the] opportunity to present its case" (RR4).
	"There is none on record" (CM5).
	Limited "I wouldn't really remember the exact but I know what would happen would be during the examination of witnesses when the lawyer would do what we call leading the witness and the other party would object so the arbitrator would be called to intervene. That happened a number of times during the hearing" (RR1).
	"…this one was the type that would say, don't interrupt him, just let him you will interfere with his thought process" (CR1).
	Not required "There were no interruptions because the advocate for the claimant had a field day" (AB3).
	"Because there was no defence" (CR3).

Table 4.33 *(cont'd)*

Indicator	Case excerpts
Limiting the number of hearings	*Did not limit* "…The only thing the arbitrator did was to facilitate an agreement with the parties that having filed witness statements, you are not going to start examination-in-chief. You will proceed straight to cross-examination. So that I think helped to manage the time" (RR1). "This one was not limited because we fixed a day and we finished" (AB3). "We didn't prolong it. We had witness statements which witnesses would adopt, and then we proceeded to cross-examine the witnesses" (CR4). "He gave us an opportunity to call our witnesses" (RR4). "He was going by the applicants and the witnesses to exhaust. So even if a witness required more time, he would squeeze the time" (RS4). "This is the longest hearing I have ever done. If you look at the dates, the hearing was done over a span of [about sixty] days. That's over a year" (CR5). *Limited* "I think first letting parties agree, parties liberty to agree on the number of sittings was helpful, and then letting the parties agree on the issues was again critical, but very importantly in limiting or agreeing on the number of witnesses, that also was good because he helped the parties" (CR2). "He was saying that we need to conclude very fast, so when we sought for adjournment he refused. So, he forced us to close" (RR2). *Not required* "There was no need" (CR1). "We agreed on three hearing sessions" (AB1). "Because there was no much of a defence. We just presented our case and they conceded" (CR3).

Nonetheless, the tribunals failed to use their powers in limiting delays during the award-writing phase. Results indicate that awards in two cases (Cases 1 and 4) were issued one year after the last sitting. Interestingly, this award-writing phase constitutes almost one-third of the overall duration of the proceedings. The award-writing phase in Case 3 lasted three months, which constitutes half of the overall duration of the proceedings. In Case 5, the award-writing phase lasted seven months. Thus, the tribunals contributed to the poor time performance of the cases.

Instructively, there were reported instances where the tribunal was required to limit interruptions during the examination of witnesses in Case 1. According to CR1, the arbitrator's intention was to ensure that the party whose witness was being interrupted had a reasonable opportunity to present its case and to deal with the opponent's. Nonetheless, participants in Cases 1 and 4 described their arbitrators as "patient", to the extent that they felt that the proceedings in Case 4 were cordial and less judicialised.

Finally, the tribunals seem to have been liberal on the question of limiting the number of hearings, to the extent that CR5 felt that the proceedings dragged for far too long. However, the general feeling in Case 1 and 4 is that the tribunals were flexible, but they really assisted in limiting the number of hearings by eliminating the need for examination-in-chief. Notably, RR2 reported that the arbitrator seemed determined to conclude the proceedings while CR2 felt that the arbitrator was simply following what the parties had agreed upon beforehand.

The above analysis suggests that Cases 3, 4 and 5 were affected in one way or another by the arbitrators' failure to use or inadequate use of their powers during the proceedings. This passive approach might have made the parties and their representatives to pay little attention to the time and cost of resolving their disputes. Parties and their representatives might have focused on the need to resolve the disputes in line with the party autonomy principle.

The issue of flexibility in the exercise of the tribunals' powers appears to have been central to the participants' assessment. For instance, participants in Case 1 were split on the extent to which the tribunal made use of its powers, but they generally felt that the arbitrator was flexible. This flexible approach may have contributed to the long period taken to resolve the disputes in Cases 1, 4 and 5. However, the strict approach taken by the tribunal in Case 2 appears to have strained the respondent's view of whether the tribunal was keen to give it a chance to present its case.

(d) The extent of the pre-action protocol

The extent of the pre-action protocol was measured by asking the participants to indicate the amicable settlement mechanism used prior to reference and how such mechanisms strengthened their cases. **Table 4.34** shows how the participants responded.

Results show that there was concerted effort to settle the disputes prior to reference in all cases, except Case 5. Disputants in these four cases attempted to use negotiation to settle the disputes. However, participants' responses to the question of the extent to which such negotiations strengthened their cases was split.

Table 4.34: Summary of responses on the extent of pre-action protocol

Interview Question	Response Options	Case 1	Case 2	Case 3	Case 4	Case 5
Which amicable settlement mechanisms were explored prior to reference to arbitration	Negotiation	3	2	2	2	0
	None	0	0	1	1	2
To what extent did the amicable settlement mechanisms (if used) strengthen your case	Not Applicable	1	0	1	1	2
	Not at all	1	0	1	1	0
	To a great extent	1	2	0	1	0

Participants' verbatim responses to these questions are displayed in **Table 4.35**. Cases 2 and 4 were characterised by recalcitrant respondents who were unwilling to resolve their respective disputes amicably, as corroborated by RR2, CR4 and RS4. Evidence from the party representatives in Case 4 indicated that there were some negotiations, contradicting RS4's argument that there was nothing to settle. However, Case 5 was referred to arbitration after the respondent had rushed to court instead of exploring the contractual dispute resolution mechanisms.

Results show that negotiations strengthened the claimant's case in Case 1. In this case, the claimant demonstrated that it indeed had a valid claim and had shown some effort toward resolving the dispute. Moreover, such effort on the claimant's part was evident during the proceedings as demonstrated under the sub-heading '*Conduct of the Parties*' above under this sub-section. However, in Case 2, the negotiations simply hardened each party's positions, with CR2 reporting that the claim helped in identifying issues and RR2 observing that it helped them to demonstrate that they did not owe the claimant anything. Given that the award was made in favour of the claimant, it can be concluded that the negotiations may have strengthened the claimant's case.

In sum, most participants in four cases reported settlement attempts. Only participants in Case 1 indicated that the attempt to settle strengthened the claimant's case. These findings suggest that pre-action protocol did not have a bearing on the way the parties approached the arbitration in Cases 3 and 4 but may have influenced the approach in Cases 1 and 2.

Table 4.35: Excerpts of responses on the extent of the pre-action protocol

Indicator	Case excerpts
Amicable settlement mechanism	*Negotiation* "The parties were involved in some negotiations and the respondent had even offered to pay some amount of money without [the] involvement of the lawyers. They didn't agree on the quantum. The claimant wanted more but the respondent could not offer" (RR1). "…The respondent was given an opportunity to look at this and negotiate or settle" (CR1). "The parties had tried but failed" (AB1). "…I also think he did have some negotiation meetings, but they all did not obtain" (CR2). "There were efforts…but the ministry was not amenable to any settlement (RR2). "…I think the parties had tried to negotiate between themselves (AB3). "There was a back and forth between my client and the respondent, but it failed because of non-cooperation on the part of the respondent" (CR4). "…They tried to negotiate in the presence of the professionals" (RR4). *None* "There was nothing to settle. The claim was just carefully not thought out. The claim was offensive" (RS4). "They went to court" (CR5).
How the pre-action protocol strengthened the case	*Strengthened case* "I don't think the negotiations strengthened their case. If anything, it strengthened the claimant's case because now they felt emboldened that these people appreciate 'I have a valid claim'" (RR1). "It was not a factor in the award but we used it as part of our case that we have shown good faith in settling the matter but there is no good faith from the other side" (CR1). "They [negotiations] did because when we subsequently addressed the arbitrator and proved we had actually attempted [an] amicable settlement and provided the minutes, the record became helpful for the arbitrator to see that attempts had been made and the minutes captured exactly the areas of difference…So the meetings clearly brought out the areas of difference" (CR2). "Because before that, committee documents were brought and from the government side, we were able to prove that there was no money that was due and owing" (RR2).

(e) Summary of control outcomes

The above analysis has considered five major control domains which are now examined to establish the extent to which control was distributed. From **Table 4.36**, it is evident that pre-action protocol, better representation and good conduct on the claimants' part may have tilted process control in favour of the claimants in Cases 1 and 2. The tribunal's perceived attempt to use its powers in Case 2 does not seem to have swayed such control.

Table 4.36: Summary of process control outcomes

Control domain	Case 1	Case 2	Case 3	Case 4	Case 5
Nature of party representation	Claimant in control	Claimant in control	Claimant in control	Balanced	Respondent in control
Conduct of the parties	Claimant in control	Claimant in control	Claimant in control	Claimant in control	Respondent in control
Repeat player effect	Unclear	Unclear	Unclear	Unclear	Unclear
The degree of arbitrator's use of conferred powers	Split	Used powers	Did not use powers	Did not use powers	Did not use powers
The extent of the pre-action protocol	Strengthened claimant's case	Strengthened claimant's case	No effect	No effect	Not applicable
Distribution of Process Control	**Claimant**	**Claimant**	**Claimant**	**Claimant**	**Respondent**

The claimant in Case 3 also appears to have gained process control in terms of representation, given that the tribunal did not use its powers in the case in which the claim was not defended. The claimant appears to have been in control of the process in Case 4 because of its good conduct while the respondent controlled the process in Case 5 because of the claimant's conduct relating to the constitution of the tribunal and the way the respondent occasioned an adjournment to the claimant's chagrin.

4.6.5 Quality of the Decision-making Process

Quality of the decision-making process was measured using four surrogates: bias, favouritism, truthfulness, and consistency in the application of rules. Results of the closed-ended questions are displayed in **Table 4.37**. Findings indicate that four cases (Cases 1, 3, 4 and 5) generated more positive than negative responses, suggesting that perception of the quality of the decision-making process was good. Participants in Case 2, however, were split, having returned consistent responses across the four measures. In this case, CR2 and RR2 returned consistently positive and negative ratings, respectively. Cases 3 and 5, in which respondents' teams were not interviewed, returned consistently positive ratings. Thus, only Cases 1 and 4 displayed a different pattern of responses.

Table 4.37: Summary of responses on the quality of the decision-making process

Indicator	Response Options	Case 1	Case 2	Case 3	Case 4	Case 5
Extent to which the tribunal decided the dispute based on facts and not personal biases	To a great extent	3	1	3	1	2
	Not at all	0	1	0	2	0
Extent to which the tribunal decided the dispute without favouritism	Not Applicable	1	0	0	0	0
	Not at all	1	1	0	2	0
	To a great extent	1	1	2	1	2
Extent to which the tribunal showed consistency in the application of rules	Not Applicable	1	0	0	0	0
	To a great extent	2	1	2	3	1
	Not at all	0	1	0	0	0
Extent to which the tribunal handled the dispute truthfully	Not Applicable	1	0	0	0	0
	To a great extent	2	1	2	2	2
	Not at all	0	1	0	1	0
	Summary					
	Not Applicable	**3**	**0**	**0**	**0**	**0**
	To a great extent	**8**	**4**	**9**	**7**	**7**
	Not at all	**1**	**4**	**0**	**5**	**0**

In Case 1, party representatives returned positive ratings on all measures except one. These representatives were split on the question of favouritism, with RR1 feeling that there was some element of favouritism (**Table 4.38**). In Case 4, participants agreed on only one measure: consistency in the application of rules. The rest of the measures, except one, followed a pattern in which the claimant's and respondent's teams consistently returned positive and negative ratings, respectively. Participants' perception may thus have been guided by favourability of the awards. Nonetheless, RS4 contradicted party representatives, both who agreed on the question of the extent to which the tribunal decided the dispute truthfully.

These findings suggest that respondents, who did not accept the awards, might have been informed by their negative perception of the quality of the decision-making process, perhaps attributed to their perception of bias and favouritism. In sum, these findings suggest that the perception of the quality of the decision-making processes across the five cases was good for claimants but poor for respondents. Overall, the quality of the decision-making process was good for Cases 1, 3 and 5 because of the high proportion of positive-negative ratings but was average for Cases 2 and 4 because of the relatively balanced positive-negative ratings.

Table 4.38: Excerpts of responses on the quality of the decision-making process

Indicator	Case excerpts
Consistency in the application of rules	*Consistent* "The claimant, of course, felt that he was a little too lenient you know because you know, he still gave the respondent time and we thought, especially giving liberty to apply when he had already closed the case. Yet at the same time even as much as he gave them the liberty to apply he still kept up to the orders so that where they failed to apply, he stopped the arbitration…So he was fair to both sides this way" (CR2). "He accorded equal treatment to both parties" (CR4). "He was very consistent" (RR4).
Deciding the dispute based on facts and not personal biases	*Based on facts* "We did not agree with it, but I think he dealt with facts" (RR1). "I think that's it because when the people left, when you look through his ruling, he doesn't show that he was at all affected, emotionally bitten" (CR2). "Facts and evidence before him" (CR3). *Based on personal biases* "Personal biases were evident" (RR2). "He lost the facts as far as I am concerned then he lost the substance" (RR4). "He did with personal bias to help his friends" (RS4).
Deciding the dispute truthfully	*Decided truthfully* "He was just plain. He was just truthful" (CR2). "To some extent he did" (RR4). "They were guided by facts" (CR5). *Not truthfully* "…Read his ruling and read submissions of both parties and then you will know who was the aggrieved party" (RS4).
Deciding the dispute without favouritism	*Decided with favouritism* "I think there was some element of favouritism in the eventual award but that is coming from a party who challenged the award, so it is expected. He took long, number one, to deliver the award, then something happened in between. After doing all the work the lawyers had done, the claimant came to us giving an intention to act in person, now the directors of the claimant. And I thought that was fishy because the lawyers had done their work. What was pending was the delivery of the award. So when the claimant wrote to the tribunal and gave notice to act in person and subsequently the long period it took to deliver the award, I don't know, I thought that was a bit suspect because the arbitrator, number one, ought have even responded or if possible to have summoned the parties to come and clarify because it was not necessary at that time because they had done their bit" (RR1). "He favoured the claimant more, that is why we felt he was biased" (RR2). "He favoured the contractor. He did, I can tell you for sure" (RR4). *Decided without favouritism* "There was no favouritism" (CR1). "I think similar manner he got to the facts, he just decided based on the facts" (CR2). "He was a bit fair" (CM3). "I don't think he favoured us. We didn't even know him. As I have already indicated, he was appointed by the Architectural Association of Kenya" (CR4).

4.6.6 Quality of Treatment

Quality of treatment was measured using three surrogates: award reasoning, the extent to which the arbitrator refrained from improper remarks or comments and the extent to which the arbitrator treated the parties politely, with dignity, courtesy, and

respect. As **Table 4.39** reveals, all the awards were reasoned based on prior agreement by the parties. Nonetheless, whereas these reasons were challenged in Cases 1, 2 and 4, participants in Case 5 were split on whether the reasons were challenged.

Table 4.39: Summary of responses on the quality of treatment experienced

Interview Question	Response Options	Case 1	Case 2	Case 3	Case 4	Case 5
To what extent did the tribunal treat parties politely, with dignity, courtesy, and respect	Not Applicable	1	0	0	0	0
	To a great extent	2	2	2	3	2
To what extent did the tribunal refrain from improper remarks or comments	Not Applicable	1	0	0	0	0
	To a great extent	2	2	2	3	1
Did the award contain reasons	Yes	3	2	3	2	2
	Not at all	0	0	0	1	0
Was the award challenged based on reasons provided or lack thereof	Yes	2	2	0	3	1
	Not at all	1	0	2	0	1

Results also show that participants across the five cases felt that the tribunals treated parties politely, with courtesy, respect, and dignity. The question of ensuring equal treatment of the parties was evident in Case 1 where the arbitrator avoided meeting one party in the absence of the other (**Table 4.40**). Nonetheless, there was a feeling that the tribunal's courteous approach contributed to the delays experienced in Case 5.

Participants also reported that the tribunals generally refrained from making improper remarks or comments. Evidently, the tribunals in Cases 1 and 2 tried to exercise restraint even in the face of provocation. However, RR2 felt that the tribunal was partial even in the face of such restraint.

These results suggest that participants had positive ratings of the quality of treatment-experienced, irrespective of whether they received favourable or unfavourable awards. The only issue the unsuccessful parties in four cases had with the tribunals was the award reasons. These findings indicate that the quality of treatment across the five cases was good.

Table 4.40: Excerpts of responses on the quality of treatment experienced

Indicator	Excerpts
Refraining from improper remarks or comments	*Refrained* "He was very keen on those. In fact, if you used harsh words, he would tell you to withdraw. He is a very polite gentleman" (CR1). "Like that time when they walked away on him, they challenged him on the face and then they walked out on the old man and these were young people, walked away from him. They said they were not going to participate. They picked the files without even seeking any permission and just walked away. I thought he really restrained himself so much" (CR2). "Of course, he never commented. But from the rulings he gave, one would see that he was leaning towards one side" (RR2). "He was well versed, he was well-spoken, he did not offend any party with any foul language or any disrespectful remarks" (CR3). "I think he treated both parties with decorum" (RS4).
Treating disputants politely, with dignity, courtesy, and respect	*Well Treated* "By the way he treated us, number one, even the pleasantries. You go there, number one, he would not start before all of you are there, he would ask his assistants to confirm whether you people are ready. Even when you are in, he would offer you snacks and what have you. Even the language, I would say he is a dignified person. That calls for reciprocity when dealing with someone who is dignified naturally you also try to emulate" (RR1). "When you get into his office, he would be informed; he comes out to greet you. If both of you are there, he would invite you. If one party, he would say let's wait for your colleague then you can come in together. He is polite" (CR1). "He did, even where in this situation they walked away on him, he still kept his cool" (CR2). "He is a very polite guy" (CM3). "A very polite man" (RR4). "And I think that's part of the problem to the first problem. Because they were courteous and showed a lot of, let me not say deference to the parties, the control of time ended up being difficult. Because they were like 'what do you want to do?' I want thirty days; I want forty-five days. They left it to the parties. It's towards the end that they were harsh on the issue of time" (CR5).

4.6.7 Complexity of the Dispute

Complexity of the dispute was measured using six surrogates: number of parties, number of contract agreements, nature of the cause, number of sittings, language differences and cultural differences. The number of parties and the number of contract agreements have already been covered under Section 4.2 above. There were no complexities associated with these two issues because each dispute involved two parties and one contract agreement. Nonetheless, the close to sixty sittings held in Case 5 appears to have been a key factor. The number of sittings in the remaining cases seems to have been within allowable limits. However, none of the cases required a language translator during the proceedings, thus there were no crosscutting language differences.

Participants' responses to the closed-ended questions are summarised in **Table 4.41**. Majority of the disputes (Cases 1, 2, 4 and 5) required contract interpretation. However, only Case 3 involved a dispute on quantum.

Table 4.41: Summary of responses on complexity of the dispute

Interview Question	Response Options	Case 1	Case 2	Case 3	Case 4	Case 5
What was the nature of the dispute	Quantum & contract interpretation	2	2	0	2	1
	Contract interpretation	1	0	0	0	1
	Quantum	0	0	2	0	0
Was a language translator used	No	3	2	3	3	2
	Yes	0	0	0	0	0
Did any of the parties or their representatives engage in conduct that was not acceptable to the others' culture	No party or its representative engaged in unacceptable conduct	3	0	2	3	1
	At least one party's representative engaged in unacceptable conduct	0	2	0	0	1
	At least one party engaged in unacceptable conduct	0	0	1	0	0

Two cases (Cases 4 and 5) required determination of quantum due and interpretation of the rights and obligations of the disputants following termination of the construction contracts (**Table 4.42**). Conversely, three cases (Cases 1, 2 and 4) involved unpaid quantum sums but the first two required interpretation of the disputants' acts of omissions and commissions.

Based on the above considerations, it can be concluded that Case 5 generated sufficient grounds to create an environment in which the dispute can be considered the most complex. While the case was not characterised by other complexity aspects, this conclusion can be attributed to the intricacies involving contract interpretation to establish the rights and obligations of the disputants, which required almost sixty sittings. Case 3 can be classified as the least complex because it purely involved the determination of undefended quantum. Nonetheless, although Cases 1, 2 and 4 required contract interpretation, the relatively few sittings involved in each and the lack of crosscutting language and cultural differences make these cases amenable to classification as moderately complex.

Table 4.42: Excerpts of responses on the nature of the cause of the dispute

Nature	Case excerpts
Contract interpretation	"Breach by the Employer of express and implied terms of the contract and failure to pay monies due to the claimant" (AB1).
	"We had a joint venture agreement in which one party wanted to exit. But the agreement was not very clear on what should happen when one party decided to terminate. So, the dispute required interpretation of the terms and conditions of the JV agreement to establish each party's rights" (CM5).
Quantum	"...This one really did not require interpretation of the parties' rights under the contract because it was a straightforward claim for money because what happened is that when the claimant submitted three certificates, they were not paid and as a result, there was a suspension and a termination. So, after that, they made their claims, the issue of claims after termination" (AB3).
Quantum and contract interpretation	"Largely, I would say it eventually came out as a mixture of the two but the pre-arbitration correspondence and negotiations I saw, the issue was largely on the quantum" (RR1).
	"What happened, there were certain delays in the performance of the contract which on the part of [the] claimant, he explained there was a time I think the price of materials went up and obtaining some of the materials was also a bit difficult. So at the time, he wanted the respondent to bear the increment in the price of materials because at the time when the contract was signed they had envisaged a certain price…So because of that, the client did not agree. So, there was a delay in performance. So, client now said 'you delayed in performance, you have not completed this part within the agreed period'. So, the client refused to pay certain certificates because of that...And there are so many other disagreements, which arose as a result of that. Also, some of them were based on the quantification of what to be paid. And so, based on that, there were certain clauses in the agreement, which they were relying on, 'so because of this clause in the agreement, we can't pay'. So, it was both in terms of interpretation and quantum" (CR1).
	"There were very major issues that came up in this dispute. One was the power of the [lead consultant] in running a project. The [lead consultant] had raised various certificates but had failed to prepare a final certificate. What the [lead consultant] could and/or could not do was an issue before the Arbitrator. The power vested in the [lead consultant] and whether anybody else could fetter or interfere with that power required determination...Meanwhile, the other issue in contention was whether the [lead consultant] in exercising his mandate under the contract was required to exercise that mandate within certain timelines. Our position was that the [lead consultant] delayed in issuing the final certificate. We were similarly revisiting other areas the [lead consultant] missed out of the certificate, for example, the aspect of whether the contractor was entitled to payment of interest on delayed payment and certification or not. Then came the issue of the [Government] Committee to review certificates prepared by consultants on public projects. It was necessary to investigate the mandate of the [Government] Committee and to determine whether the Committee could interfere with certificates on this particular project. There were issues pertaining [to] grant or otherwise of extension of time and whether the [lead consultant] rightfully exercised his discretion" (CR2).
	"There was a certificate that had not been paid by the Employer. There was also the question of whether the termination of the contract had been properly done and whether the claimant was entitled to damages for wrongful termination" (CR4).
	"It involved quantum and a determination on whether the contract had been terminated lawfully. Apart from quantum, there were legal issues on whether the contractor's services had been properly terminated" (RR4).
	"It required three things. First, there was a dispute as to [the] interpretation of the contract; there was a dispute in terms of timelines for the construction, what was the agreed price. And there were subsequent instructions or correspondence, which appeared to change the scope of the contract. So that was probably the interpretation part of it. And then there was a dispute as to the quality of the workmanship that had been done. And therefore, there was an aspect which required technical experts to come and explain whether or not the contractor had discharged obligations within the confines of the BQ and technical specifications" (CR5).

4.6.8 Competence of the Tribunal

Competence of the tribunal was measured by asking participants a range of questions on three main areas: attitudes, knowledge, and skills. Three of the four sole arbitrators (Cases 1, 2 and 4) were construction industry professionals while one (Case 3) was a legal practitioner. The multi-member tribunal consisted of a legal practitioner and a construction industry professional, who also doubled up as a legal practitioner. All these arbitrators had extensive experience in their respective fields, spanning more than ten years.

Results of the remaining closed-ended questions are displayed in **Table 4.43**. All the cases generated more positive than negative attributes, with Case 3 generating the highest proportion of positive-negative attributes while Case 2 generated the lowest proportion. Nonetheless, the remaining three cases had more positive than negative attributes. These findings suggest that the arbitrators in these five cases were competent.

A more in-depth analysis was carried out to establish the extent to which participants' verbatim responses supported this finding. Because of the high number of surrogates involves, this factor was partitioned into three sub-factors based on the theoretical framework: knowledge, skills, and attitudes.

a) Knowledge

A summary of the pattern-matching analysis for knowledge-based attributes is displayed in **Table 4.44**. These attributes were canvassed by asking questions on three knowledge areas. The first question canvassed participants' assessment of the tribunals' understanding of the law and practice of arbitration. Results show that all the arbitrators were knowledgeable. Only RR2 felt that the tribunal was not knowledgeable.

The second knowledge area was concerned about the tribunals' legal knowledge. Case evidence revealed that most of the arbitrators lacked such knowledge. The only exceptions were Cases 3 and 5 where the arbitrators were legal practitioners. Nevertheless, in Case 2, CR2 felt that the technical issues, which could effectively be handled by the construction professional, carried greater weight than legal issues.

Table 4.43: Summary of responses on the competence of the tribunal

Interview Question	Response Options	Case 1	Case 2	Case 3	Case 4	Case 5
What is your assessment of the tribunal's understanding of the law and practice of arbitration	Not Applicable	1	0	0	0	0
	Good	2	1	2	3	2
	Poor	0	1	0	0	0
What is your assessment of the tribunal's ability to identify and assess issues in dispute	Not Applicable	1	0	0	0	0
	Strong	2	1	2	2	2
	Weak	0	1	0	1	0
How would you rate your ability to identify and assess the issues in dispute	Not Applicable	2	1	0	0	0
	Found it very easy	1	0	1	0	0
What is your assessment of the tribunal's ability to resolve issues in dispute	Not Applicable	1	0	0	0	0
	Strong	2	1	2	1	2
	Weak	0	1	0	2	0
How would you rate your ability to resolve the issues in dispute	Not Applicable	2	0	0	0	0
	Found it very difficult	1	0	0	0	0
	Found it very easy	0	0	1	0	0
To what extent did the tribunal decide the dispute based on concern for time and cost	Not at all	3	1	1	1	1
	To a great extent	0	1	2	2	0
To what extent was the tribunal proactive in managing the case	Not Applicable	1	0	0	0	0
	Not at all	1	1	0	1	1
	To a great extent	1	1	2	2	0
To what extent did the proceedings follow an advance hearing schedule	Advance hearing schedule but not adhered to	2	0	0	0	1
	Advance hearing schedule was adhered to	1	2	3	3	1
To what extent did the tribunal demonstrate ability to listen attentively	Not Applicable	1	0	0	0	0
	To a great extent	2	2	2	3	1
To what extent did the tribunal demonstrate ability to speak clearly	Not Applicable	1	0	0	0	0
	To a great extent	2	2	2	3	1
To what extent did the tribunal understand power imbalances between the disputants	Not Applicable	1	0	0	0	0
	To a great extent	2	0	2	1	1
	Not at all	0	2	0	1	0
To what extent did the tribunal show sensitivity to strongly felt values of the disputants	Not Applicable	1	0	0	0	0
	To a great extent	2	1	1	1	1
	Not at all	0	1	0	2	0
To what extent did the tribunal demonstrate ability to deal with underlying emotions	Not Applicable	2	0	1	1	0
	To a great extent	1	1	0	0	1
	Not at all	0	1	0	2	0
To what extent did the tribunal maintain confidentiality of the dispute	Not Applicable	1	0	0	0	0
	To a great extent	2	2	2	3	1
To what extent was the tribunal likeable to both sides	Not Applicable	1	0	0	0	0
	To a great extent	2	1	2	1	1
	Not at all	0	1	0	1	0
	Summary					
	Not applicable	**16**	**1**	**1**	**1**	**0**
	Positive attributes	**22**	**16**	**26**	**25**	**14**
	Negative attributes	**7**	**10**	**1**	**11**	**3**

Table 4.44: Excerpts of responses on tribunals' knowledge areas

Indicator	Case excerpts
Knowledge of arbitration practice	*Knowledgeable* "Member of the Chartered Institute of Arbitrators" (AB1).
	"…even how you break down the specifics of the claim, I could see someone who understands matters construction in so far as the kind of questions he would pose to a witness.… having appeared at the preliminary meeting because that also tells a lot, I could see somebody who is fairly experienced as a professional and could maturely and professionally handle the dispute before him…" (RR1).
	"And I do believe he was already a Fellow at that time. I think from the letter I received; he must have had more than 10 years as an Arbitrator" (CR2).
	"Member of Chartered Institute of Arbitrators" (AB3).
	"They understood" (CM3).
	"My impression is that he understood" (RS4).
	"The [construction industry professional] had quite a bit of experience with arbitration generally... The [legal practitioner] sits as an arbitrator and has done arbitrations for far a while." (CR5).
	Not knowledgeable "Very low" (RR2).
Legal knowledge	*Knowledgeable* "…advocate of the High Court of Kenya" (AB3).
	"One was an advocate…" (CM5).
	Not knowledgeable "The legal issues were not as much as the technical issues and contractual issues which the Engineer I believe was proficient in handling" (CR2).
Specialisation in the subject area of the dispute	*Specialised* "Number one was the nature of [the] dispute we were dealing with. We needed somebody who is familiar with matters construction and I thought being a construction dispute we advised our client that this was a suitable person" (RR1).
	"I think like in this case I looked at the seniority and the relevance of qualifications. So, because this is a matter that involved a lot of construction issues. There were bills of quantities that were going to be considered. So as a [construction industry professional], this was going to be easy for him" (CR1).
	"I think one of the major issues I was looking at is one relevance, being [a construction industry professional] and this was an engineering contract, I thought that was good." (CR2).
	"He was a [construction industry professional]" (CR4).
	"…the other a [construction industry professional]" (CM5).
	"…as a [construction industry professional] in construction disputes, far much more than ten years" (CR5).
	Not specialised "…an advocate having handled various construction disputes" (AB3).

The final knowledge area sought to establish the tribunals' specialisation in the subject matter. Pattern-matching analysis of the participants' responses helped to reveal that arbitrators in four cases (Cases 1, 2, 4 and 5) were specialised in construction, going by their professions and experience. However, Case 3 was handled by an arbitrator who lacked such specialisation, although he indicated that he had handled several construction disputes.

In sum, the arbitrators were knowledgeable in the law and practice of arbitration. Although all cases (except Case 3) required contract interpretation, such interpretation simply revolved around contract issues. There were no substantive issues requiring interpretation of the law. Hence, legal knowledge was not a critical requirement of the tribunals' competence. However, because of the specialised nature of the construction disputes, construction professionals were crucial to the resolution of the disputes. Therefore, all the arbitrators possessed the requisite knowledge.

b) Skillset

An arbitrator requires several skills to help in resolving the dispute. Participants were asked to rate tribunals' functional and interpersonal skills.

(i) Functional skills

Table 4.45 displays pattern-matched excerpts of functional skills. Excerpts of listening and speaking skills have been left out because there were no adverse ratings. Findings reveal that the tribunals were concerned about time and cost in Case 2 only. In the process, RR2 felt that the arbitrator's strict approach denied the respondent the opportunity to present its case. In the remaining four cases, the tribunals must have left it to the parties to conduct the proceedings the way they wished. Consequently, participants in two cases (Cases 4 and 5) observed that costs escalated with the long period taken.

The second functional skill involves the tribunals' ability to identify and assess issues. Findings suggest that participants in two cases (Cases 3 and 5) returned positive ratings of the tribunals. However, participants in the remaining three cases (Cases 1, 2 and 4) expressed doubts about the tribunals' abilities. For instance, the main concern in Case 1 was the tribunal's inability to limit the number of issues, which could have escalated the time and cost, while in Case 2, RR2 felt that the tribunal did not deal with the issues exhaustively.

Table 4.45: Excerpts of responses on functional skills

Indicator	Case excerpts
Concern for time and cost	*Concerned* "He was conscious, that is why he went ahead to make the ruling, gave timelines to the defaulting party and he kept those timelines" (CR2). "In fact, he sacrificed the case at the altar of time saying that it must be resolved quickly, denying even witnesses the opportunity to come and testify" (RR2). "He expedited the process" (RR4). *Not concerned* "I would put it at an average of say 50 percent. He was supposed to put his foot down so that he could manage the time and the cost of the proceedings. But it took longer, including delivery of the award" (RR1). "You know he would state something by word of mouth, but he was not acting as fast as it was required. Because sometimes he would take long to set a date. You can take an adjournment and it takes three months, four months before getting any communication from him" (CR1). "The mistake we made was not to agree on his rates in respect of the time taken to prepare his award. The award writing phase was expensive" (CR4). "The fact that we had to cough more money, I think he was not conscious about cost. He could have conducted this thing within budget. But the thing was prolonged. He took more than we anticipated to take. It should have taken shorter" (RS4). "I think in terms of time, we lost a lot. They showed concern but I don't think they controlled it properly" (CR5).
Identifying and assessing issues	*Strong or easy* "This one was quite easy; it was very easy" (AB3). "He was fairly comfortable and well versed with the process" (CR3). "He is a good arbitrator; he is a lawyer" (CM3). "Some of the matters were not explicit in the JV agreement, for example, the procedure for termination" (CM5). *Weak or difficult* "…Maybe what the arbitrator failed to do and maybe what he ought to have done would be to insist on a specific number because parties can even say we have fifty issues in dispute. If the arbitrator does not intervene and says, 'gentlemen why don't we narrow this down to say, five, ten'. I think there he tried to give us a little more window. He did not really limit, and that is always very chaotic because parties then can go overboard" (RR1). "I would also say low because most of the issues we raised, he was not able to deal with them comprehensively" (RR2). "Even if you look at his judgement, I could have written better" (RS4).
Resolving identified issues	*Strong or easy* "I thought he had the ability. Maybe because as an advocate appearing for the respondent, my client was not satisfied. But I think he had the ability to solve the issues" (RR1). "It was not difficult" (AB3). "I would give eight out of ten" (CR3). *Weak or difficult* "It was not easy, but I had to deal with them" (AB1). "I would also say low" (RR2). "I don't think it was weak because of lack of skills, he had skills. It was just deliberate" (RR4).

Table 4.45 *(cont'd)*

Indicator	Case excerpts
Hearing schedule	*Hearing schedule adhered to* "This one as I said, it went as per the timetable set" (AB3). "Largely yes apart from the point at which the respondent made an application to introduce its counterclaim" (CR4). *Hearing schedule not adhered to* "You know the arbitrator would ask before the hearing how long you think you will take. And you estimate maybe one hour. But then in the process, you find one hour is not enough. He would just allow. He was flexible" (RR1). "Because of delays which were resulting from either of the parties not complying with certain deadlines or the arbitrator himself not being available so that by the time he is available, that timeline has already lapsed" (CR1). "Non-disclosure, adjournment requests, extensions of time. I think the assumption is it was going to be a straight-forward dispute" (CR5).
Proactivity in managing the case	*Proactive* "He sought clarifications when necessary" (CR4). *Passive* "He failed" (RR1). "In the conduct of the proceedings, he was okay. He was managing the case well" (CR1). "I think the only thing he did was to listen to the parties and issued the orders for directions and kept those orders. But in terms of putting himself into the field and heavily pronounce himself, he did not do that" (CR2). "He was not. It is just what comes" (RS4). "I think the parties were more in control of the process rather than the tribunal and when there was disagreement, they referred to the tribunal if I want seven days the other party wants thirty days, they would take a mean and round off, say 21 days, which still stretched the time" (CR5).

Another functional skill assessed the tribunals' ability to resolve the issues. Participants in Cases 1 and 3 generally felt that the arbitrator was adequately equipped with this skill set, although AB1 admitted that it was difficult to resolve the issues. However, participants in Cases 2 and 4 observed that the arbitrators had weak problem-solving skills. Instructively, RR4 noted that the arbitrator had deliberately failed to utilise those skills adequately.

The last functional skill set consisted of two indicators that sought to establish the extent to which the tribunal managed the case. Results of the pattern-matching analysis are displayed in **Table 4.45** above. On the first question, evidence from Cases 2, 3 and 4 revealed that the tribunals adhered to the hearing schedules (see also **Table 4.43**). However, participant data in Cases 1 and 5 suggests that the tribunals did not follow advance-hearing schedules, mainly because of non-compliance by disputants. Regarding tribunals' proactivity in managing the cases, pattern-matching analysis helped to discern that the tribunals were passive in four cases (Cases 1, 2, 3 and 5). CR5 observed that this passive approach contributed to delays. However, the arbitrator in Case 4 proactively sought clarifications where necessary.

(ii) Interpersonal skills

Interpersonal skills consist of four indicators. Participants' excerpts on these indicators are shown in **Table 4.46**. In three cases (Cases 1, 3 and 4), results suggest that there were no emotional issues requiring the tribunals to intervene. However, the tribunals in two cases (Cases 2 and 5) had to manage the emotional aspects of the disputes.

Table 4.46: Excerpts of responses on interpersonal skills

Indicator	Case excerpts
Dealing with underlying emotions	*Not applicable* "There were not much emotions. What could have happened at the time of the hearing, a particular witness being taken through difficult cross-examination questions could get emotional, but the arbitrator would calm the situation" (RR1). "There were none. There were no emotions in that arbitration, no defence" (CR3). "Tempers didn't flare" (CR4). "I don't think as far as I am concerned there was nothing really emotional as such, so the issue of managing emotions did not arise" (RR4). *Able* "He chose not to play to the emotions" (CR2). "They tried to manage them. There are days when things were very heated. They would tell us to take a break, they would try to intervene. One of the arbitrators was very good at that" (CR5). *Unable* "He was less concerned" (RS4).
Sensitivity to strongly felt values	*Sensitive* "…In my view, he was sensitive to their values, particularly time-keeping and business culture" (RR1). "Of course, there are values, for example, taking an oath, whether somebody wants to affirm, whether they want to just take an oath. I think in terms when the witness chose to stay, when the lawyer had left for the respondent and he knew that was his conviction to stay, he allowed it. At the point at which the witness again walked out, he did not shout at them or anything, he let them walk out. And so, I think that in terms of their own standing, he allowed the parties to keep their values" (CR2). "At least their witnesses were using the Gita" (CR5).
Understanding power imbalances	*Understood* "He understood the power dynamics" (RR1). "I think, in this case, he was balanced" (RS4). "Towards the end. They finally understood that this thing, the way it was procured and whatnot, I think they understood" (CR5). *Did not understand* "I think he chose not to try and introduce power imbalances... He chose to sit back and therefore looked at the parties, and not looking at government as a big body out there somewhere. So, he just looked at the issues rather than at the parties" (CR2). "I think no because he tilted more to one side" (RR2). "He didn't give any impression" (CR4).

Evidence in **Table 4.43** above suggests that all the arbitrators maintained confidentiality of the proceedings. Therefore, there were no issues casting doubt on the integrity of the tribunals.

In addition, the tribunals in three cases (Cases 1, 2 and 5) were sensitive to disputants' strongly felt values that included time-consciousness and religious values. That notwithstanding, there were no adverse mentions in the remaining two cases.

The last aspect of interpersonal skills assessed the tribunals' understanding of power imbalances. Outcomes were split. Participants in two cases (Cases 1 and 5) felt that the tribunals understood the underlying power dynamics. However, participants in Case 2 felt that the arbitrator did not pay attention to the imbalanced power while participants in Case 4 were split, with RS4 observing that the arbitrator was balanced and thus understood while CR4 felt that the arbitrator did not understand.

(iii)Summary of skill outcomes

In sum, the tribunals in Cases 3 and 5 possessed strong functional skills while such skills for the remaining three were weak. The arbitrator in Case 3 scored highly in all abilities. However, the remaining arbitrators scored moderately on similar measures. A detailed summary this analysis can be found in **Table 4.47**. Notably, three cases had arbitrators with strong interpersonal skills. Nonetheless, a combined analysis reveals that all tribunals' skills, except for one, were moderate.

Table 4.47: Summary of skill outcomes

Skillset	Skill subset	Case 1	Case 2	Case 3	Case 4	Case 5
Functional skills	Concern for time and cost	Weak	Strong	Strong	Weak	Weak
	Ability to identify and assess issues	Weak	Weak	Strong	Weak	Strong
	Ability to resolve issues	Strong	Weak	Strong	Weak	Strong
	Adhering to schedule	Not adhered	Adhered	Adhered	Adhered	Not adhered
	Proactivity in managing the case	Passive	Passive	Proactive	Proactive	Passive
	Functional skills	**Weak**	**Weak**	**Very strong**	**Very weak**	**Moderately strong**
Interpersonal skills	Dealing with emotions	N/A	Able	N/A	N/A	Able
	Sensitivity to strongly felt values	Sensitive	Sensitive	Sensitive	Not sensitive	Sensitive
	Understanding power imbalances	Understood	Did not understand	Understood	Understood	Understood
	Interpersonal skills	**Strong**	**Moderate**	**Strong**	**Moderate**	**Strong**
Skills summary		**Moderate**	**Moderate**	**Strong**	**Moderate**	**Moderate**

c) Attitudes

Attitudes were measured as an open-ended question. The question sought to establish attributes considered by the disputants and their representatives before confirming the tribunals' appointments. A summary of the three main attitudes that emerged from the pattern-matching analysis is displayed in **Table 4.48**. These attitudes include affability (Cases 1 and 5), impartiality (Cases 4 and 5), repeat appointment (Cases 3 and 5) and appointment by independent bodies (Case 4). However, RR2 observed that the respondent never approved of the tribunal's appointment by an independent body.

Table 4.48: Excerpts of responses on arbitrators' attitudes

Attitude domain	Case excerpts
Affability	"All of us were very comfortable with him" (RR1).
	"I liked them, I don't know about the other side, especially if you lost, you don't normally say they were good" (CR5).
Impartiality	"You do your background check to find whether he is conflicted, once you find he is not conflicted you have no business objecting to his appointment because he is a professional. You consult other people in the same industry, then you are satisfied, and you have no reasons" (RR4).
	"Our decision to accept their arbitrator was based on [his] expertise and the perception that [he] is impartial, same for the other arbitrator" (CR5).
Repeat appointment	"First he is an arbitrator I have used before. I gave three arbitrators and both parties agreed. And secondly, it was by consensus...All this was disclosed" (CR3).
	"…track record on previous jobs" (CM5).
Appointed by an independent body	"Secondly, it was not a matter of choice at that time because of the contract. The arbitrator was appointed by the Architectural Association of Kenya and you cannot do anything about an arbitrator appointed by an independent entity" (CR4).
	"We didn't have a choice because the arbitrator was appointed by another entity" (RR4).

d) Summary of competence outcomes

The summary of case outcomes on the various competence domains is shown in **Table 4.49**. The last row in the table infers the tribunals' competence based on a three-point scale: low, moderate, and high. These results indicate that arbitrator in Case 3 was highly competent, having scored favourably on the three measures. Competence of the remaining tribunals was moderate, largely moderated by their skills.

Table 4.49: Summary of competence outcomes

Competence domain	Case 1	Case 2	Case 3	Case 4	Case 5
Knowledge	Knowledgeable	Knowledgeable	Knowledgeable	Knowledgeable	Knowledgeable
Skills	Moderate	Moderate	Strong	Moderate	Moderate
Attitudes	Likeable	-	Repeat appointment	Impartial, Independently appointed	Likeable, Repeat appointment, Impartial
Competence Summary	**Moderate**	**Moderate**	**High**	**Moderate**	**Moderate**

4.6.9 Perceived Adequacy of the Size of the Tribunal

Perceived adequacy of the size of the tribunals was measured using one surrogate, by asking respondents how many arbitrators were appointed to resolve the dispute and the underlying reasons. Four cases, mainly guided by the provisions of the contract,

were handled by sole arbitrators. However, a multi-member tribunal "*appointed jointly by the parties following a court order*" [CM5] handled Case 5. Appointment of the multi-member tribunal was mainly driven by the need to guarantee "*impartiality and avoidance of conflict of interest*" [CM5]. Thus, perception of the expected quality of the decision-making process was instrumental to the determination of the perceived adequacy of the size of the tribunal.

Incidentally, Case 5 was the longest in terms of duration and the costliest in terms of cost as a percentage of the claim award. In addition, the resultant award was not only challenged in court but also frosted relations between the disputants. Thus, the large size of the tribunal may have negatively affected the efficiency of the proceedings. Neither did it enhance the quality of the resultant award.

An analysis of the other cases revealed that the sizes of the tribunals were adequate to handle the disputes. These cases were characterised by considerably shorter durations and lower proportions of the cost compared to Case 5. However, Case 4 was characterised by concerns over the fairness of the award, which RR4 attributed to the size of the tribunal. When he compared this dispute to similar disputes, RR4 observed that participants in the other disputes were satisfied with the outcomes because two arbitrators handled the dispute. His final recommendation was that arbitration cases should not be handled by sole arbitrators:

> "Single arbitrator, for me is out…When the parties have appointed the arbitrators each, no problem, they are professionals. They will hear the case; they will go and conference and they produce a joint award. And you are not able to challenge a joint award because both arbitrators have signed and there is very little room for manoeuvring. You know because both of them are professionals, they will check each other, they will debate. They are experts. But a single arbitrator, no, that is wrong. As far as I am concerned, that is where the problem is" [RR4].

A similar observation was made by RS4, who felt that, depending on the complexity of the dispute, a multi-member tribunal is likely to enhance the quality of the decision-making process:

> "…arbitration should be presided [over] by not less than two [arbitrators] based on the amount claimed or the weight of the matter, to avoid this abuse … So, it has to be either three, totally independent or five. Because I think [the] arbitration process is more…if it's done objectively without bias, without self-serving, it is better than the court…When we are talking about a claim or a matter which involves a lot of money, it is better to have more than one. I think it is better that way" [RS4].

Thus, these participants' perception of the quality of the decision-making process and of award fairness influenced their perception of the adequacy of the size of the tribunal. These findings suggest that the perceived adequacy of the size of the tribunals influenced perception of the quality of the decision-making process in Cases 4 and 5 and perception of the award fairness in Case 4. Thus, participants' responses suggest that the sizes of the tribunals were adequate in Cases 1, 2, 3 and 5 but inadequate in Case 4.

4.6.10 Approach to the Presentation of Evidence

The approach to the presentation of evidence was measured using seven factors. The responses to closed-ended questions are displayed in **Table 4.50**. Four cases (Cases 1, 2, 4 and 5) involved more than one fact witness and more than one expert. In Case 5, for instance, the high number of witnesses and experts were required in diverse areas "*to respond to all those aspects*" [CR5] of the dispute. It appears that the way the parties framed the pleadings determined the number of witnesses. This observation was corroborated by RR1 who noted that the "*...number of witnesses a party calls has a bearing on the number of witnesses the person who has been sued will call.*" However, Case 3, which involved more than one fact witness, did not require experts because "*it was a straightforward case*" [AB3]. Disputants reserved their right to appoint experts in all cases where such experts were required. In addition, all experts were appointed in good time, but some delays were experienced in Case 1.

Table 4.50: Summary of responses on approaches to the presentation of evidence

Interview Question	Response Options	Case 1	Case 2	Case 3	Case 4	Case 5
How many experts and fact witnesses were involved	More than one fact witness and more than one expert	2	2	0	2	2
	More than one fact witness	1	0	2	1	0
	One fact witness and one expert	0	0	1	0	0
How were the expert(s) appointed	Not Applicable	1	0	0	1	0
	By the disputants	2	2	2	2	1
When was or were the expert(s) appointed	Not Applicable	1	0	0	1	0
	In good time	2	2	2	2	1
When were the expert reports and witness statements submitted	Late	1	0	0	0	0
	In good time	2	1	2	3	0
Which of the following methods of exchanging expert reports and witness statements was used	Sequential	3	2	2	3	1

Participants' verbatim responses are indicated in **Table 4.51**. The first aspect of the approach to the presentation of evidence involved meticulousness of documentation. Results suggest that Case 1 was largely characterised by good documentation which was adequate, well arranged, relevant, non-confusing and in an agreed format. However, RR1 observed that he found some of the documentation confusing and irrelevant, which could explain why the respondent's submission ended up being excessive, as observed by AB1.

Cases 2, 4 and 5 were characterised by submission of irrelevant documents, as observed by the respondents' teams. These respondents' teams may have found it difficult to go through and respond to the claimants' documentation. Interestingly, claimants' teams in these cases felt that their documentation was relevant. The only exception was Case 3 in which AB3 and CR3 had a positive view of the documentation. Looking at the number of positive and negative views, these results suggest that Case 3 produced the most meticulous documentation; Case 5 produced the least meticulous while Cases 1, 2 and 4 were moderately meticulous.

Table 4.51: Excerpts of responses on approaches to the presentation of evidence

Indicator	Case excerpts
Meticulousness of documentation	*Poorly documented* "Some of the documents were not relevant. As a lawyer, they would confuse but I had to sit with a witness during the preparation to really appreciate what they were about" (RR1). "…in varying formats" (CR1). "The respondent was excessive in its submissions" (AB1). "…in varying formats…A lot of documents especially from the claimant were totally irrelevant" (RR2). "I think some were excessive. Some too much. I would say they were haphazard. I don't think they were arranged in a manner that follows a certain sequence. I would say 50 percent were irrelevant. Since we were familiar, to us it was okay" (RS4). "Excessive… It was a mixture of relevant and irrelevant documents…There was no agreed format. Each party was filing in their own format. The problem is how they were arranged and some, which came later. So even when you are having a hearing, you'd refer to this document in terms of sequence, the next document is in another bundle somewhere in the middle. So, you had to have three or four bundles open at the same time. Part of the reason is that thing of hiding some information" (CR5). *Well documented* "…in agreed format, well arranged, adequate" (RR1). "…relevant, adequate, well arranged… non-confusing" (CR1). "…non-confusing, well arranged, relevant, in agreed format, adequate… The documentation was helpful" (AB1). "…adequate, relevant, in agreed format… I think it was well arranged, paginated. It was not confusing, it was easy, very easy" (CR2). "…non-confusing, adequate, well-arranged" (RR2). "…adequate, relevant, non-confusing…I had given directions that the documents should be paginated so the documents were well arranged. They followed the format we had agreed, statement of claim, witness statements, supporting documents" (AB3). "…adequate, relevant, well arranged, in agreed format, non-confusing" (CR3). "…adequate, well arranged, relevant, in agreed format, non-confusing…The parties had focused on facts. Also, the attitude of the parties helped a lot" (CR4). "…adequate, well arranged, relevant, non-confusing" (RR4). "…well arranged, non-confusing" (CR5).
Number of experts and fact witnesses	*More than one fact witness for each disputant and more than one expert* "There were just two witnesses, and both witnesses, I think the facts had been agreed on. What was in issue were the opinions. And so, both witnesses were really witnesses of opinion. They were experts, though the Arbitration Act here doesn't quite well define who an expert is" (CR2). "For the claimant, they were involved in the project. On our part, they were not but they were experts…" (RR2). "The claimant basically called the same fellows. He gave evidence himself, then he called the quantity surveyor and the architect. That is why I am telling you he had to carry the day because he called the most critical witnesses. We also tried to get somebody else to assess the work, we also called our witnesses, but they did not carry much weight. We had fact witnesses because we called some of the fellows who were in charge of the work. Either two or three, especially on the quality of work done by the contractor. We called some people because of poor workmanship. We called them as experts" (RR4). "From our side, we had four witnesses. From the applicant he had four, he had the architect, the QS, he had the wife who came and accused him and the partner. I had four. I had the selling agent, I had the clerks of works, the new QS and I had one partner" (RS4). "Two fact witnesses for the claimant and eight experts. That is how ridiculous it was. For the respondent, three fact witnesses and four experts" (CR5).

Table 4.51 *(cont'd)*

Indicator	Case excerpts
	More than one fact witness for each disputant "The Claimant had two. The Respondent also had two. The parties said that was adequate. No expert witness was provided" (AB1). "We had the director and then the QS. The other side did not call any" (AB3).
Techniques for preparing and presenting expert reports and witness statements	*Cross-examination and re-examination only* "Cross-examination and re-examination only…Questioning by the tribunal" (RR1). "There was oral testimony by witnesses through cross-examination and re-examination. Witnesses appeared separately" (AB1). *Examination-in-chief* "…they were taken through examination-in-chief, cross-examination and re-examination" (CR2). "Examination in-chief was conducted" (RR2). "There was examination-in-chief. It's only that there was no cross-examination and re-examination. But actually, the witnesses had their written statements, but they gave oral evidence" (AB3). "There was no cross-examination from the other side" (CR3). "You know lawyers rarely change, they follow the procedure of the court where your witness is put there, he gives background information, if he has sworn a statement he adopts the statement as part of his statement, then you surrender him to the other side for cross-examination. It was basically the court format. Counsel had to examine his witness before surrendering him for cross-examination…That is the standard approach, tested" (RR4). "Examination-in-chief" (CR5).
The timing of expert reports and witness statements	*Late* "Largely because of identifying the experts, engaging them because when you are talking about people like architects, I think they had really to pay them. Identifying and availing them to the lawyers. Then preparation of the drafts and reviewing of the statements where appropriate took a little longer" (RR1). *In good time* "They were filed together with the pleadings, the documents" (AB3). "They were submitted together with the pleadings" (CR4). "Before actual commencement of the hearing" (RR4).

The second aspect of the approach to the presentation of evidence involves the number of fact witnesses and experts. Cases 4 and 5 were characterised by several witnesses and experts, all appointed by the disputants. However, Cases 1, 2 and 3 had more than one fact witness each. It appears that the high number of the claimant's fact witnesses in Case 4 may have tilted the outcome in favour of the claimant. Nonetheless, the number of witnesses was excessive in Cases 4 and 5 but moderate in Cases 1, 2 and 3.

The third aspect of the approach to the presentation of evidence involves techniques for preparing and presenting expert reports and witness statements. Results show that Case 1 avoided examination-in-chief, which was extensively used in the other four cases, apart from Case 3 where there was no cross-examination and re-examination. Nonetheless, the tribunals across the cases occasionally sought clarifications by

putting across questions to the experts and witnesses. These findings suggest that participants' choice of techniques was poor in Cases 2, 3, 4 and 5 but good in Case 1.

The final aspect of the approach to the presentation of evidence is the timing of expert reports and witness statements. These reports and statements were submitted in good time in Cases 2, 3 and 4 but late in Cases 1 and 5. Thus, these findings suggest that such late submission could have had a bearing on the schedule in the latter two cases.

From the above analysis, it can be concluded that Cases 3 adopted the best approach to the presentation of evidence, mainly driven by meticulous documentation. However, a moderate approach was used in Cases 1, 2, 4 and 5. These outcomes are summarised in **Table 4.52**.

Table 4.52: Summary of outcomes on approaches to the presentation of evidence

Indicator	Case 1	Case 2	Case 3	Case 4	Case 5
Meticulousness of documentation	Moderate	Moderate	Good	Moderate	Poor
Number of experts and fact witnesses	Moderate	Moderate	Moderate	Excessive	Excessive
Techniques for preparing and presenting evidence	Good	Poor	Poor	Poor	Poor
The timing of the expert appointment	Late	Timely	Timely	Timely	Timely
The timing of expert reports and witness statements	Late	Timely	Timely	Timely	Late
Summary	**Moderate**	**Moderate**	**Best**	**Moderate**	**Moderate**

4.7 Relationship between Arbitral Effectiveness and its Influencing Factors

Generally, arbitration of the five cases considered in this study was found to be ineffective. The factors that influenced arbitral effectiveness in each of the cases are summarised in **Table 4.53**. The proceeding paragraphs analyse the various propositions developed in Section 2.9.6.

Table 4.53: Summarised outcomes of factors influencing arbitral effectiveness

Construct	Scale	Arbitral effectiveness		
		Most Ineffective	**Moderately Ineffective**	**Least Ineffective**
Award favourability	Claimant	Case 1 Case 4	Case 3	Case 2
	Respondent	-	-	-
	Split	-	Case 5	-
Award fairness	Fair to claimant	Case 1 Case 4	Case 3 Case 5	Case 2
	Unfair to claimant	-	-	-
	Fair to respondent	-	-	-
	Unfair to the respondent	Case 1 Case 4	-	Case 2
Procedural fairness	Poor	-	-	-
	Average	-	-	Case 2
	Good	Case 1 Case 4	Case 3 Case 5	-
Distribution of Process Control	Claimant	Case 1 Case 4	Case 3	Case 2
	Respondent	-	Case 5	-
	Balanced	-	-	-
Quality of the decision-making process	Poor	-	-	-
	Average	Case 4	-	Case 2
	Good	Case 1	Case 3 Case 5	-
Quality of treatment-experienced	Poor	-	-	-
	Average	-	-	-
	Good	Case 1 Case 4	Case 3 Case 5	Case 2
Complexity	Least complex	-	Case 3	-
	Moderately complex	Case 1 Case 4	-	Case 2
	Most complex	-	Case 5	-
Competence of the tribunal	Low	-	-	-
	Moderate	Case 1 Case 4	Case 5	Case 2
	High	-	Case 3	-
Perceived adequacy of the size of the tribunal	Inadequate	Case 4	-	-
	Adequate	Case 1	Case 3 Case 5	Case 2
Approach to the presentation of evidence	Worst approach	-	-	-
	Moderate	Case 1 Case 4	Case 5	Case 2
	Best approach	-	Case 3	-

4.7.1 Analysis of Propositions in Section 2.9.6

This Section analyses the propositions presented in Section 2.9.6 and in **Figure 2.2**. Each proposition is represented by a proposition number, for example, P1 refers to Proposition 1.

4.7.1.1 Award favourability positively influences the effectiveness of arbitration (P1)

Starting with award favourability, evidence reveals that all cases, except Case 5, were favourable to the claimants. Cases 3 and 5 were moderately ineffective, despite Case 3 being favourable to the claimant and Case 5 being split. In addition, Case 2 was the least ineffective, despite being favourable to the claimant. Thus, a matched pattern was not only established in two cases whose awards were found to be the most ineffective and favourable to the claimants (Cases 1 and 4) but also replicated in one moderately ineffective case whose award was split (Case 5). This observation suggests that award favourability influenced the effectiveness of arbitration, supporting Proposition P1, but negatively.

Although two other cases (Cases 2 and 3) contradicted the matched pattern in the most ineffective cases, the pattern from the three cases suggests that award favourability may have negatively affected the effectiveness of arbitration. Given that time was one of the top concerns among the participants (see **Figure 4.1**), this contradiction may be attributed to the fact that these were the only cases that were found to be time-efficient. Thus, arbitration was most ineffective when the award was favourable to one party but moderately ineffective when the award was split.

4.7.1.2 Award favourability positively influences perception of award fairness (P2)

All cases were fair to the claimants, despite the split award in Case 5. It appears that splitting the award did not affect participants' perception of fairness. Given that the tribunal awarded 31 percent of the claim but only 5 percent of the counterclaim, the respondent must have felt that the final award was favourable to the claimant. Perhaps splitting the award in almost equal proportions would have resulted in satisfactory outcomes to both parties.

Four awards that were favourable to the claimants were also perceived to be fair by the claimants' teams (Case 1, 2, 3 and 4), three of which were perceived to be unfair by respondents' teams (Cases 1, 2 and 4). This evidence suggests that the awards were perceived to be fair when they were favourable, supporting Proposition P2 that award favourability positively influences perceived award fairness.

4.7.1.3 Perceived award fairness positively influences the effectiveness of arbitration (P3)

Results show that all the five awards were perceived to be fair to the claimants, irrespective of their degree of effectiveness. In addition, the awards in Case 2, which was the least ineffective, and in Cases 1 and 4, which were the most ineffective, were found to be unfair to the respondents. Given that no clear pattern was observed, there is no evidence to support Proposition P3 that perceived award fairness influences the effectiveness of arbitration. Consequently, Proposition P3.1 that perceived award fairness mediates the influence of award favourability on the effectiveness of arbitration was not supported.

4.7.1.4 Perceived award fairness positively influences perception of procedural fairness (P4)

Evidence shows that all the five cases were fair to claimants, but the perceived procedural fairness was good in four cases (Cases 1, 3, 4 and 5). Looked at from the claimants' perspective, these four cases suggest a positive relationship. However, given that participating respondents' teams (Cases 1 and 4) perceived the awards to be unfair suggests a negative relationship. Additionally, Case 2 was even more confounding given that its perceived procedural fairness was found to be average, yet it was fair to the claimant's team and unfair to respondent's team. This blurred pattern suggests that case evidence did not support Proposition P4 that perceived award fairness positively influences perceived procedural fairness.

4.7.1.5 Perceived procedural fairness positively influences the effectiveness of arbitration (P5)

Results show that perceived procedural fairness was good in the two most ineffective cases (Cases 1 and 4) and the two moderately ineffective cases (Cases 3 and 5). However, it was average in the least ineffective case (Case 2). Both claimants' and respondents' teams in Case 2 disagreed on all measures, except the ease of award recognition, enforcement, and execution. Positive perception of procedural fairness was thus replicated in the most ineffective and moderately ineffective cases.

One would expect that the perceived procedural fairness of the moderately ineffective cases should be average. Although the five cases were found to be ineffective and that perceived procedural fairness was good in four of these cases (Cases 1, 3, 4 and 5), the blurred relationship pattern suggests that Proposition P7 was not supported. Consequently, Proposition P5.2 that perceived procedural fairness mediates the influence of perceived award fairness on the effectiveness of arbitration was not supported.

4.7.1.6 Award favourability positively influences perception of procedural fairness (P6)

Perceived of procedural fairness was found to be good in three cases that were favourable to the claimants (Cases 1, 3 and 4). However, the split award in Case 5 did not negate participants' perception of procedural fairness. The wide margin between positive and negative attributes in **Table 4.16** above suggests that even respondents in these four cases were satisfied with the procedure, despite their dissatisfaction with the awards. In particular, the finding in Cases 1 and 4, in which both claimants' and respondents' teams participated, indicates that both teams had a positive view of perceived procedural fairness, irrespective of how favourable the awards were. In Case 3, the claimant, who received a favourable award, also felt that procedures were fair.

Given that participants in the other cases agreed on most indicators of procedural fairness, it is possible that participants' perception of procedural fairness was mainly driven by award favourability. Evidently, participants across the five cases had a consistent pattern of responses on how fairly the dispute was decided, with claimants' teams giving consistently positive responses while respondents' teams returned consistently negative responses.

Nonetheless, Case 2 was ranked average on procedural fairness, despite the award being favourable to the claimant. In this case, the claimant's team had a positive evaluation while the respondent's team negatively evaluated the various indicators, balancing the outcome on perceived procedural fairness. Thus, only Case 2 supported Proposition P6. This finding does not support Proposition P6 that award favourability

positively influences the perception of procedural fairness. Hence, the following two propositions were not supported:

- Perceived procedural fairness mediates the influence of award favourability on the effectiveness of arbitration (P5.1).
- Perceived award fairness mediates the influence of perceived award favourability on perception of procedural fairness (P6.1).

4.7.1.7 Distribution of control positively influences award favourability (P7)

The pattern of findings between distribution of control and award favourability matched. The awards were favourable to the claimant in four cases in which the claimants wielded process control (Cases 1, 2, 3 and 4). When such process control shifted to the respondent in Case 5, the tribunal ended up splitting the award. This finding suggests that greater process control by the claimants had a higher chance of achieving a favourable award. Given that there were no counterclaim awards in Cases 2 and 4, and that Case 5 is the only case that had a counterclaim award suggests that the respondent's process control in Case 5 had a positive impact on award favourability. These findings support Proposition P7.

4.7.1.8 Distribution of control positively influences perception of award fairness (P8)

The awards in all the four cases (Cases 1, 2, 3 and 4) in which claimants wielded process control were perceived to be fair to the claimants, three of which (Cases 1, 2 and 4) were also perceived to be unfair to the respondents. However, Case 5, in which the respondent was in control of the process, was perceived to be fair to the claimant. These results indicate that apart from Case 5, claimants perceived the awards to be fair when they were in control of the process. Similarly, participating respondents' teams perceived the awards to be unfair where they were not in control of the process. The pattern-matched findings across the four cases suggest that perception of process control positively influenced perceived award fairness, supporting Proposition P8. Consequently, the following proposition was supported:

- Award favourability mediates the influence of distribution of control on perceived award fairness (P8.1).

4.7.1.9 Distribution of control positively influences perceived quality of the decision-making process (P9)

An analysis of the relationship between distribution of control and perceived quality of the decision-making process revealed that claimants were in control of the process in two cases where the quality was perceived to be good (Cases 1 and 3) and in two cases where it was perceived to be average (Cases 2 and 4). Conversely, the respondent was in control of the process in Case 5 whose quality of the decision-making process was perceived to be good.

Comparing findings across the cases suggests that shifting process control from claimants to respondents did not influence perception of the quality of the decision-making process. In addition, the average ratings on the perceived quality of the decision-making process in two cases and the good ratings in two other cases controlled by claimants suggest that there is inconclusive evidence to support Proposition P9 that distribution of control positively influenced perceived quality of the decision-making process.

4.7.1.10 Perceived quality of the decision-making process positively influences perception of award fairness (P10)

All cases that were perceived to have good quality of the decision-making process were found to be fair to the claimants (Cases 1, 3 and 5). The remaining two cases (Cases 2 and 4) whose quality of the decision-making process was perceived to be average were also found to be fair to the claimants but consistently unfair to the respondents. The average ratings in Cases 2 and 4, in which claimants' and respondents' teams returned divergent responses on most indicators in both measures suggest that perceived quality of the decision-making process impacted on perceived award fairness.

However, the good ratings in Case 1 suggest that perceived quality of the decision-making process did not influence perception of award fairness. Similar observations can be made of Cases 3 and 5. Thus, case evidence does not support Proposition P10 that perceived quality of the decision-making process influenced perception of award fairness. Consequently, the following proposition was not supported:

- Perceived quality of the decision-making process mediates the influence of distribution of control on perceived award fairness (P10.1).

4.7.1.11 Perceived quality of the decision-making process positively influences perception of procedural fairness (P11)

The pattern of findings on procedural fairness was replicated in the quality of the decision-making process. Results show that out of the four cases whose perceived procedural fairness was found to be good, the quality of the decision-making process was perceived to be good in three cases (Cases 1, 3 and 5). In addition, both the quality of the decision-making process and perceived procedural fairness was average in Case 2. Thus, only Case 4 defied the pattern. This finding suggests that perceived procedural fairness seemed to increase with the perceived quality of the decision-making process. Therefore, participants' perception of the quality of the decision-making process had a positive impact on their perception of procedural fairness, supporting Proposition P11. However, given that P10 was not supported, the following proposition was not supported:

- Perceived award fairness mediates the influence of perceived quality of the decision-making process on perception of procedural fairness (P11.1).

4.7.1.12 Perceived quality of the decision-making process positively influences the effectiveness of arbitration (P12)

The pattern of findings on the perceived quality of the decision-making process and effectiveness was rather mixed. The quality of the decision-making process in the two most ineffective cases (Cases 1 and 4) was perceived to be good and average, respectively. The quality of the decision-making process was perceived to be good in the two moderately ineffective cases (Cases 3 and 5) but average in the least ineffective case. One would have expected average ratings among the moderately ineffective cases.

The most ineffective cases realised consistently positive responses on measures of consistency in the application of rules and the extent to which the tribunals handled the disputes truthfully. However, the cases returned divergent responses on the extent

to which the disputes were decided without favouritism, with claimants' and respondents' teams returning positive and negative responses, respectively. A similar pattern of divergent views was observed on all measures in the least effective case (Case 2). Responses from the moderately effective cases were positive on all measures.

Given that all cases were found to be ineffective and that none returned poor ratings, an inverse pattern is supported by Case 1 only. Thus, Proposition P12 that the perceived quality of the decision-making process positively influences arbitral effectiveness was not supported. Hence, the following propositions were not supported:

- Perceived award fairness mediates the influence of perceived quality of the decision-making process on the effectiveness of arbitration (P12.1).
- Perceived procedural fairness mediates the influence of perceived quality of the decision-making process on the effectiveness of arbitration (P12.2).

4.7.1.13 Perceived quality of treatment positively influences perception of award fairness (P13)

Pattern-matching analysis revealed that findings on the perception of award fairness were replicated in participants' perception of the quality of treatment. All participants across the five cases, in which the awards were perceived to be fair to the claimants, felt that the tribunals had treated them well. However, the respondents' teams, who indicated that the awards were unfair, still felt that the tribunals had treated them well. Given that both categories had different perceptions of award fairness, there is inconclusive evidence to support Proposition P13 that perceived quality of treatment positively influenced perception of award fairness. As a result, the following proposition was not supported:

- Perceived quality of the decision-making process mediates the influence of perceived quality of treatment on perception of award fairness (P13.1).

4.7.1.14 Perceived quality of treatment positively influences perception of procedural fairness (P14)

Evidence from four cases (Cases 1, 3, 4 and 5) shows that cases that had a good perception of the quality of treatment also had a good perception of procedural fairness. However, the good quality of treatment in Case 2 was matched with the average perception of procedural fairness. Thus, evidence replicated in these four cases suggests that Proposition P14 was supported.

4.7.1.15 Perceived quality of treatment positively influences the effectiveness of arbitration (P15)

The pattern of findings on the relationship between the quality of treatment and effectiveness appears somehow blurred. Having experienced good quality treatment, the finding that two cases (Cases 1 and 4) were the most ineffective suggests a negative relationship. However, this observation is contradicted by the moderately ineffective and the least ineffective cases. For this inverse relationship to hold, one would have expected average ratings on the moderately ineffective cases and poor ratings on the least ineffective case.

Although all cases were ineffective, case evidence does not support Proposition P15 that the perceived quality of treatment influences the effectiveness of arbitration. Consequently, the following propositions were not supported:

- Perceived award fairness mediates the influence of perceived quality of treatment on perception of procedural fairness (P14.1).
- Perceived award fairness mediates the influence of perceived quality of treatment on the effectiveness of arbitration (P15.1).
- Perceived procedural fairness mediates the influence of perception of the quality of treatment on the effectiveness of arbitration (P15.3).

4.7.1.16 Perceived quality of treatment positively influences perception of the quality of the decision-making process (P16)

Results from three case (Cases 1, 3 and 5) reveal that participants had a good perception of the quality of treatment and of the quality of the decision-making process. However, whereas the quality of treatment in Cases 2 and 4 was good, the

quality of the decision-making process was perceived to be average. In these two cases, participants' perception of the quality of the decision-making process appears to have been driven by award favourability on all factors, given the observed divergent pattern of responses between the claimants' and respondents' teams. However, for Case 4, participants still felt that the tribunal was consistent in the application of the rules.

Nonetheless, the three pattern-matched cases provide sufficient evidence to support Proposition P16 that perceived quality of treatment-experienced positively influenced perception of the quality of the decision-making process. Hence, the following proposition was supported:

- Perceived quality of the decision-making process mediates the influence of perceived quality of treatment on perception of procedural fairness (P14.2).

However, the following proposition was not supported:

- Perceived quality of the decision-making process mediates the influence of perception of the quality of treatment on the effectiveness of arbitration (P15.2).

4.7.1.17 Complexity of the dispute influences distribution of control (P17)

Turning to complexity, evidence shows that claimants were in control of the process in the least complex Case 3 to the three moderately complex cases (Cases 1, 2 and 4). The respondent, however, was in control of the most complex Case 5. Given that the claimant seems to have been in control of the least complex dispute and the respondent was in control of the most complex dispute, it was expected that the moderately complex cases would be balanced in terms of process control. The claimants' process control over the moderately complex cases distorted the expected pattern. Thus, Proposition P17 was not supported.

4.7.1.18 Complexity of the dispute positively influences competence of the tribunal (P18)

The pattern of the relationship between complexity and competence surprised. The least complex Case 3 had the most highly competent arbitrator. The tribunals were

moderately competent in the remaining moderately complex (Cases 1, 2 and 4) to the most complex Case 5. This finding surprised because it is expected that disputes that are more complex require arbitrators that are more competent. However, the finding suggests that tribunals that were more competent handled less complex disputes, thus supporting Proposition P18, but negatively.

4.7.1.19 Distribution of control positively influences competence of the tribunal (P19)

Results show that all tribunals were moderate to highly competent, yet claimants wielded process control in all cases, except one (Case 5). Although competence is an intrinsic attribute which no party has control over, a party can exercise control through, for example, repeat appointments, as was evident in Cases 3 and 5. Nonetheless, the pattern-matched findings among the four cases suggest that the more process control one party possessed, the higher the chance that the tribunal would be seen to be competent, supporting Proposition P19. However, following the finding on P17, the following proposition was not supported:

- Distribution of control mediates the influence of complexity of the dispute on competence of the tribunal (P19.1).

4.7.1.20 Competence of the tribunal positively influences perception of the quality of the decision-making process (P20)

The pattern of findings of moderate to high levels of competence was matched with good perceptions of the quality of the decision-making process in three cases (Cases 1, 3 and 5). The only exceptions were Cases 2 and 4 in which respondents' teams perceived the moderately competent tribunals to be biased. The perceived inadequacy of the size of the tribunal coupled with the average perception of the quality of the decision-making process in Case 4 suggests that a larger tribunal could probably have led to a better perception of the quality of the decision-making process. Largely, the replicated evidence among the four cases (Cases 1, 3, 4 and 5) indicates that competence of the tribunal positively engendered better perceptions of the quality of the decision-making process, supporting Proposition P20. However, the unsupported P9 implies the following proposition was not supported:

- Competence of the tribunal mediates the influence of distribution of control on perception of the quality of the decision-making process (P20.1).

4.7.1.21 Competence of the tribunal positively influences perception of the quality of treatment (P21)

Analysis of the results indicates consistent findings between competence and the perceived quality of treatment experienced. The good quality of treatment across all cases, coupled with the moderately to highly competent tribunals in four cases (Cases 1, 2, 3 and 5) suggests a positive relationship between the two constructs. Thus, competence engendered a good perception of the quality of treatment, supporting Proposition P21. Hence, the following proposition was supported:

- Perceived quality of treatment mediates the influence of competence on perception of the quality of the decision-making process (P21.1).

4.7.1.22 Perceived adequacy of the size of the tribunal positively influences perception of award fairness (P22)

All cases were found to be fair to the claimants, irrespective of the perceived adequacy of the sizes of the tribunals. Even the award in Case 4, in which the tribunal was found to be inadequate, was also perceived to be fair by the claimant. However, the award was perceived to be unfair to the respondent. Notably, respondents' teams in two cases (Cases 1 and 2) whose tribunals were adequate felt that the awards were unfair. This finding suggests there is insufficient evidence to support Proposition P22 that perceived adequacy of the size of the tribunals positively influenced perception of award fairness.

4.7.1.23 Perceived adequacy of the size of the tribunal positively influences perception of procedural fairness (P23)

There were consistent outcomes on the perceived adequacy of the sizes of the tribunals and perceived procedural fairness in three cases (Cases 1, 3 and 5). In these cases, the sizes of the tribunals, which were perceived to be adequate, may have enhanced participants' perception of procedural fairness.

However, Cases 2 and 4 defied this finding. In Case 2, perception of procedural fairness was average despite the size of the tribunal, which was perceived to be adequate. Additionally, procedural fairness was perceived to be good in Case 4 despite the tribunal having been perceived to be inadequate. Nonetheless, the matched pattern of findings in the three cases suggests that perceived adequacy of the size of the tribunal positively influenced perception of procedural fairness, supporting Proposition P23. However, the unsupported P22 suggests that the following proposition was not supported:

- Perceived award fairness mediates the influence of perceived adequacy of the size of the tribunal on perception of procedural fairness (P23.1).

4.7.1.24 Competence of the tribunal positively influences perceived adequacy of the size of the tribunal (P24)

The arbitrator was found to be highly competent and perceived to be adequate in Case 3 only. Sole arbitrators were found to be moderately competent but were perceived to be adequate in Cases 1 and 2. In addition, the multi-member tribunal was found to be not only moderately competent but was also perceived to be adequate in Case 5. This multi-member tribunal complemented the inadequate competencies inherent in each arbitrator.

However, the moderately competent sole arbitrator was perceived to be inadequate in Case 4. This inadequacy suggests that a multi-member tribunal was desired. That notwithstanding, the matched pattern of findings in Cases 1, 2, 3 and 5 suggests competence positively impacted on perceived adequacy of the size of the tribunal, supporting Proposition P24.

4.7.1.25 Complexity of the dispute positively influences perceived adequacy of the size of the tribunal (P25)

The next analysis examined the relationship between complexity and perceived adequacy of the size of the tribunal. Findings show that the tribunals were perceived to be adequate for all categories of complexity, except for one of the three moderately complex cases (Case 4). The pattern of findings reveals that the multi-

member tribunal was perceived to be adequate in Case 5, which was the most complex. The sole arbitrators were also perceived to be adequate in the two moderately complex Cases 1 and 2, and in the least complex Case 3. Largely, this finding suggests that complexity of the dispute had an impact on perceived adequacy of the size of the tribunal, supporting Proposition P25, but neutrally. Thus, the following proposition was supported:

- Competence of the tribunal mediates the influence of complexity of the dispute on perceived adequacy of the size of the tribunal (P25.1).

4.7.1.26 Approach to the presentation of evidence positively influences award favourability (P26)

The next factor under consideration is the approach to the presentation of evidence. The only case with the best approaches (Cases 3) as well as the three cases with moderate approaches (Cases 1, 2 and 4) were favourable to claimants. Only Case 5 with moderate approaches returned a split award.

The way the claimant presents its evidence determines the approach to be used by the respondent. Thus, how the claimant prepares and presents its evidence and how the respondent responds is likely determine the final award. This observation could explain why the best approaches returned awards in favour of claimants while the moderate approach returned a split award. Given that the claimant is the aggrieved party, it appears that the approach it adopts in presentation of its evidence may influence how the respondent presents its evidence and ultimately, the award. Thus, the three pattern-matched cases with moderate approaches (Cases 1, 2 and 4) that were also favourable to claimants provide sufficient evidence to support Proposition P26 that the approach to the presentation of evidence positively influenced award favourability.

4.7.1.27 Competence of the tribunal positively influences the approach to the presentation of evidence (P27)

The next relationship under consideration seeks to establish whether competence influenced the approach to the presentation of evidence. Pattern matching analysis

revealed that the tribunal possessed high competence levels in the case with the best approaches to the presentation of evidence (Case 3). Moderate approaches were experienced in four moderately competent tribunals (Cases 1, 2, 4 and 5). The pattern-matched moderate competence to moderate approaches replicated in these cases and the high-competence to the best approach in Case 3 suggest that competence of the tribunals engendered better approaches to the presentation of evidence, supporting Proposition P27.

4.7.1.28 Distribution of control influences the approach to the presentation of evidence (P28)

Evidence shows that claimants were in control of the process in three cases with moderate approaches to the presentation of evidence (Cases 1, 2 and 4) and in Case 3, which had the best approach. Thus, such process control may have engendered better approaches to the presentation of evidence. The respondent was in control of the process in Case 5, whose approach was also moderate. One would expect that moderate approaches would arise from cases with balanced process control. However, it appears that the moderate approaches were evident in cases where the parties were in control of the process. These contradicting findings do not support Proposition P28 that distribution of control influences the approach to the presentation of evidence. Consequently, the following propositions were not supported:

- The approach to the presentation of evidence mediates the influence of distribution of control on award favourability (P26.1).
- Distribution of control mediates the influence of complexity of the dispute on the approach to the presentation of evidence (P28.1).
- Competence of the tribunal mediates the influence of distribution of control on the approach to the presentation of evidence (P28.2).

4.7.1.29 Complexity of the dispute influences the approach to the presentation of evidence (P29)

The pattern of findings between complexity and the approach to the presentation of evidence was consistent across most cases. For instance, the best approach was experienced in the least complex Case 3. Three moderately complex Cases 1, 2 and 4 were matched with moderate approaches. However, it appears that the moderate approach was mismatched to the most complex dispute in Case 5. Nonetheless, findings from the four pattern-matched cases suggest that less complex cases attracted better approaches than more complex disputes, supporting Proposition P29, but negatively. Thus, the following proposition was supported:

- Competence of the tribunal mediates the influence of complexity of the dispute on the approach to the presentation of evidence (P27.1).

4.7.2 Structural Model Outcomes

In sum, out of the 29 direct propositions, fourteen were supported as proposed, one of which was originally conceptualised as a negative influence (P17). Three other propositions that were initially conceptualised positively were found to be negative (P1 and P18), so was one proposition initially conceptualised as neutral (P29). However, twelve propositions, represented by the broken arrows in **Figure 4.2**, were unsupported. These findings indirectly determined the outcome of 24 mediating propositions. Five mediating propositions were supported (P8.1, P14.2, P21.1, P25.1 and P27.1). The remaining nineteen mediating propositions were unsupported.

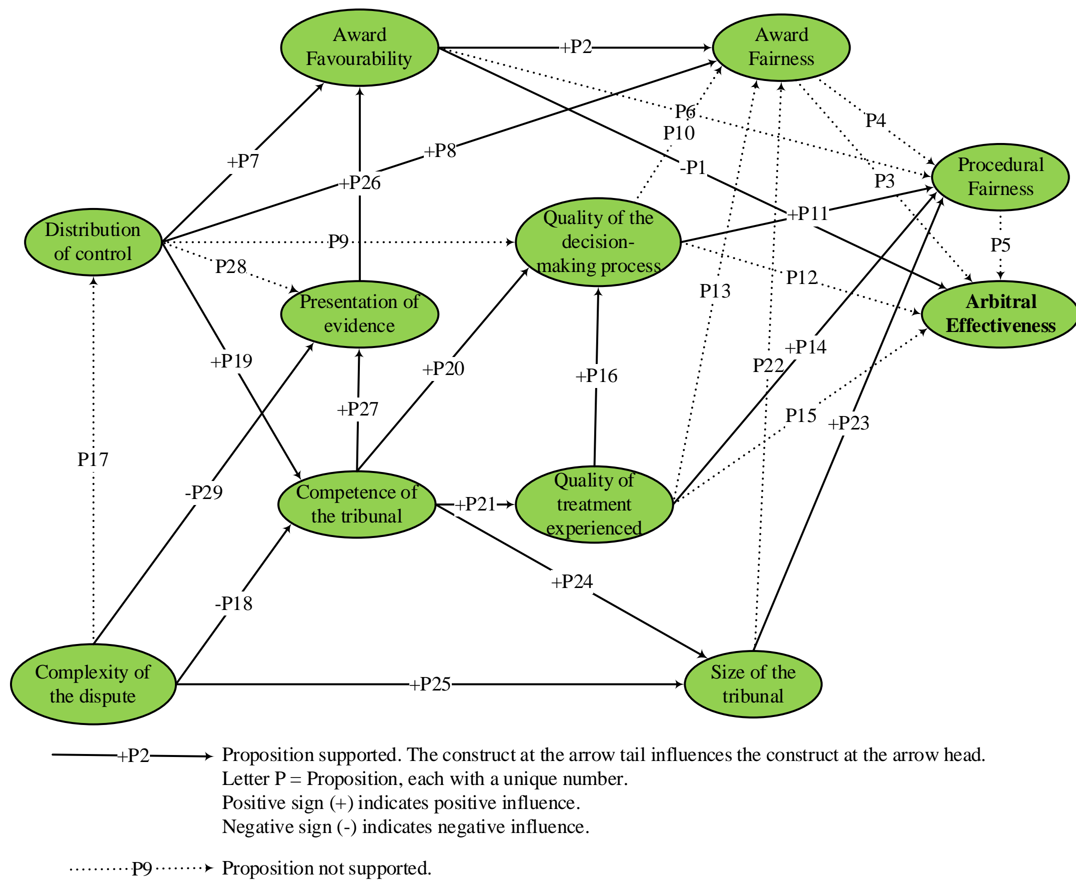

Figure 4.2: Structural model showing supported and unsupported propositions

4.8 Synthesised Framework for Effective Construction Arbitration

4.8.1 Insights from the Analysis

A scrutiny of the claim sizes revealed a useful pattern that can assist in developing a framework for effective construction arbitration. Four insights can be discerned. *Firstly*, a comparison of Cases 2 and 5, which, respectively, had high claim and counterclaim values exceeding Ksh 300 million, reveals that Case 2 was more effective than Case 5. Both cases had moderately competent tribunals and moderate approaches to the presentation of evidence. These moderate approaches included examination-in-chief. However, distribution of control and award favourability were instrumental in determining arbitral effectiveness. Given that the claimant was in control of the process in Case 2 and got a favourable award, the respondent in Case 5 might have felt deprived of expectations when the tribunal split the award yet it wielded process control. Additionally, poor documentation and the high number of

witnesses and experts in Case 5 may have contributed to its relative ineffectiveness. Thus, moderate approaches to the presentation of evidence in such a high-value, complex dispute where the respondent was in control of the process most likely resulted into ineffective arbitration when a moderately competent tribunal issued a split award. Enhancing arbitral effectiveness in such a dispute requires the tribunal to use more powers to balance the skewed process control. Indeed, as two participants suggested:

> "My suggestion would just be in terms of time management, that is where there is a problem. And time management would be, the arbitrator is able to control, able to say, 'I need you to do this thing within a specific time'" (CR1)

> "You need somebody who is in control of the process. If you are not in control, and particularly where lawyers are involved, an arbitration which will take say six months would take three years or more" (RR1).

Although the suggestions relate to Case 1, which was one of the most ineffective, they nonetheless provide an indication that the tribunal should exercise more powers. Looked at more critically, it is evident that the tribunal's use of its powers in Case 2 may have helped in enhancing its effectiveness.

Secondly, a comparison of Cases 1 and 3 revealed that both had medium-sized claim values ranging between Ksh 50-100 million. In addition to having no counterclaims, the claimants were in control of the process and received favourable awards. However, the moderately complex Case 1 was one of the most ineffective cases while Case 3, the least complex, was moderately ineffective. Thus, Case 3 was comparatively more effective than Case 1.

Nonetheless, competence of the tribunals and the approaches to the presentation of evidence appears to have been central to determining arbitral effectiveness of the cases. The tribunal was moderately competent in Case 1 in which the parties adopted moderate approaches to the presentation of evidence but highly competent in Case 3 where the parties adopted the best approaches. Case 1 was characterised by poor documentation and considerable delays in identifying witnesses and preparing the necessary witness statements. As AB1 suggested:

> "You have to intervene when the lawyers ask irrelevant questions. Witnesses waste the tribunal's time. The tribunal has to teach the witness how to respond to questions clearly and briefly" (AB1).

Thus, where the claimant wielded more process control, arbitration of the moderately complex medium-value dispute without a counterclaim would have been more effective if the tribunal moderated parties' approaches to the presentation of evidence.

Thirdly, an analysis of Case 4 revealed that the moderate approach to the presentation of evidence in the low value, moderately complex dispute where the claimant was in control of the process resulted in ineffective arbitration when a moderately competent tribunal issued an award in favour of the claimant. It appears that these moderate approaches created legitimate expectations of favourable outcomes on either side. In the process, parties spent considerable time and financial resources in prosecuting and defending claims and counterclaims. When the outcome favoured one party, the other party felt deprived of these expectations. Having established that complexity of the dispute was inversely related to the competence of the tribunal and that the tribunal possessed the weakest functional skills, resolution of this case would probably have been more effective had the tribunal been more competent, with stronger functional skills.

Finally, establishing that complexity of the dispute negatively influenced the competence of the tribunals suggests that the cases were not handled by tribunals with the right competence. Indeed, two participants emphasised the need for the disputants to select the right arbitrator:

> "…I think one of the most important things which parties need to take into consideration is the choice of the arbitrator…because you need somebody who is very knowledgeable and who can manage the process so as to cut costs. …if the arbitrator does not understand the dispute, the lawyers or the parties will take him in circles in terms of the documentation presented and identification of issues and witnesses. If you get somebody who is in charge and is experienced in the field, he will be of much assistance and he would be in a proper position to guide the parties, say 'in this kind of dispute, do you really think you need all those witnesses'?...If the arbitrator does not understand or is not versed with the area of the dispute, it will take longer because he is likely to be learning as you go on with the arbitral proceedings. And he is not likely to be in a position to make some decisions at the right time, like engaging an independent expert or experts from the very beginning. So, you find these things delay the process" (RR1).
>
> "If you agree in principle to go to arbitration, in own context if it was possible to make that determination alongside the determination of who is going to the arbitrator, that will be good" (CR5).

Selecting the right arbitrator to match the complexity of the case does not just rest with the parties; it is also the responsibility of independent appointing institutions.

Some of these institutions do not pay attention to the complexities of the disputes when requested to appoint arbitrators. The result is a mismatch between the complexities of these disputes and the arbitrators' competence.

The above insights provided a foundation upon which the framework for effective construction arbitration was developed, tempered with the power wielded by the various participants in the arbitral process.

4.8.2 Power of the Participants over the Critical Factors

The above findings suggest that enhancing the effectiveness of construction arbitration revolves around selecting competent arbitrators for each case and redistributing process control. Small, less complex disputes require a more passive approach by the tribunal, as demonstrated in **Figure 4.3**. Conversely, larger disputes of higher degrees of complexity require arbitrators to exercise more powers to level process control. Thus, the tribunal should be more proactive in managing the dispute as the size and complexity of the dispute increases. These combinations are instrumental in ensuring that the approaches adopted in the presentation of evidence are well moderated to minimise expectations of favourable awards that may negatively influence arbitral effectiveness.

Overall, a strategy for improving the effectiveness of arbitration should focus on the above five main factors. These factors are within control of the participants in the arbitral process. Starting with control, one of the ways of enhancing effectiveness is to avoid exaggerating claims and counterclaims. Such exaggeration suggests existing loopholes in the existing contract provisions. Exaggeration essentially increases the time and cost of resolving the dispute as both the claimant and the respondent devote their resources towards assembling requisite evidence to build and support their respective cases. It also escalates the need for more process control that exaggerates expectations of receiving favourable awards. Participants must also strive to comply with deadlines set by the tribunals. Compliance entails ensuring that the tribunals' deposits are promptly paid, required documents are promptly prepared and filed, and participants attend the proceedings on scheduled time. Such compliance minimises unnecessary delays.

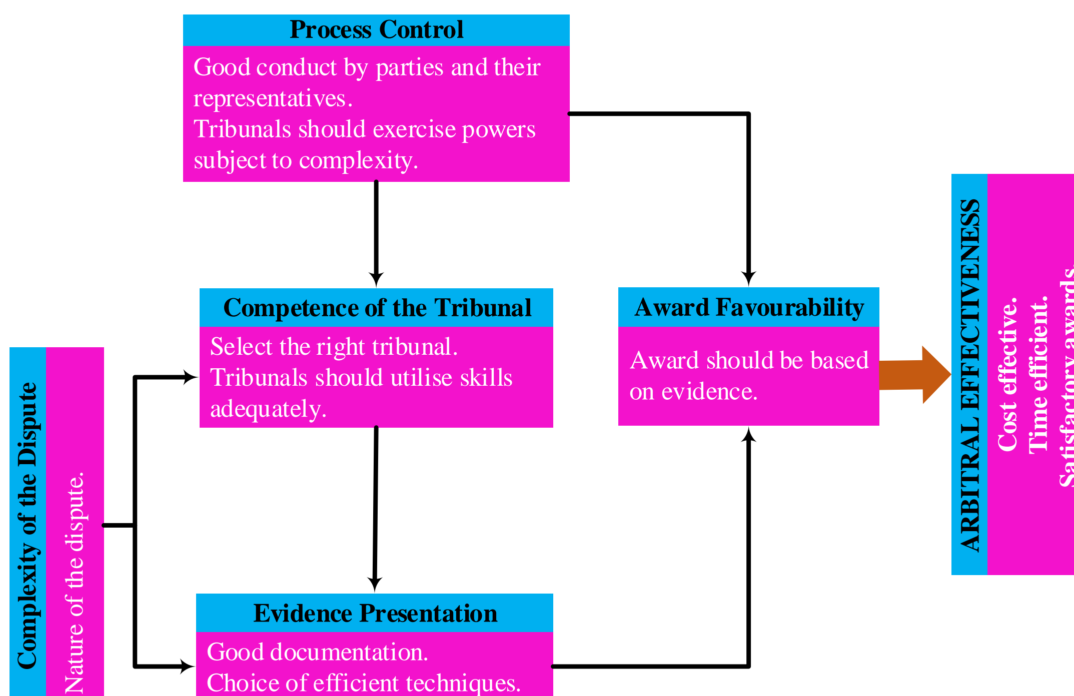

Figure 4.3: Synthesis of the model concepts guiding the framework for effective construction arbitration in Kenya

In addition, participants must avoid the tendency to wilfully misstate facts. Such misstatement essentially escalates both the time and cost of arbitration as the other party endeavours to disprove the misstatement. Thus, avoiding misstatement enables participants to focus on the core issues in dispute. Participants must also avoid revisiting previous rulings made by the tribunals. Revisiting such rulings has the tendency to draw back the proceedings as parties take time and incur costs in arguing their respective positions. Hence, avoiding prior rulings focuses the parties on the dispute.

Turning to evidence, case data suggests that the process of gathering and presenting evidence was either weak or difficult. Participants wasted considerable time and cost reviewing excessive, irrelevant, and poorly arranged documents. Good documentation can help in focusing on the disputed issues. Additionally, avoiding unnecessary techniques really helps in enhancing effectiveness. For instance, once parties file witness statements and fact witnesses adopt their statements, it is unnecessary to take the witnesses through examination-in-chief. Participants may proceed directly to cross-examination to save time and cost.

As the parties endeavour to avoid the above aspects of negative conduct, tribunals must make adequate use of its powers to ensure that the proceedings are not derailed. In addition to taking a proactive approach in managing the case, tribunals should try to balance between concerns for time and cost and the need to be flexible enough to give each party a reasonable opportunity to present its case. In the end, tribunals must issue timely awards that are adequately supported by sufficient evidence to withstand possible court challenges. Thus, there is a need for tribunals to make good use of their functional skills. However, training institutions must place greater emphasis on developing such skills through their training and mentorship programs.

These skills can only be effectively applied if the arbitrators appointed to resolve the various construction disputes are properly matched to the complexities of the cases they handle. Disputants and appointing institutions must carry out adequate due diligence before appointing or agreeing to the appointment of arbitrators. In the end, these arbitrators can capitalise on their understanding of the complexity of the dispute to guide disputants in presenting their evidence efficiently.

The above discussion points to weaknesses in the existing legal, policy and institutional framework that must be addressed as proposed in **Figure 4.4**. The main participants in the arbitral process exploit these weaknesses through their various approaches to the resolution, based on the model concepts shown in **Figure 4.3** above. For instance, exaggerated claims that skew process control suggests a weakness in the dispute resolution clauses contained in the standard contract documents issued by such institutions as the JBCC, PPRA and FIDIC. It is unclear why claims escalate after reference and why respondents introduce counterclaims by way of pleadings, yet they did not table the same prior to reference.

Additionally, skewed process control and poor approaches to the presentation of evidence suggest a weakness not only in the arbitration rules and policy, but also in the training of arbitrators and party representatives by the various institutions. For example, why should a witness who has filed and adopted its witness statements be taken through examination-in-chief?

Moreover, the poorly matched complexities against the competence of the tribunals suggest a weakness in the appointment mechanism that includes appointing

institutions, parties, and their representatives. It points to lacking criteria for ensuring that the arbitrators so appointed are adequately matched to the various case complexities. It also appears that parties and their representatives do not submit adequate details to help these institutions in making the right choice and may not have guidelines on the scope of information to be supplied when referring disputes. This weakness points to a gap in the dispute resolution clause contained in the standard conditions of contract, which makes it difficult for the appointing institutions to obligate parties to supply dispute information beyond what these clauses stipulate.

Finally, while the unending challenges to the final arbitral awards suggest a weakness in the legal instruments, the courts' upholding of the majority of the awards suggests a weakness in the training of party representatives, particularly on aspects that can be successfully challenged. Although the Kenyan Arbitration Act contains narrow provisions for challenging arbitral awards, these unsuccessful challenges suggest attempts to skirt around these provisions, resulting in unnecessary expense and delay in award enforcement. This approach suggests that party representatives have a weak understanding of the extent to which courts can overturn an arbitral award. These weaknesses must be addressed to make arbitration an effective method of resolving construction disputes.

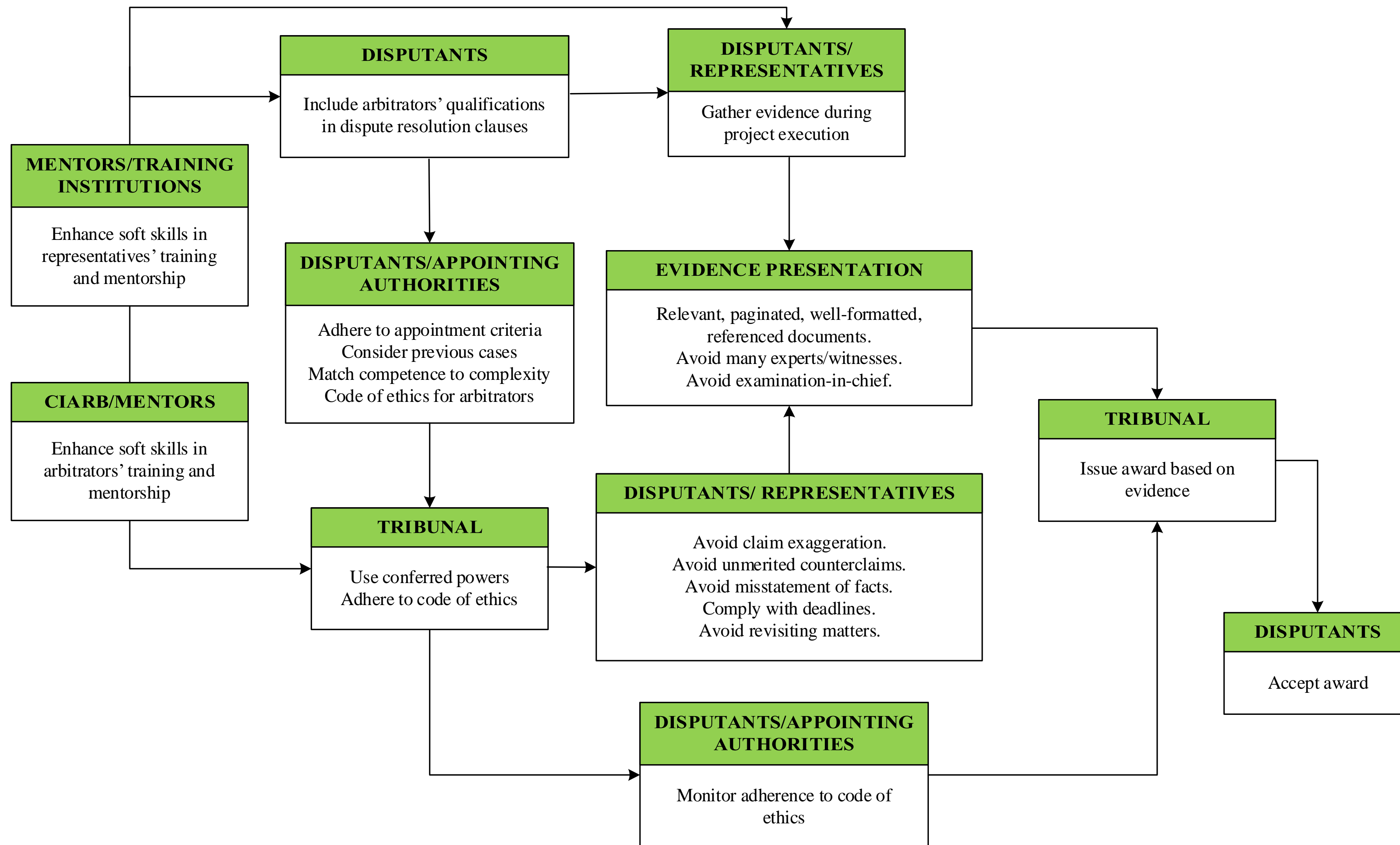

Figure 4.4: Framework for effective construction arbitration

4.9 Validation

4.9.1 Model Validation

The model was validated by conducting five semi-structured interviews. Validation experts were asked to comment on each path connecting the factors found to influence arbitral effectiveness in **Figure 4.3** to establish their agreement with the findings on the significant factors. Analysis of the experts' excerpts is displayed in **Table 4.54**. The path descriptions shown in the first column have been sorted alphabetically. Results show that most of the experts agreed with the findings.

First, most of the experts (VE1, VE2, VE3 and VE4) agreed with the finding that competence of the tribunal positively influences the approaches to the presentation of evidence. They felt that the tribunal must play a more proactive role in streamlining the presentation of evidence in a way that makes it easier to conduct the proceedings.

Second, all experts agreed with the finding that the complexity of the dispute negatively influences perceived competence of the tribunals. They attributed the problem to lapses in the appointment process that end up with mismatches between the arbitrators' competence and the dispute complexities. Having served as an appointing authority, VE5, an architect, agreed to elements of cronyism in institutional appointments, which, unless done meritoriously, may contribute to the mismatch.

Third, the finding that complexity of the dispute negatively influences the approaches to the presentation of evidence was supported by most of the experts (VE2, VE4 and VE5). These experts argued that careful choice of party representatives and of the right tribunal would play a key role in moderating the approaches to the presentation of evidence in complex cases.

Table 4.54: Excerpts of experts' responses on model validation

Path Description	Agreement responses and participants' excerpts
Competence positively influences approaches to the presentation of evidence	*Agree* "That is correct" (VE1). "…where the tribunal is more competent, then presentation of evidence will be more streamlined. I think that is the correct way of describing it" (VE2). "Normally, the arbitrator guides the process. In as much as the process is party-driven, he still is the driver…When we start discussing the issue service of documents, I am very clear to the parties that I want…documents and evidence filed in a certain way because then it makes oral hearing easier and faster..." (VE3). "A good arbitrator is one who is able to set the standards for presentation of evidence, he insists on them, keeps the parties to the procedure and gets the evidence which will produce a fair outcome..." (VE4).
Complexity negatively influences competence of the tribunal	*Agree* "That may be so because it goes back to the appointing authority. And you see, there is a perception, is it a perception? I think it is true that the more experienced an arbitrator is, the easier he will be able to handle the issues, to separate the issues, those complex and the like. Somebody who is very green will be challenged" (VE1). "I think the parties have themselves to blame for that because they needed to interrogate whether that person was at the level that he could deal with the actual substance of the matter. Because I think the issue of appointment is not taken really seriously. You see if you don't match, out of your own choice, the tribunal to the complexity, then you know it is your problem, it's not mine…So in making your choice of arbitrator, you should think seriously about whether or not whomever you choose will be able to deal with your dispute" (VE2). "I guess the answer will be YES. It will look more complex simply because this person is not so competent enough. So that means they are not guiding the process as it should whereas it could be an easy matter to decide. Since they are not conversant with the process, maybe they end up making it more complex and it actually is a simple matter. I think the answer is YES" (VE3). "...sometimes there is a mismatch, that an extremely complex matter finds somebody who does not have the level of domain expertise required to handle that matter. And therefore, the perception in that matter would be that the arbitrator is incompetent. So, it is matter-related...And it happens, it does happen..." (VE4). "The way I look at it, it is an element that you are reaping what you sow. Because you are basically saying that this arbitrator did not have the competence. And the onus of selecting the arbitrator is on the parties...So either you two selected this person or you allowed the institution to select this person, you agreed...I also tend to feel it is for the same reason that person is complaining that this person has become to be the president of AAK and he is going to appoint his friends to arbitrations, the same applies to that person who has lost, if he had got in there, it's going to be the same scenario..." (VE5).
Complexity of the dispute negatively influences presentation of evidence	*Agree* "It goes to this [competence], to exactly what we have been talking about. We talked about streamlining the flow of evidence, so the greater the expertise the arbitrator has, having recognised the complexity of the dispute, he will then be able to streamline this. So, the choice of the tribunal is going to affect this in a complex case" (VE2). "That is incompetence of the representatives. One thing you need to perhaps appreciate is that representation in arbitration is ordinarily done by lawyers. And lawyers, in my own view as an arbitrator, have challenges in understanding construction contracts. So if you are dealing with construction contracts and you have lawyers, this will always show up and that incompetence has to be moderated by the competence of the arbitrator in terms of procedure...So it is control, it goes to competence, procedural competence now, not even domain competence and you need to have the two of those in mind...You can have an arbitrator who has great domain expertise...but they don't know how to control the parties, they don't know the art of getting evidence, they don't know the art of human control, they are not confident to stop people from running wild" (VE4).

Table 4.54 *(cont'd)*

Path Description	Agreement responses and participants' excerpts
	"I think it follows. It's a complex case, therefore it requires competent counsel on both sides to run it, and if they don't have the competence and the expertise, then they are going to have irrelevancies, too much documentation that is not pertinent. In fact, it is complex, the outcome is going to be as you have said, and it needs competent counsel. If you don't have a competent counsel, you are going to have a disjointed submission" (VE5).
Distribution of process control positively influences favourability	*Agree* "That's true" (VE1). "...as an arbitrator, you have to retain some form of objectivity nevertheless, but you would be inclined to assist this person, which is why I would not be happy to conduct such an arbitration. Because then the other party, if they end up losing, well represented as they are, they will say it is because you were favouring this other person" (VE2). *Disagree* "I would say NO. And I would explain because sometimes you find one party, of the two parties, is more experienced in matters arbitration than the other is. So, they tend to have an upper hand when it comes to control in terms of the preliminary matters. When you are agreeing on the details, they seem to know, they push, and they get what they want. But that does not affect the outcome because the arbitrator can see one is definitely more experienced than the other is. But in the aspect of fairness you look at things, look at the facts in regards of who has an upper hand in the process" (VE3). "It might be a perception; it may be true but that now goes to the arbitrator. If the arbitrator is incompetent, if the arbitrator is not properly centred, if the arbitrator is intimidated and is moved from the centre by the stronger party, then that is a different thing altogether. It has more to do with the arbitrator than the parties because the arbitrator is supposed to focus on the contract, on evidence and the arbitrator should not award anything which has not been won on the strength and the relevance of the evidence...So the arbitrator has to be very clear in his mind, what the dispute is and solve the dispute, not influenced by the power balance between the parties because that part will be very unfair...A good arbitrator one who has what it takes, the domain expertise, they are familiar with the issues, they will ignore everything which came by way of power and only work with what came by the way of evidence" (VE4). "The only thing you do when you are running that as the arbitrator is that it is not as easy in running that process because...you have to make sure that there is a balance in the process" (VE5).
Distribution of process control positively influences perceived competence of the tribunal	*Agree* "Yes, he will be looking at it from the legalistic point of view because he is talking about rights. So, for him, that tendency of bias or lack of understanding, he will be going away with that perception that this arbitrator is not up to it or my favourite" (VE1). "Yes, I agree. As an arbitrator from the outset, you must show the parties who is in charge. You must show this, and you must be robust, and you know what to do in whatever situation props us. I accept that it comes with experience, but we have got some really rough people in this jurisdiction when it comes to doing arbitration. They feel like it's a stumbling block to them making money in the courts. Many people still have not made that transition to accepting that arbitration is complementary to litigation. So, if the parties are able to ride roughshod over the tribunal, then there is a problem" (VE2). "Through my own experience, I would say YES in the sense that they can see I also understand the process. But I have helped a few arbitrators who are not too experienced and they end up with one experienced party, and they tend to take over the control and everything and they feel on the other side and they can see the arbitrator is not very conversant. Then they have an issue with the arbitrator and the outcome of the whole process...But if it's me to speak, I would say it would be a YES" (VE3). "My comment will be they just got their way and so they were happy. If they were more in control, it means they possessed the faculties of the arbitrator and therefore naturally you would expect them to be happy and say positive things about the arbitrator. And the truth is it would be a bad thing for arbitration if the domineering party was to feel that because they dominated, then the arbitrator was fair. It is lopsided, it is a selfish way of looking at things and again it should not be allowed to affect the award" (VE4). "I want to say you would expect that because remember at the end of the day, you are going to challenge that. In fact, sometimes I feel one of the parties from the word go has already made

Table 4.54 *(cont'd)*

Path Description	Agreement responses and participants' excerpts
	the decision they are going to challenge this thing...It seems to be what you have extracted from your findings. It seems to be the scenario" (VE5).
Favourability negatively influences effectiveness	*Agree* "But you find that from their training, advocates don't necessarily go that route of expeditious resolution of disputes because it will eat into their pockets. So a counsel can know that they don't stand a good chance but nonetheless they can turn a blind eye and say that they have a chance in the high court...Some cases are obvious that an arbitrator is not handling the matter well but nonetheless you proceed in the hope that something good will come on. So, if it doesn't come on, you want to revive...There is a bit of that in that they want to exhaust whatever right they have and feel that they have gone through the whole way. They try to identify if there is any procedure that was not there. That is what they go for and they hope that they will be listened to" (VE1). "Normally YES, that's the true position. If the whole matter has favoured one party, then definitely the other party would not be happy about everything about it. That is true and they would most likely go to challenge it" (VE3). "...one of the things about arbitration is that there will be a winner and there will be a loser, unfortunately...The process can run well on everything but at the end of the day what does the award say. And one party, whoever has lost, most likely will feel disfranchised and the natural thing again is to seek another avenue of challenging which is, of course, going to court. I think that's generally what I would say...And it is only natural for such a proceeding ideally that for it to go on, it is not likely that both parties are going to be happy. I think that is broadly speaking without any bias..." (VE5). *Disagree* "I am quite cynical. What I can say is that advocates want work. I think they are the ones who persuade them...Even when it is quite clear that the reason why that unfavourable outcome has come about is that the client just didn't have a good case" (VE2). "It all depends on how the claim is framed. There are those people who believe in the saying that less is more where the claimant prepares their claim according to their entitlement, what they believe they are entitled to, what is supported by the contract, what is supported by evidence and in situations like those, then they deserve to win everything, if it is all supported. But there are others who frame their claims and exaggerate them...So it all depends really, and I think it is part of the psychology of winning and losing..." (VE4).
Presentation of evidence positively influences favourability	*Agree* "The challenge which will be there is the presentation of that claim in terms of ensuring that you have enough supporting documentation. Because when the matter comes before the arbitrator, the arbitrator has to determine based on what is presented to him. Many times, you can see the substance of the claim. But then, what have they presented? Because it is that, which they have presented that the other opponent also has a chance to counter. You then now determine the arguments and what is there as evidence...That's true" (VE1). "That is true because, in the end, the arbitrator must look at the evidence as is presented. If evidence has not been properly presented or is been mixed up or is not easy for the arbitrator to follow through, it becomes difficult for that party to get the favour. Whereas one who knows what he is doing will present the evidence clearly, in a certain sequence that makes it easier for the arbitrator to make a determination. So, that is a YES" (VE3). "You may have a good case and you have not presented it well, you have not brought the evidence, the other person has brought the evidence clearly, it will follow. I think it just follows. And it should, it should" (VE5). *Disagree* "I would not say so; it really depends on the case because you can find both parties presenting their case in that streamlined fashion. But still, the favourability will not fall one way or the other, because of this. So, I don't think so. It depends on whether they have a good case" (VE2). "The manner of presentation will perhaps come in in terms of making it easier to navigate through the evidence and being able to get a clear line cutting through all the evidence and it would not be more so much about the outcome from my own experience. It would determine the time taken because wherever the evidence is, a good arbitrator should be able to find it and piece it together even if it is produced back to the front and in the middle, it will still form one

Table 4.54 *(cont'd)*

Path Description	Agreement responses and participants' excerpts
	complete whole. It would take more time, but the outcome would still be favourable. So, it is how much evidence, how relevant it is, how it resolves the issue of rights and obligations. The one without evidence loses because they don't have the case for themselves. It is as simple as that" (VE4).

Fourth, most of the experts (VE3, VE4 and VE5) disagreed with the finding that the perceived distribution of process control positively influences award favourability. They stressed the need for the arbitrator to ensure that the process control is relatively balanced. However, supporting the finding, VE2, an advocate, felt the realisation that the skewed process control is likely to produce favourable outcomes sometimes requires the arbitrators' intervention.

Fifth, the finding that perceived distribution of control positively influences perception of competence of the tribunals was supported by all the experts. Thus, a proactive approach by the tribunal in ensuring balanced process control may instil confidence.

Sixth, most experts (VE1, VE3 and VE5) supported the finding that award favourability influences the effectiveness of arbitration. They seemed to support the notion that each party expects to win. However, while VE1, a quantity surveyor and VE2, an advocate had diametrically opposed responses; they both attributed such challenges to advocates' instrumental nature. Nonetheless, disagreeing with the findings, VE4, a quantity surveyor and an advocate, argued that exaggeration of entitlements as an aspect of control creates expectations that may affect the effectiveness of construction arbitration.

Finally, most of the experts (VE1, VE3 and VE5) supported the finding that the approaches to the presentation of evidence positively influence award favourability. However, VE3, an advocate, argued that the outcome depends on the strength of the evidence, rather than how it is presented. Nonetheless, VE4, a quantity surveyor and an advocate argued that while the manner of presentation may have a bearing on the efficiency of conducting the proceedings, it should not determine the outcome because a competent arbitrator should be able to sift through the evidence to determine the extent to which the evidence supports each party's case:

> "A good competent arbitrator is not one who is able to follow through a well laid out document…And it is not one whose imagination is captured by the way documents are laid out…A competent arbitrator follows evidence like a heat-seeking missile, wherever it is, and a good arbitrator knows what he is looking for even if it is not obviously presented. He will be able to find it and a good arbitrator does not become good because of the documents put before him or the way evidence is presented before him."

Thus, according to VE3 and VE4, better approaches to the presentation of evidence that enhance the chances of securing favourable outcomes should ideally be moderated by the competence of the tribunals.

4.9.2 Framework Validation

The framework was validated by asking the experts to comment on the proposed policy, institutional and legal interventions, and actions required of participants. Their responses are summarised in **Table 4.55**. First, recognising the existing gap in the appointment process, the experts felt that there is a need for disputants to specify the qualifications of arbitrators in their contract documents. They also proposed that appointing institutions should develop and adhere to appointment criteria to guide the appointment process. This approach is likely to ensure that arbitrators are appointed to handle disputes not just in their areas of expertise but also by considering other factors such as the size and complexity of the disputes. Thus, larger and more complex disputes may be assigned to more experienced Chartered Arbitrators or Fellows as small, less complex disputes are assigned to the less experienced Members.

Second, the experts stressed the need for the appointing institutions to collaborate with the CIArb (Kenya Branch) in the appointment process in ensuring that arbitrators appointed have undergone and completed rigorous mentorship. In addition to this collaboration, the experts called for these appointing institutions to develop and implement a code of ethics that can help in instilling discipline among their arbitrators. Thus, arbitrators with pending complaints against them and those whose awards are successfully challenged may be suspended from the panel for a specified period.

Table 4.55: Excerpts of experts' responses on framework validation

Action point	Categories and Participants' Excerpts
Institutional framework	
Appointing institutions	*Code of ethics* "...the AAK and IQSK need to set up now their own rules for their own arbitrators because they need to be answerable because of the fact that they are appointing authorities. So, can they ascertain to the industry that the arbitrators they are giving us are qualified, they are able? What rules do they have if I have a problem or a complaint, things like that?" (VE3). "But the thing is let's focus on the conduct of the arbitrator. If you are not able to deliver an award within a certain time, the parties have remedies on that. You can be reported to, arbitrators do have the Chartered Institute but again you will have reasons, I am sure…" (VE5). "…these institutions can actually monitor and do a follow up in terms of ascertaining the challenges being brought up against specific arbitrators" (VE1). "There should be a penalty to the arbitrator by probably even the institution that licences them or governs them, appoints them. They will lose the opportunity to be appointed because you have set a bad precedent. You lose the opportunity to be a member of that fraternity for a period of time and it can be published. There has to be a recourse. That way you will get people to adhere and to behave. And it also brings back the integrity to the whole fraternity" (VE3). *Setting up and adhering to appointment criteria* "When you are an appointing authority and you have a case of this complexity, then it has to go to an arbitrator of a certain kind. It is not a question of whether there is a rule, it is an obvious thing. We don't follow because we are unethical. It's just a question of integrity and ethics…But there have been cases that you hear people complaining that cases are skewed towards friendships and things like that. I can't ascertain, but if indeed they are there, it's a question of ethics and a lack of integrity, which unfortunately a lot of professionals have demonstrated" (VE3). "They need to develop guidelines. I think it is *ad-hoc* with all the institutions. They need to have clear guidelines especially that matchmaking, it really needs to be checked properly and it should not be a question of going down the list, who has not had a matter lately because I feel that gets done…there should be criteria, which should guide the appointing authorities, which is more robust than what they have now. I think now they don't have written criteria. If it is there, it is not robust enough and it has ended up producing mismatched situations to the detriment of parties..." (VE4). "…I think the Chartered Institute is one of the places where ideally they are supposed to be value-strong, I don't know how they are in the sense that when they are making the appointments, they should be appointing people who are experts in that area of dispute..." (VE5). *Collaboration in appointments* "…what I would like to see is the appointing institutions domestically; please refer to the Chartered Institute. I would want to see the appointing clauses say, 'in conjunction with the Chairman of the Chartered Institute of Arbitrators'" (VE2). "That one is a bit tough, but I see institutions need to work together. Because the Chartered Institute is the only one training. So AAK, IQSK, and any other should be able to ask the Chartered Institute, 'are these people qualified or are they in good standing' or there must be a procedure before the AAK puts you in a panel, they need to know that the Chartered Institute has cleared you significantly, that you can handle cases. Again, there is a gap there because once I get my membership certificate; I'll get my cases from AAK. There is no control mechanism at AAK the way there is at the Chartered Institute" (VE3).
Participants	*Change of attitude* "It is really a change of the mindset. First, you know construction is adversarial itself. Then now when you get this person who wants his pound of flesh, you know, it calls for that sort of acceptance by the advocates or so on. Fine, this is arbitration; it is not the court, just that realization" (VE1).

Table 4.55 *(cont'd)*

Action point	Categories and Participants' Excerpts
	"In fact, there is something else I wanted to add: sensitization. All the players need to understand from the outset that the reason they have come to arbitration is that they want to expedite. So even in the construction industry, we need to teach the lawyers, teach the consumers what arbitration is…That may actually result in people being more careful in presenting their cases. So, I think there is still a lot of education that needs to be done, lawyers especially and stop this business of in whose best interest are you acting, the client or yours...Just refuse the arbitration. You must do it conscientiously. You must be conscientious about it..." (VE2).
	"...arbitrators need to have integrity to be fair so that they don't take more work than they cannot handle...It is basically balance…They should resolve it in the time best for business, best for parties, best for the economy…" (VE4).
	"I think the onus of that is just really on just educating the parties…the running of the whole process is normally on the parties, the conduct of the parties, one or both...And that is why there is a question about how efficient arbitration is" (VE5).
	Parties should choose knowledgeable representatives "And then there is the ignorance of the parties especially with respect to representation. They think that every lawyer is competent to handle every case, it is not so" (VE4).
	"Now if I am an advocate and I am coming to arbitration, I should be having expertise in that area of dispute...If your skills are both, you are a quantity surveyor and you are a lawyer, you have done law, you are good both as an arbitrator and as a party representative" (VE5).
	Parties should specify arbitrators' qualifications "I think in making the case for an appointment, they need to be specific because they have that option...Please say as our dispute relates to the following, we want a specific arbitrator in this line and since it is by consent, the institution has to do it. If can be by consent, even if it is just by one party, please we need somebody with the following. So, take greater care in making the appointment" (VE2).
	"In terms of the incompetence of the arbitrators, again I would blame the parties. Why would you as a party going to arbitration not take interest in the person who is going to determine your case? So parties end up with 'incompetent' arbitrators as if it's a fate that befalls them but they have the first opportunity to choose a competent arbitrator and during that time, they have all the time consult and to find out and to do their background checks so that they end up with a competent arbitrator, they don't" (VE4).
	"...define the type of arbitrator that you will want should you dispute" (VE5).
	Parties to agree on and adhere to the timelines "You know time could be pegged because you know this is a consensual agreement of the parties. The time could be pegged to the appointment such that after a certain period, you will lose jurisdiction, then you must go back to the parties to seek fresh jurisdiction…Even appointing bodies can put a time, but that again really should be consensual, and the parties can" (VE1).
	"The parties should enter into a contract with the arbitrators on the period, if they leave it open, you cannot blame the rules" (VE4).
	"I think by the very nature, if you don't work with a deadline, that is why I was asking if you don't work with a timeframe, I think in terms of planning and everything, I don't think that is the right thing. 'I will make my award and issue it on notice' is not fair to the parties in my view because you are not giving them a timeframe to plan…it should not be open-ended" (VE5).
Training institutions	*Curriculum review* "There needs to be an integrated approach in terms of developing specific curriculum as to what is being done at the various institutions" (VE1).
	"I think we need to do a little more…So yes I agree, inculcation, they need to be inculcated, more sensitization, more education, yes, at the lower level that arbitration is good and they need to understand where it is coming from. So yes, and that can as well be endorsed at KSL level..." (VE2).
	"It is true. Maybe the training institutions need to do more for their representatives for them to understand that arbitration is not a court, and this is specifically only for the lawyers. When it

Table 4.55 *(cont'd)*

Action point	Categories and Participants' Excerpts
	comes to non-lawyers, the issues are not like that, because non-lawyers, of course, don't know the adversarial nature of a courtroom…That the training should incorporate special training on how to conduct yourself in an arbitration…So a little knowledge in the process of arbitration helps the lawyers to come a bit round to the process so that they don't make it as adversarial" (VE3).
	Enrich mentorship programmes "... there is the issue of mentorship, there is a gap there because there is no method of ascertaining that a member has gone through a rigorous mentorship. And that is a bit of work because when you are not well mentored and you start handling cases, chances are that there will be many issues because you are basically starting from the deep end and that can come with a lot of issues. But now I know the [Chartered] Institute has taken a stride towards making sure that its members who are qualified go through proper mentorship to a point where they ask you to present evidence that you have done three cases with either three different arbitrators or three complete cases as a mentee. That way, before you get a case to handle, the Institute is sure it is giving somebody who has a good experience. The only gap to answer your question has been on mentorship. All the other issues are questions of ethics" (VE3).
	Short ADR courses "What perhaps can happen is for the same institutions to develop specific short courses for people with different interests, and then offer them, depending on industry feedback" (VE4).
	Training representatives "The Chartered Institute can perhaps now develop an interest in training not just arbitrators but also representatives because the Act is clear that in arbitration, you don't necessarily need to have a lawyer to represent you. And the Chartered Institute may perhaps be best placed to train people on its procedure, but this time of representation, so that it is aligned to the procedure of arbitration" (VE4).
Legal framework	
Contract documents	*Interventions required* "With contract documentation for construction, I think I would not bring in mediation. I think having the DABs would be preferable; so that disputes are decided very quickly, then adjudication, then we can have arbitration…I would not introduce mediation. I don't think it's appropriate for a big construction industry issue" (VE2).
	"That the spirit of it. It is a good spirit in the sense that there are disputes that will actually be resolved at that stage that don't need to move forward when you look at it from the spirit of it and I personally advocate for it. Where you can resolve quickly, please do so. If it doesn't work, then there is another recourse by the time you even end up anywhere near arbitration. In fact, several layers needed to have been put in place including a requirement for mediation and then now arbitration becomes the last one…but of course, we all know ourselves and we know how we are unscrupulous sometimes so to speak, so we use it as a test measure. But that should not be the reason why it should not be there" (VE3).
	"By seeing the extra layers of dispute resolution that have been created and clarity, I see one; it will in a positive way prevent people from even going into a dispute. They will try to resolve even before they get to that stage because when they look at that stage, they will say you know from here adjudication, from adjudication, arbitration so that's one side of it" (VE5).
	Interventions not required "What the drafters of the JBCC now are trying to do is to define that part 'with the assistance of third parties' and they are taking away the freedom of the parties and making it more expensive. They are being prescriptive…I feel that this introduction is going to make it more expensive, more protracted and ADR then becomes less desirable" (VE4).
	"…I would say if you are that party who is perpetually in dispute, then you've just increased the length. This person is very clear at the end of the day he is going to the high court. So, what you are doing, you have at least increased another layer in terms of the delay in the process. Of course, in one way, it reduces the cost because if you are able to resolve the matter within that short period…But if you don't get it resolved there you still spend that money on adjudication and then again, you are going to spend on arbitration…I was quite comfortable with the JBC, the way the clause sat…" (VE5).

Table 4.55 *(cont'd)*

Action point	Categories and Participants' Excerpts
Rules and regulations	*Interventions required* "Our rules don't indicate anything but all we say is that the award will be issued on notice. We do need a little standardization; I think I would want a maximum of six months. We need to give a guideline on that" (VE2). "…it is something that would be an added advantage if there was at least a guideline to which the award should be returned...Things come differently, and everything has its own uniqueness. But not having a guideline does not mean you are helping the industry. On the contrary, a guideline would force people, regardless of their complexities, to work within certain parameters…Let me tell you, when you put guidelines there, then everybody is forced to conform...I am for guidelines on timelines. I am for that, absolutely" (VE3).

Third, in agreement with the proposed framework, the experts felt that there is a need for participants in the arbitral process to change their attitude towards arbitration. Such change requires party representatives to distinguish arbitration from litigation thus avoiding unnecessary delays and award challenges. The experts also proposed that disputants should choose representatives with a good understanding of both arbitration and construction contracts. At the same time, they stressed the need for arbitrators to avoid taking matters beyond their workload capacities.

Fourth, some of the experts felt that the proposed amendments to the dispute resolution clause in the JBC standard contract would minimise the number of disputes ending up in arbitration. However, other experts felt that the extra layers would not only cause delays and increase resolution costs but also escalate hostilities, making it difficult to arbitrate the disputes.

Fifth, some of the experts felt that it is necessary to introduce in the rules guidelines on timelines for issuing awards after conclusion of proceedings. These guidelines would eliminate instances where arbitrators inordinately delay issuance of the award after concluding hearings. When confirming the terms of reference of the arbitrators, disputants would then ensure that these guidelines are incorporated with possible amendments to take care of the varying complexities of their respective cases.

Finally, in support of the proposals for curriculum review, some of the experts felt that training institutions should sensitise their students on the need to distinguish the arbitration from litigation. They also stressed the need for these institutions to introduce short vocational courses on alternative dispute resolution, including courses to train party representatives in arbitration.

4.10 Conclusion

This Chapter has presented data analysis results of the five cases conducted to establish the factors influencing arbitral effectiveness. Despite establishing that all the five cases were ineffective, the degree of ineffectiveness varied from case to case. Two of the cases were found to be the most ineffective (Cases 1 and 4), two were moderately ineffective (Cases 3 and 5) while one was the least ineffective (Case 2). Thus, arbitration of disputes of larger values appears to have been more effective than that of medium and small sized disputes.

The overall ineffectiveness of the five cases was also supported by participants' sentiments. The five cases generated more negative than positive sentiments. However, Case 1 generated the least proportion of negative-positive sentiments while Case 5 generated the highest. Nonetheless, the degree of ineffectiveness across the five cases did not follow the same pattern of findings as that of generated sentiments.

Participants' sentiments revealed that they were more concerned about the quality of the awards than the efficiency of the proceedings. However, the high proportion of negative-positive sentiments on cost-effectiveness suggests that participants agreed on their perception of award quality than they did on procedural efficiency.

Another surprising finding emerged from the word frequency search. The most frequent words indicate that participants seem to have paid greater attention to the role of the arbitrator, the parties, and the court in influencing not only the outcomes but also the resolution time. This finding was later confirmed during the detailed analysis phase when it was established that out of the ten factors, five of which had been predicted to have direct impact, only award favourability influenced arbitral effectiveness, supported by distribution of control, approach to the presentation of evidence, competence of the tribunal and complexity of the dispute.

The framework for effective construction arbitration in Kenya proposes that arbitrators minimise their intervention in less complex, low-value disputes. However, as such disputes become larger and more complex, the arbitrators are required to use more powers to curtail abuse of process control by the parties. Parties also have a duty to conduct themselves well and to present evidence in a manner that facilitates

effective arbitration. They must also specify qualifications of the arbitrators prior to dispute occurrence. The framework proposes that appointing institutions should develop and maintain criteria for appointment of arbitrators and develop a code of ethics to which these arbitrators must adhere. The framework also requires training institutions to enrich their curricula with content that promotes effective construction arbitration.

The next Chapter presents the research conclusions and implications.

CHAPTER FIVE

CONCLUSIONS AND IMPLICATIONS

5.1 Introduction

The research problem addressed in this thesis was presented in Chapter One. In the second Chapter, a review of the related literature was discussed, at the end of which the research gap, theoretical and conceptual framework were outlined. It was established that while the problem of arbitral ineffectiveness in construction still lingers, the underlying reasons have not been clearly brought out. Thus, it was found necessary to establish the unexplored relationship between such effectiveness and its influencing factors. This assertion paved the way for the methodology presented in Chapter Three, which described the research approach used in data collection and analysis. Chapter Four presented the results of the data analysis carried out in accordance with the procedures outlined in Chapter Three.

In this final Chapter, the researcher discusses the findings by comparing them with those of previous researchers. The Chapter revisits the objectives of the study outlined in Chapter One and demonstrates the extent to which those objectives were realised. The second section following this introduction recaps the findings in summary. The third section draws conclusions about the research aim and objectives. The fourth section draws conclusions about the research problem. These two sections rely on cross-case synthesis and the explanation-building approach to demonstrate how the research contributes to the body of knowledge. The implications for theory are presented in the fifth section while the implications for policy and practice are presented in the sixth section. The seventh section presents the research limitations while the eighth section presents the implications for further research. At the end of the Chapter is a conclusion which wraps up the thesis.

5.2 Summary of Findings

This study was conducted by examining five objectives, whose findings are summarised below:

1) ***To establish the effectiveness of construction arbitration in Kenya.***

This objective was achieved by examining the structure of the indicators of arbitral effectiveness in Section 4.5. Results indicate that the five cases were ineffective because of cost ineffectiveness, time inefficiency and poor awards. However, such ineffectiveness varied from case to case, with one case being the least ineffective, two cases being moderately ineffective while two cases were the most ineffective.

2) ***To describe the factors influencing the effectiveness of construction arbitration.***

This objective was achieved by examining the structure of factors in each construct based on the observations made during the field interviews. First, results in Section 4.6 not only indicate that the awards were favourable but also satisfactory to claimants in most of the cases. Second, claimants felt that these awards were fair while respondents felt otherwise. Such perceptions of fairness were mainly driven by participants' comparison of the awards against their expectations, against similar disputes and against what they felt they deserved.

Third, participants' perception of procedural fairness was good in most of the cases except in Case 2. The average perception, in this case, was mainly driven by perceptions of how fairly the tribunals had decided the disputes. The claim and defence teams returned opposing responses. Fourth, there was a perception that process control was skewed in favour of claimants in four cases. Such skewness was mainly driven by better party representation and misconduct by most respondents in an environment where the tribunals did not make adequate use of their powers in streamlining the proceedings.

Fifth, perception of the quality of the decision-making process was good in most of the cases. However, there were some diametrically opposed responses between claimants and respondents on perceptions of bias and favouritism, suggesting that these aspects may have been influenced by award favourability. Sixth, most of the participants across both divides felt that the tribunals had treated them well. However, respondents had issues with award reasons.

Seventh, the five cases displayed varying levels of complexity, mainly driven by the nature of the cause of the disputes, with the least complex disputes bordering on

quantum disagreements while complex disputes required contract interpretation, thus calling for more sittings. Eighth, the tribunals in most of the cases were perceived to be moderately competent. This level of competence was mainly occasioned by moderate skill levels resulting from weak functional skills.

Ninth, the analysis suggested that the sizes of the tribunals were adequate in most of the cases, except in Case 4. The sole arbitrator created a perception of bias and favouritism among the respondents in this case. Finally, the approach to the presentation of evidence was moderate in four cases but best in one case. The best approaches were mainly driven by meticulousness of documentation.

3) ***To explain the relationship between arbitral effectiveness and its influencing factors.***

This objective was achieved by examining 53 propositions that defined the relationships among the various constructs. These relationships consisted of 29 direct and 24 mediating propositions. In summary, seventeen direct propositions were supported, two of which were found to be negative despite having been predicted to be positive while one was found to be negative despite having been predicted to be neutral, as established in Section 4.7. Five mediating propositions were also supported.

These results established that out of the ten factors, only distribution of process control, complexity of the dispute, competence of the tribunals and the approaches to the presentation of evidence indirectly influenced the effectiveness of arbitration through award favourability. A structural model of these factors was revised and later validated. The remaining factors including perceived adequacy of the size of the tribunal, perceived procedural fairness, perceived award fairness, perceived quality of the decision-making process and perceived quality of treatment experienced were not critical to arbitral effectiveness.

4) ***To synthesise the findings into a framework for effective construction arbitration.***

This objective was addressed in Section 4.8 by making proposals on policy, institutional and legal reforms and other interventions required of participants in the arbitral process. The proposed framework calls for favourable policies that can

enhance the effectiveness of construction arbitration. It also highlights the need to retain the finality of the award while ensuring that loopholes that encourage exaggeration of claims and counterclaims are sealed. The framework proposes the need for disputants to specify the qualifications of arbitrators when drafting their contracts and for appointing institutions to develop and maintain appointment criteria and to follow-up on their appointments to reduce the mismatches between competence and dispute complexities. The framework also proposes that training institutions should review their curricula to ensure that both arbitrators and party representatives are adequately prepared to conduct proceedings effectively. Finally, while expecting parties to conduct themselves well and to change their approaches to the presentation of evidence, the framework proposes that tribunals should be proactive in ensuring that they streamline the proceedings to balance process control.

5) ***To validate the framework for effective construction arbitration.***

This objective was achieved by seeking views of five experts in the arbitral process. Results in Section 4.9 indicate that these experts not only agreed with the proposed framework but also made additional proposals that enriched the overall framework.

5.3 Conclusions about the Research Aim and Objectives

The aim of this study was to develop a framework for effective construction arbitration. This aim was achieved by addressing the following specific objectives:

1) To establish the effectiveness of construction arbitration in Kenya.
2) To describe the factors influencing the effectiveness of construction arbitration.
3) To explain the relationship between arbitral effectiveness and its influencing factors.
4) To synthesise the findings into a framework for effective construction arbitration.
5) To validate the framework for effective construction arbitration.

The conclusions against each objective are articulated in the following sub-sections.

5.3.1 Effectiveness of Construction Arbitration in Kenya

The first objective was addressed in Sections 4.4 and 4.5. The conclusion arising from this analysis is that the five cases were ineffective because of time inefficiency, cost ineffectiveness and poor-quality awards. An analysis of the word frequency cloud revealed that the effectiveness of construction arbitration revolved around perceptions of the role of the arbitrator, the parties, and the court in determining the finality of the award. Additionally, participants were more concerned about time efficiency and quality of the award than they were about cost-effectiveness.

Analysis of the results on cost-effectiveness in Section 4.5.1 suggests that three of the five cases were ineffective, with the majority of the participants reporting that the cost incurred, which ranged between 0.5-42.6 percent of the claim award values, exceeded their budgets. These results replicate findings of similar studies by Alshahrani (2017), El-Adaway et al. (2009), Marques (2018), Moza and Paul (2017) and Torgbor (2013) that also found arbitration to be cost-ineffective. However, just like time efficiency, participants' responses on the reasonableness of the costs were mixed.

Findings in Section 4.5.2 showed that the actual duration in most cases exceeded participants' anticipated duration. Most participants expected the cases to last up to six for cases handled by sole arbitrators and six to eighteen months for the case handled by multi-member tribunal. However, the duration for cases under sole arbitrators ranged between 5.9-33.7 months while the case handled by the multi-member tribunal lasted more than 51 months. The case with the shortest duration, which appears to have been an outlier, lasted 5.9 months because there was no defence, implying that the case could possibly have taken longer if the defendant opted to file its defence. These findings suggest that it was not easy to conclude the cases in less than six months as recommended in earlier works (e.g. Fortese & Hemmi, 2015; Risse, 2013; Rivkin & Rowe, 2015). Thus, the five construction cases in Kenya were characterised by delays, resonating with similar findings by El-Adaway et al. (2009), Marques (2018), Moza and Paul (2017) and Torgbor (2013). Despite these delays, participants' responses on the reasonableness of the duration

were generally mixed, with participants in only one case agreeing that the duration was reasonable.

Given that four of the five awards were challenged in court, the findings in Section 4.5.3 are inconsistent with the literature in two ways. First, time and quality of the award were key concerns in this study, partly contradicting the work of Naimark and Keer (2002) who established that participants were most concerned about fair and just result, followed by cost. A possible explanation of this inconsistency is that the earlier findings were based on a survey of participants in international arbitration. Second, the findings presented here partly contradict the work of Stipanowich and Lamare (2014) who found that time and cost were the most important considerations in the USA. In sum, these findings indicate that the most important considerations for participants in the cases from Kenya were different from those of the USA because of geographical and cultural differences (Cheung & Suen, 2002). The other reason for the inconsistency could be the different research approaches used. While the current study is case based, the earlier study in the USA was a general survey.

5.3.2 Factors Influencing the Effectiveness of Construction Arbitration

The second objective was addressed in Section 4.6. Respondents' challenges to most of the awards indicate that losing parties were unwilling to comply with the awards (Section 4.5.3). Results in Section 4.6.1 showed that all awards, except in one case, were favourable to the claimants. These findings confirm the notion that winners are more willing to defer to outcomes than losers are (Adams, 1965; Blau, 1964; Gross & Black, 2008), suggesting that respondents challenged these awards because the awards were unfavourable to them. Even the respondent may have challenged the split award because the counterclaim award was largely unfavourable. Thus, disputants were only self-interested and sought to maximise material gains in these cases (Blau, 1964; Brockner & Wiesenfeld, 1996; Tyler & Blader, 2000), demonstrating their instrumental character.

These unfavourable awards and the ensuing challenges may have contributed to the strained business relations among the disputants. Most participants reported that disputants were unwilling to engage in further business. Findings from the five cases

confirmed that ineffective arbitration essentially fractures business relationships (Besaiso et al., 2018; Cheung et al., 2002; Gebken II, 2006; Stipanowich, 2010). Nonetheless, the participants overwhelmingly expressed their willingness to refer to arbitration future construction disputes. This finding surprised because Tyler and Blader (2000) argued that people's long-term judgements about groups depend on the quality of outcomes they receive from the groups, across situations, relative to outcomes from alternative groups and the degree of resources invested in the groups. The quality of outcomes has been found to determine commitment to arbitration (Brockner & Wiesenfeld, 1996). It was thus interesting how such poor outcomes encouraged both winners and losers to recommend arbitration for resolution of future disputes. Apart from expertise and finality, some of the reasons the participants cited such as speed were incongruent with the observations made in the cases.

Turning to award fairness, claimants' teams across the five cases reported that the awards were fair while respondents' teams felt they were unfair (Section 4.6.2). These reactions appear to have been informed by perceptions of inequities in their comparative input-output ratio (Adams, 1965). Respondents' reactions in challenging these inequities appeared to border on anger and resentment. However, claimants' reactions seemed to defy feelings of guilt as postulated by Folger and Cropanzano (2001). Although the awards suggest exaggerated claims and counterclaims, these claimants' reactions indicate that the tribunals did not over-reward claimants.

Participants also compared the awards against expected standards. Whereas most claimants' teams reported that the awards were fair and compared reasonably with awards in similar disputes, respondents' teams felt otherwise. By not getting what they expected and deserved, these respondents' teams may have felt deprived of their expectations (Adams, 1965; Tyler & Lind, 1992). Conversely, claimants' teams may have been satisfied with the awards when they compared what the tribunals had awarded them to the respondents' teams (Tyler & Blader, 2000), especially where counterclaims were involved.

The question of perceived procedural fairness returned mixed responses, as reported under Section 4.6.3. Case participants reported that the rules and procedures were

fair and satisfactory. This finding indicates that participants were satisfied with the chosen rules of the Chartered Institute of Arbitrators (Kenya Branch) and other procedural techniques including documents and oral hearings. Additionally, they felt that the tribunals not only tried to be fair in the process of handling their disputes but also were concerned about disputants' rights. However, their responses to two indicators were split. There was no clear pattern of responses from both claimants' and respondents' teams on the first question of the ease of award recognition, enforcement, and execution. The second question of how fairly the dispute was decided returned positive and negative responses from claimants' and respondents' teams, respectively, suggesting that award favourability may have influenced participants' responses. Nonetheless, an analysis of all the indicators revealed that the perceived procedural fairness was good in most of the cases.

Findings in Section 4.6.4 indicate that claimants retained process control in most of the cases. Such process control mainly arose because the claimants' representatives were either more knowledgeable in construction disputes or relied on experts. However, these representatives did not utilise their good knowledge of arbitration to devise meaningful procedures that would minimise time and cost (Lane, 1997; Lörcher et al., 2012). In addition, claimants in most of the cases were more willing to settle the disputes compared to their counterparts. Thus, failure of the tribunals to exercise their powers in most of the cases handed over process control to the claimants. This skewed process control may have created a perception of distributive injustice among respondents (Thibaut & Walker, 1978), explaining why most of these respondents challenged the awards (Shestowsky, 2008; Shestowsky & Brett, 2008). Nonetheless, there was no evidence that one party had an advantage over the other because of prior arbitration experience. Finally, most of the participants reported that the attempted pre-action protocol did not strengthen their cases.

Case data under Section 4.6.5 revealed that the perceived quality of the decision-making process was good in most of the cases. However, participants' responses followed a consistent pattern in which most of the claimants and respondents returned positive and negative responses, respectively. The negative responses mainly resulted from perceived bias and favouritism. These findings confirm the interaction between interactional justice and outcome favourability as argued by

Folger (1993). They could explain why most respondents challenged their awards as earlier established by Brockner and Wiesenfeld (1996). Nonetheless, participants in majority of the cases felt that the tribunals handled their cases truthfully and were consistent in their application of rules, suggesting that informational justice was fostered.

Moreover, perception of the quality of treatment was good across the five cases (Section 4.6.6). Participants reported that the tribunals had refrained from using improper remarks or comments and had treated them politely, with courtesy, dignity, and respect. Such treatment helped in fostering interpersonal justice. Although the work of Tyler and Blader (2000) suggested that the quality of treatment may influence compliance, majority of the respondents challenged the awards based on the reasons.

An analysis of the case complexities in Section 4.6.7 revealed that one case was the least complex; one was the most complex while three were moderately complex. The respondent did not file a defence in the least complex case, whose dispute revolved around quantum only. Given that defences were filed in the remaining four cases, three of which had counterclaims, it appears that the respondent may have played a key role in determining the complexity of the cases. Additionally, the need to interpret the contract to establish the rights and obligations of the disputants were instrumental in determining the complexity of the cases. The least and most complex cases recorded the shortest and longest duration respectively, agreeing with earlier findings by Choi et al. (2014) and Hinchey (2012). Nonetheless, the cases did not display any complexities relating to the number of parties, language, and cultural differences.

Evidence from the cases presented in Section 4.6.8 revealed that the tribunals' competence ranged from moderate to high, with most of the tribunals oscillating around moderate competence. Such competence was mainly driven by the tribunals' good knowledge of arbitration and of construction disputes, and moderate skills. It can, therefore, be concluded that most of the tribunals put such knowledge and skills into good use in making their awards, given that the court varied only one of the four challenged awards. Although their construction knowledge should have helped in

yielding efficient proceedings (Hobbs, 1999; Stipanowich, 1988; Wiezel, 2011), their failure to make adequate use of conferred powers in limiting delays and unnecessary cost escalation suggests the tribunals underutilised or had weak functional skills. The tribunals may have conducted the proceedings with little concern for time and cost, contrary to expectation by earlier scholars (e.g. Overcash, 2015; Park, 2010; Stipanowich, 2010). Thus, the moderate to high competence did not enhance efficiency as postulated in earlier studies (Croall, 1998; Wiezel, 2011). These inconsistencies could be attributed to the fact that these earlier studies were based on opinions and anecdotes while the current study is based on data collected from participants in concluded cases.

Findings in Section 4.6.9 suggest that the sizes of the tribunals were adequate in most of the cases. However, a sole arbitrator handled the only case in which participants felt that the size of the tribunal was inadequate. In this case, most of the participants, drawn from the respondent's team, reported perceptions of bias and impartiality. Consistent with Stipanowich (1988), similar considerations informed disputants' choice of the multi-member tribunal. Thus, perception of the adequacy of the sizes of the tribunals was mainly driven by perceived quality of the decision-making process in these two cases only.

Nonetheless, the sole arbitrators did not expedite proceedings in their cases as contemplated by Holt (2008), thus contributing to the delays and high costs. Similarly, some of the sole arbitrators took relatively longer to write their awards compared to the multi-member tribunal, contradicting the notion that multi-member tribunals take longer to deliberate and make their awards (Holt, 2008; Newmark, 2008; Park, 2011). It is unclear whether the multi-member tribunal produced a better award as postulated by Giorgetti (2013) and Harmon (2004), given that only one of the four challenged awards was varied, the rest having been upheld.

Finally, disputants' approaches to the presentation of evidence were moderate to good (Section 4.6.10). These approaches were mainly driven by moderate to good documentation in most of the cases, except one case which was characterised by the least meticulous documentation. Moreover, even after witnesses submitted and adopted their witness statements, participants opted to use such inefficient techniques

as examination-in-chief in most of the cases. This costly approach wasted considerable time and may have created legitimate expectations of receiving favourable awards.

5.3.3 Relationship between Arbitral Effectiveness and its Influencing Factors

The relationship between arbitral effectiveness and its influencing factors was addressed in Section 4.7. The theoretical and conceptual framework developed in Sections 2.9 and 2.10 predicted that out of the ten identified constructs, five constructs not only directly influenced, but also mediated the influence of the remaining five factors on the effectiveness of arbitration. These five direct constructs included perceived procedural fairness, perceived award fairness, award favourability, perceived quality of the decision-making process and perceived quality of treatment.

The third objective was addressed by analysing 53 propositions, consisting of 29 direct (P1 to P29) and 24 mediating propositions. Out of the 29 direct propositions, seventeen were supported (P1, P2, P7, P8, P11, P14, P16, P18, P19, P20, P21, P23, P24, P25, P26, P27 and P29). However, case data did not support twelve propositions (P3, P4, P5, P6, P9, P10, P12, P13, P15, P17, P22 and P28). Surprisingly, Propositions P1 and P18 were found to be negative, despite their positive prediction. These findings suggest that favourability had a negative influence on arbitral effectiveness and that complexity negatively influenced perception of the tribunals' competence. Additionally, Proposition P29 was found to be negative despite its neutral prediction, suggesting that disputants did not match appropriate evidence presentation techniques to the complexities of the various cases. Moreover, P25 was found to be neutral despite its positive prediction. The 24 mediating propositions also returned mixed findings, with only five propositions being supported (P8.1, P14.2, P21.1, P25.1 and P27.1). Thus, nineteen mediating propositions were not supported (P3.1, P5.1, P5.2, P6.1, P10.1, P11.1, P12.1, P12.2, P13.1, P14.1, P15.1, P15.2, P15.3, P20.1, P23.1, P26.1, P28.1, P28.2 and P29.1).

Results of the analysis indicate that only award favourability directly influenced the effectiveness of arbitration, albeit negatively (–P1). This finding suggests that

disputants were self-interested and sought to maximise material gains in their economic exchange (Blau, 1964; Brockner & Wiesenfeld, 1996; Tyler & Blader, 2000). This instrumental approach explains why respondents opted to challenge the awards in most of the cases. These respondents were unwilling to accept and comply with the awards because these awards were unsatisfactory and unfavourable to them (Adams, 1965; Blau, 1964). These findings suggest that arbitration was ineffective because the awards were favourable to one disputant.

Such award favourability mediated the influence of two other constructs on the effectiveness of arbitration. These constructs include the approach to the presentation of evidence and distribution of control, both of which were found to positively influence award favourability (+P26 and +P7 respectively). Firstly, final awards in cases with the best approaches to the presentation of evidence were favourable to the claimant while the award was split in one case with a moderate approach. These findings suggest that the approach to the presentation of evidence had a positive impact on award favourability, as initially established by Kangari (1995) and Risse (2013). Secondly, greater process control by the claimant had a positive impact on award favourability. Such process control enhanced claimants' chances of securing favourable outcomes (Brockner & Wiesenfeld, 1996; Lind & Tyler, 1988; Thibaut & Walker, 1975, 1978; Tyler & Lind, 1992). Thus, claimants tried to exercise greater process control and secured favourable awards in the arbitration cases where tribunals wielded decision control.

Perceived distribution of control in turn positively influenced perceived competence of the tribunals (+P19). Parties wielded process control in all the five cases in which the tribunals' competence varied from moderate to high. Disputants may have felt that they had a reasonable opportunity to present their cases given the tribunals' good knowledge and moderate to high skill levels (Folger & Cropanzano, 2001; Tyler, 1988, 2000; Tyler & Blader, 2000). Nonetheless, these tribunals did not make use of conferred powers in most of the cases. Thus, disputants had a good perception of the tribunals' competence when they wielded process control.

Tribunals' competence in turn positively influenced disputants' approaches to the presentation of evidence (+P27). Moderate to highly competent tribunals engendered

better approaches to the presentation of evidence. However, the tribunals did not devise appropriate strategies to minimise the negative impact of inefficient techniques on the effectiveness of arbitration (Torgbor, 2013), given that bad techniques such as examination-in-chief were used to tilt outcomes and that some cases were characterised by poor documentation (Kangari, 1995). Although the competent tribunals gave disputants a reasonable opportunity to present their evidence, their passive approaches did not encourage the disputants to conduct the proceedings efficiently. Finally, respondents may have challenged the outcomes not because of the tribunals' competence but because the awards were unfavourable to them.

Both competence of the tribunal and approaches to the presentation of evidence were negatively influenced by complexities of the disputes (–P18 and –P29 respectively). This finding surprised because the theoretical framework established that complexity had a neutral influence on the approaches to the presentation of evidence but a positive influence on the competence of the tribunal. As the disputes became more complex, they used more judicialised approaches (Hinchey, 2012; Hinchey & Perry, 2008) such as excessive documentation, a raft of witnesses and examination-in-chief. These approaches suggest that the cases required a high quantum of proof (Choi et al., 2014; Hinchey, 2012).

Similarly, complexity of the dispute negatively influenced participants' perception of the competence of the tribunals. Thus, participants' perception of the competence of the tribunal diminished as the disputes became more complex. This finding points to the lacking capacity of appointing institutions in matching arbitrators' expertise to case complexities (Stipanowich, 1988). Thus, arbitrators appointed by such institutions may lack adequate management skills to balance between efficiency and due process (Bruner, 2011). Nonetheless, support for these two propositions implies that the competence of the tribunal mediated the influence of complexity on the approaches to the presentation of evidence (P27.1). Hence, as cases became more complex, disputants adopted poor approaches to the presentation of evidence and had a negative perception of the competence of the tribunals.

The unsupported propositions indicate that some of the theorised constructs did not manifest in the analysed cases. Case data provided no support for five constructs that had been theorised to influence the effectiveness of arbitration. These include perceived procedural fairness, perceived award fairness, perceived quality of the decision-making process and perceived quality of treatment. These findings suggest that perceptions of distributive justice, the relational model of procedural justice and interactional justice did not influence the effectiveness of arbitration among the cases. These findings partly support Patil et al. (2019) who established that fairness and dominance (control) significantly predicted the success rate of arbitral awards.

As already discussed under Section 2.9.4, the two theories that make up distributive justice are the equity theory and the relative deprivation theory. The equity theory posits that people perceive outcomes to be fair when their input-output ratio is approximately equal to referent others' (Adams, 1965). Conversely, the relative deprivation theory provides that people will experience feelings of injustice when their outcomes do not meet their expectations (Adams, 1965; Tyler & Blader, 2000; Tyler & Lind, 1992). It was anticipated that such assessment of fairness would foster positive evaluation of the effectiveness of arbitration if awards were perceived as fair, and vice versa. Although the cases were found to be fair to claimants, negation of Proposition P3 suggests that perception of award fairness did not have a bearing on the effectiveness of arbitration.

Additionally, the proposition that perceived award fairness influences disputants' perception of procedural fairness was not supported (P4). This finding is inconsistent with earlier empirical studies that established a relationship between perceived distributive justice and perceived procedural fairness (Aibinu et al., 2011; Skitka et al., 2003; Tyler, 1988). This inconsistency can be attributed to the finality of arbitral awards that places greater emphasis on procedural fairness than on award fairness. For instance, it is easier to challenge an award if a disputant is not given an opportunity to present its case than it is based on perceived award fairness. Moreover, the proposition that award favourability influences perceived procedural fairness was unsupported (P6). These two unsupported propositions suggest that disputants' procedural justice perceptions were driven by other factors.

The analysis revealed that both interactional justice and perceived adequacy of the sizes of the tribunals influenced perception of procedural fairness but not perceived award fairness. Participants' perceived quality of treatment and perceived quality of the decision-making process positively influenced their perception of procedural fairness (P14 and P11 respectively). Support for these two propositions implies that the perceived quality of the decision-making process mediated the influence of perceived quality of treatment on perceived procedural fairness (P14.2). This finding partly contradicts the work of Aibinu et al. (2011) who established that only the quality of the decision-making process predicted perceived procedural fairness. The two unsupported propositions P10 and P13, also contradict earlier studies that both components predict perceived outcome fairness (Aibinu et al., 2011; Lim & Loosemore, 2017). The reason for the inconsistencies appears to be that the two earlier studies were not only done in Singapore and Australia but were also concerned about the pre-dispute claims handling process in building projects and project management, respectively, while the current study conducted in Kenya dealt with the post-dispute resolution process. Thus, perception of bias and favouritism seem to have been central to the current study. Additionally, support for proposition P23 but lack of support for proposition P22 suggests that the sizes of the tribunals were adequate in fostering perception of procedural fairness but not award fairness. Given that sole arbitrators handled most of the cases, it is possible that procedural decisions were not protracted (Holt, 2008). These findings suggest that perceived adequacy of the sizes of the tribunals and perceived interactional justice were instrumental to participants' perceived procedural fairness but not their perception of distributive justice.

Moreover, the three unsupported propositions, P5, P12 and P15 suggest that effectiveness of cases could not be attributed to perceived procedural fairness and perceived interactional justice. These unsupported propositions indicate that participants' perception of interactional and procedural justice had little impact on the effectiveness of arbitration. Thus, perceived procedural and interactional justice did not influence acceptance of awards in the cases and referral of future disputes to arbitration, partly contradicting earlier studies (Adler et al., 1983; Colquitt, 2001; MacCoun et al., 1988; Tyler & Blader, 2000). The reasons for this contradiction

appear to be the varying jurisdictions, contexts and subject matters involved. These earlier studies were conducted in the USA and involved non-construction disputes where the subject values involved are not so significant. Thus, the significant claims in construction disputes may create legitimate expectations of receiving favourable outcomes, hence perception of fairness may matter less.

Case evidence supported the two propositions P2 and P8 that award favourability and distribution of control positively influenced perceived award fairness. This finding resonates with previous empirical studies, demonstrating that both perceived distribution of control and outcome favourability predicted perceived outcome fairness (Aibinu et al., 2011), explaining why respondents felt that the unfavourable outcomes received were unfair while claimants felt otherwise. Additionally, respondents may have felt that the awards were unfair because claimants wielded greater process control. Such process control may have enhanced claimants' chances of receiving favourable awards. Support for propositions P2, P7 and P8 implies that award favourability mediated the influence of the distribution of control on perceived award fairness (P8.1). This finding supported the notion that people desire to control the process in order to secure favourable outcomes or to enhance the chances of receiving fair outcomes (Thibaut & Walker, 1975).

Case evidence also supported interaction between the two components of interactional justice. Support for proposition P16 indicates that perceived quality of treatment positively influenced perception of the quality of the decision-making process. This finding suggests that the two justice components affect each other, which is consistent with earlier studies (Aibinu et al., 2011). Nonetheless, the two justice components were influenced by competence of the tribunals. This conclusion rests in the support for the two propositions P20 and P21. Case data revealed that most of the tribunals possessed strong interpersonal skills, which could have contributed to the participants' good perception of interactional justice.

Finally, perceived adequacy of the sizes of the tribunals was influenced by competence of the tribunals and complexity of the disputes. Support for proposition P24 reinforced the fact that participants' perception of the tribunals' competence has a positive influence on perceived adequacy of the sizes of the tribunals (Stipanowich,

1988). Additionally, support for proposition P25 indicates that complexity of the dispute had an influence on the perceived adequacy of the sizes of the tribunals, but neutrally. These two supported propositions imply that competence of the tribunals mediated the influence of complexity on the perceived adequacy of the sizes of the tribunals (P25.1). However, the lack of support for proposition P17 suggests that complexity did not encourage disputants to exercise process control. Such process control, in turn, had no impact on disputants' approaches to the presentation of evidence and perceived quality of the decision-making process, as evidenced by the two unsupported propositions P9 and P28. The unsupported influence of distribution of control on the perceived quality of the decision-making process is consistent with the findings of Aibinu et al. (2011), who established that such control did not shape contractors' perception of the quality of the decision-making process in handling claims.

5.3.4 Framework for Effective Construction Arbitration

To achieve the fourth objective, the proposed framework for effective construction arbitration was developed in Section 4.8. The framework was based on the finding that effectiveness of construction arbitration was influenced by five main factors: the complexity of the dispute, distribution of control, competence of the tribunals, approaches to the presentation of evidence and award favourability. Effective construction arbitration requires balanced process control. Such control requires good conduct that demonstrates disputants' willingness to resolve the dispute, for instance, by submitting only legitimate claims and counterclaims, complying with deadlines set by the tribunals, avoiding misstatement of facts and avoiding revisiting rulings already made by the tribunal. Such good conduct ensures time and cost are not spent on irrelevant issues and minimises the need for enhanced process control to secure favourable awards.

Arbitrators must also be proactive enough to redistribute process control as soon as they detect that such control is skewed in favour of one party. To achieve this goal, the arbitrators must adequately utilise their skills in exercising conferred powers. This approach requires that case complexities should be matched with competent arbitrators. The finding that most of the tribunals were moderately competent

essentially suggests some gaps in their training curriculum. It also suggests that the arbitrators appointed to handle these cases may not have been adequately qualified to deal with the complexities of their respective cases. It appears that disputants and appointing authorities may not be paying sufficient attention to the case complexities when appointing these tribunals. Thus, disputants and appointing authorities must ensure that tribunals so appointed possess requisite competence to deal with the complexities of the disputes.

Proactive approaches also require the tribunals to properly guide disputants and their representatives towards good approaches to the presentation of evidence. Based on case complexities, the tribunals should provide such guidelines as the number of experts and fact witnesses, and choice of appropriate techniques. The number of fact witnesses and experts should be adequate to provide relevant evidence of probate value to the case outcome. Additionally, where fact witnesses have already adopted their statements, irrelevant techniques such as examination-in-chief should be avoided to minimise repetitions. These approaches should be tempered with meticulous documentation that includes only relevant, well-paginated, well-formatted and referenced documents that make it easy for each participant to review the documents with minimal effort. Once this is done, the tribunals' award should be based on the tendered evidence to minimise possible challenges.

5.3.5 Validation of the Framework for Effective Construction Arbitration

To achieve the fifth objective, the framework for effective construction arbitration was validated by five experts who had extensive experience in arbitration. Most of these experts not only agreed with the proposals in the framework but also made additional proposals that enriched it, including the need for a code of ethics to guide arbitrators, the need for training of representatives and the need for parties to specify qualifications of arbitrators under the dispute resolution clause. These proposals require institutional and legal interventions as well as actions on the part of the participants.

5.4 Conclusions about the Research Problem

The problem investigated in this study is the *ineffectiveness of arbitration as a method of resolving contractual disputes.* A qualitative strategy involving five arbitration cases in the construction industry of Kenya was deployed. Data was collected through documentary analysis and thirteen semi-structured interviews. Thematic, pattern-matching, and cross-case synthesis revealed that all the five cases were ineffective. However, the degree of ineffectiveness varied from case to case, largely characterised by cost ineffectiveness, time inefficiency and poor-quality awards. The research problem was addressed by analysing support for the following main proposition:

> Effectiveness of arbitration is influenced by ten key factors namely: (i) distribution of control, (ii) complexity of the dispute, (iii) competence of the arbitrator, (iv) perceived adequacy of the size of the tribunal, (v) procedural fairness, (vi) the approach to the presentation of evidence, (vii) award fairness, (viii) award favourability, (ix) quality of the decision-making process and (x) quality of treatment experienced.

Findings of the analysis in Section 4.7 are summarised in **Figure 5.1**. The modified model not only reproduces all the factors and their linked paths, but also highlights the paths for the factors found to influence the effectiveness of construction arbitration.

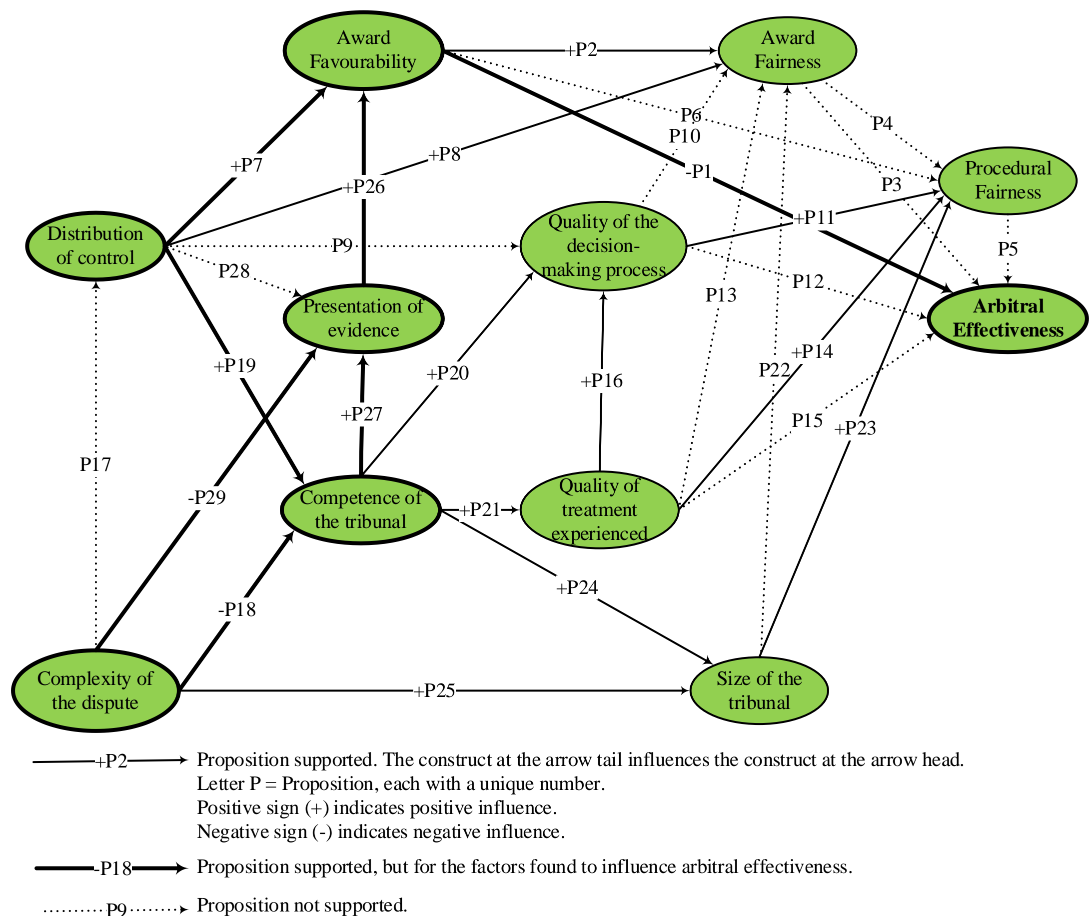

Figure 5.1: Revised model highlighting factors influencing effectiveness

The conclusion arising from this study is that effectiveness of construction arbitration was influenced by one direct factor: award favourability, albeit negatively and four other indirect factors: approaches to the presentation of evidence, competence of the tribunals, distribution of control and complexity of the dispute. Both distribution of control and complexity influenced the effectiveness of arbitration through competence of the tribunal, approach to the presentation of evidence and award favourability. These factors are further amplified in **Figure 5.2**. Given that the conceptual model suggested that the constructs influenced one another, these findings suggest that the main proposition was partly supported.

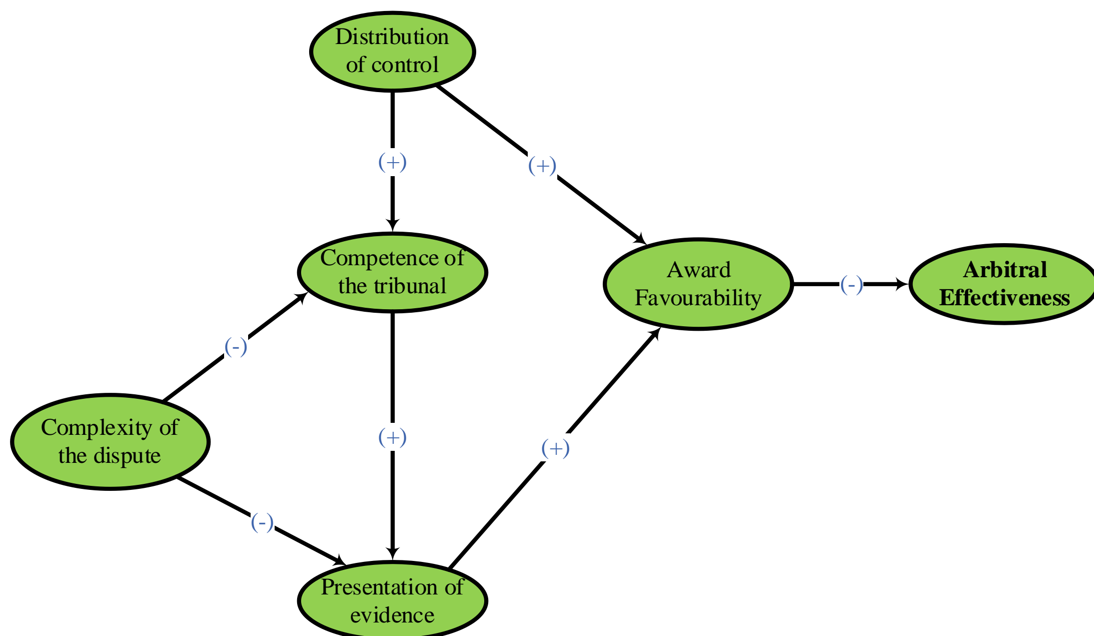

Figure 5.2: Significant factors influencing arbitral effectiveness

These factors were also implied in the word cloud displayed in **Figure 4.1** above. For instance, award favourability relates to the word "award"; distribution of control relates to "arbitrator", "parties", "court", "claimant", and "respondent" while competence relates to "arbitrator". Thus, the themes from the collected data related very closely to some of the pre-structured themes derived from theory.

Evidently, claimants received favourable awards in cases in which they generally wielded process control. The perception that claimants were in control of the process may have made it difficult to resolve the disputes. Generally, respondents may have been reluctant to conclude the proceedings quickly because of the perception that such control was likely to result in awards in favour of the claimants. Nonetheless, shifting control to the respondent in the most complex case made it even harder to resolve the dispute, given the long duration it took.

These findings indicate that the problem of ineffectiveness of construction arbitration mainly revolved around material gains disputants expected to receive. Thus, disputants endeavoured to control the process to enhance their chances of receiving

favourable outcomes (Lind & Tyler, 1988; Thibaut & Walker, 1978; Tyler & Lind, 1992). The finding that claimants received favourable outcomes indicates that their process control paid off. Such process control influenced the participant' perception of the tribunals' competence. Nonetheless, the tribunals' moderate competence, which was not properly matched to the case complexities and their failure to streamline the proceedings prompted respondents to counter such control. These observations may explain why the cases took longer and cost more than expected and may have provided the groundwork for the ensuing award challenges.

These findings also indicate that distributive justice, interactional justice, and relational aspects of procedural justice did not influence the effectiveness of arbitration in the cases. It appears, therefore, that participants were less concerned about the extent to which these justice components were fostered. Despite the ineffectiveness of the cases, participants' relatively good ratings on these components could have informed their decisions to prefer arbitration as a method of resolving future disputes.

The above conclusions about the research objectives and the research problem demonstrate that this study has made a distinct contribution to knowledge in three ways. First, case evidence confirmed that the construction arbitration of the five cases in Kenya was ineffective because of cost ineffectiveness, time inefficiency and poor-quality awards. Second, the study revealed that such arbitral ineffectiveness was mainly influenced by award favourability, supported by distribution of process control, approaches to the presentation of evidence, competence of the tribunals and complexity of the disputes. By this finding, the study demonstrated that the effectiveness of construction arbitration was influenced by two components of organisational justice: outcome favourability and the control model of procedural justice. These components also influenced perception of award fairness. Although interactional justice did not influence arbitral effectiveness, it influenced participants' perception of procedural justice. The findings were synthesised into a revised structural model depicting supported and unsupported relationships. Finally, the study synthesised the findings into a framework for effective construction arbitration in Kenya.

Contribution to knowledge entails "using a relatively new methodology in a field, using a methodology in a country where it has not been used before, or making a synthesis or interpretation that has not been made before" (Perry, 1998, p. 81). The work presented in this study used the concept of organisational justice and the multiple case study approach to explain and model the factors influencing the effectiveness of construction arbitration and to develop a framework for effective construction arbitration in Kenya. Therefore, the study has made a distinct contribution to the field of arbitration as a method of construction dispute resolution.

5.5 Implications for Theory

In this study, the researcher relied on the concept of organisational justice to explain the effectiveness of construction arbitration. This construct was conceptualised in terms of four components: outcome favourability, distributive justice, interactional justice, and procedural justice. On the other hand, arbitral effectiveness was conceptualised in terms of three indicators: time efficiency, cost-effectiveness, and award quality. Given that only award favourability and the control model of procedural justice were supported confirms the challenges faced in attempting to balance between procedural efficiency and award quality.

The control model of procedural justice posits that disputants endeavour to control both the process and the outcome to secure favourable or fair outcomes (Thibaut & Walker, 1975, 1978). In arbitration, outcome control is vested in the arbitrator. Disputants can only seize such control when they agree to a consent award. None of the cases analysed was concluded through a consent award, suggesting that most of the disputants contested and argued their respective positions to increase the chances of securing favourable or fair outcomes. Thus, process control was instrumental in achieving these objectives.

Respondents had to counter such process control that was mostly skewed in favour of the claimants. In the process, considerable time and cost were spent in uncontrolled behavioural activities aimed at retaining or countering such control. This finding extends the current conceptualisation of the control model of procedural justice in terms of explaining outcomes to explaining procedural efficiency in arbitration. In

brief, procedural efficiency in arbitration depended on the extent to which the tribunals managed the cases to ensure balanced process control.

5.6 Implications for Policy and Practice

The implication of the above findings is that a framework for effective construction arbitration should ideally revolve around the five identified factors. Interaction of these factors requires participants in the arbitral process to work closely with the mutual goal of realising effective construction arbitration. Thus, the tribunal, disputants and their representatives must conduct the proceedings in an efficient manner that gives each disputant a reasonable opportunity to present its case.

The framework presented in Section 2.2 above demonstrated the environment in which construction arbitration currently operates in Kenya. However, the findings presented in this study require interventions that will make it possible to implement the proposed framework. First, the negative relationship between the complexity of the dispute and competence suggests institutional bottlenecks in the process of matching arbitrators' competence and case complexities. It appears that the arbitrators appointed to handle the various construction disputes are not properly aligned to the various case complexities. Appointing institutions must obtain sufficient information that can help them to establish relative case complexities before appointing arbitrators to handle them. They must also develop and adhere to appointment criteria. In addition, these institutions must keep an up-to-date panel of arbitrators with current qualifications and experience. Such experience must include a brief description of the cases handled. These institutions should, prior to appointing any arbitrator, carry out due diligence on the arbitrators' historical performance, including challenges to their awards and the outcomes of these challenges. Thus, the institutions must have adequately qualified standing panels with a good understanding of the dynamics of case complexities and arbitrators' competence. Finally, these institutions must develop and strictly implement a code of ethics to help in instilling discipline among the arbitrators. This recommendation is likely to be crucial in addressing challenges of unethical behaviour, missing codes of conduct and enforcement loopholes as articulated in the ADR draft policy (Nairobi Centre for International Arbitration, 2019).

The narrow confines of Section 35 of the Arbitration Act made it difficult to overturn most of the challenged awards. These outcomes rekindle debate on whether appeals should be allowed on tribunals' determination of factual issues. Although the court exercised its discretion in varying one of the awards to the chagrin of the arbitrator, the unmatched competencies against complexities raises questions on whether such tribunals can be trusted to render fair outcomes (Lind, 2001; Lind & Tyler, 1988; van den Bos et al., 2001). Given that an unfair outcome is not a ground for challenging arbitral awards in Kenya, coupled with the difficulty of proving bias, such trust can be enhanced through conscientious due diligence by both the parties and the appointing institutions. Nonetheless, courts should continue facilitating arbitration and only intervene in the public interest.

Consistent with the parties' duty to conduct the proceedings efficiently and given that decision control is vested in the tribunals, there is a need for disputants and their representatives to change their attitude and approach to the resolution of the disputes. The strong vote of confidence in arbitration expressed by the participants implies that these disputants are likely to use arbitration as a forum for resolving future construction disputes. The dynamic nature of construction disputes is such that either of the disputants may possess process control in future disputes. This dynamism requires the disputants and their representatives to understand the importance of effective dispute resolution in maintaining good business relations. Thus, training institutions must incorporate soft skills that explain how effective construction arbitration can be achieved, through for example, avoiding unwarranted conduct and opportunism, use of good approaches to the presentation of evidence and active case management by the tribunals. Because disputants have no training in dispute resolution, both tribunals and representatives should sensitise them on the need to conduct themselves in a manner that fosters efficient dispute resolution. They must also be sensitised on the best approaches to the presentation of evidence in a manner that gives each party a reasonable opportunity to present its case. However, these approaches can only work effectively if project participants maintain a proper chain of evidence during project execution. This chain is likely to ensure that when disputes arise, disputants have access to evidence that is relevant to the dispute.

Finally, although the participants reported that the rules were clear, the finding that the tribunals took long to write awards requires time guidelines during the award-writing phase. Thus, the CIArb (Kenya Branch) should consider amending its procedural rules to indicate the maximum time within which the tribunal should issue the award after closing hearings. This recommendation is in line with ADR policy drafted by the Nairobi Centre for International Arbitration (2019). Case evidence suggests that three to six months are sufficient for the tribunals to conclude the process of making awards. To deal with the varied case complexities that may affect this period, these amendments should also include provisions that allow the disputants to vary the time. The clause should be designed in a way that allows the tribunal to request for such extension before the end of the award-writing period, and for the determination of the extension to be made in good time to allow the tribunal to realign its programme if the request is declined.

As indicated in Section 2.2, some of the policy statements contained in the ADR draft policy (Nairobi Centre for International Arbitration, 2019) are not adequate to address all the challenges identified in the document. Recommendations arising from this study can help in filling some of the glaring gaps.

5.7 Research Limitations

The findings presented in this study are limited to the five cases that were purposefully drawn from a list of arbitrated cases concluded by the High Court in Nairobi, Kenya. Although the cases are typical, their performance on the three measures of arbitration considered in this study does not necessarily reflect the way other cases would perform. In addition, the factors that influenced the effectiveness of these cases may not necessarily be reflected in other cases, however similar the facts of the disputes seem. However, the findings provide a good foundation upon which performance of other cases may be analysed, and quantitative studies conducted.

Moreover, the findings are limited to the construction industry of Kenya. The findings are not necessarily conclusive of how arbitration of other construction cases

or cases in other sectors and/or countries performs. Nonetheless, the findings provide a framework for conducting similar studies in these other sectors and/or countries.

At the same time, some of the participants represented one side of the dispute. For instance, the respondent and their representatives were not interviewed in Cases 3 and 5. Thus, only the claimants' side was represented in these cases. However, complementing the interviews with documentary analysis helped to achieve multiple lines of convergence, which helped to strengthen the findings.

Finally, the study focused on domestic arbitration only. Although literature on international arbitration was instrumental to the development of the theoretical and conceptual framework, the findings presented here may not necessarily mirror the performance of international arbitration. However, they present a more nuanced understanding of the factors that influence the effectiveness of domestic arbitration.

5.8 Implications for Further Research

The findings presented in this study are based on a comparative case study research design. The findings have only been analytically generalised to the theories that guided the research. There is a need to conduct quantitative studies using cross-sectional designs to generalise the findings and to test the structural model presented in this study using such techniques as structural equation modelling.

Future researchers may also consider studying the effectiveness of construction arbitration using other theories, such as the theory of planned behaviour, to provide alternative or enhanced explanations for the factors influencing such effectiveness. These theories may provide competing or complementary explanations, which may help in providing a better understanding of the problem.

Finally, conducting similar studies in other countries may provide a basis for generalising to other cases. Such studies may reveal cultural similarities and differences in the justice perceptions thus forming a foundation for meta-analyses.

5.9 Conclusion

Extant literature suggests that the effectiveness of construction arbitration is influenced directly by five factors and indirectly by five other factors. In this multiple case study, the researcher developed a structural model of the factors influencing arbitral effectiveness, in which only award favourability directly influenced the effectiveness of construction arbitration. Four other factors influenced the effectiveness of arbitration indirectly through this factor. Based on these findings, the study developed a framework for effective construction arbitration in Kenya and set the foundation for further research about the effectiveness of construction arbitration in other parts of the world.

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APPENDICES

Appendix I: Interview guide for parties

DEVELOPMENT OF A FRAMEWORK FOR EFFECTIVE CONSTRUCTTION ARBITRATION: A COMPARATIVE CASE STUDY OF CONSTRUCTION DISPUTES IN KENYA

Allan A. Abwunza

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INTERVIEW GUIDE FOR PARTIES

PART I

1.1 Case Name (Optional): ____

1.2 Category of Interviewee:
☐Claimant ☐Respondent

1.3 How were you represented in the arbitration?
☐Self-represented
☐Represented by attorney
☐Represented by a person other than an attorney (specify) ___________________________

1.4 How many parties were involved in the dispute?
☐Two. ☐More than two.
Reasons:
____
____

1.5 How many arbitrators were appointed to resolve the dispute?
☐Sole arbitrator. ☐Multi-member tribunal.
Reasons:
____
____

1.6 How many contract agreements were involved in the subject matter of the dispute?
☐One. ☐More than one.
Reasons:
____
____

1.7 How many arbitrations have you been involved in before? *(Question to determine whether the interviewee is experienced in arbitration. For parties, it seeks to address the question of repeat player effect).*
____

1.8 On which date was the tribunal appointed? *(Seeks to establish how long it took for proceedings to commence after appointment). Copy of the appointment letter to confirm date.*
____

1.9 What were the educational and professional qualifications of the tribunal?
____
____

1.10 What was the tribunal's experience in the subject matter of the dispute? *(Verify)*
☐Less than 10 years. ☐10 or more years.

1.11 What was the nature of the dispute?
☐Quantum. ☐Contract interpretation. ☐Quantum & Contract interpretation
Details:
____
____

1.12 What was the claim value?

____

1.13 What was the counterclaim value, if any?

____

1.14 Was the arbitration conducted on *ad hoc* basis or was it institutional?

☐*Ad hoc*. ☐Institutional.

Reason for choice:

____

1.15 Which arbitration rules were used?

☐*Ad hoc rules*. ☐CIArb Kenya Rules.

☐Other (specify)

____

Reason for choice:

____

____

1.16 To what extent were these rules clear?

☐Not clear at all. ☐Very clear.

Reasons and aspects considered unclear:

____

1.17 What form of arbitration was used?

☐Documents only. ☐Hearings. ☐Documents and hearings.

Reasons:

____

1.18 Which of the following techniques was applied?

☐Not applicable (no hearings).

☐Prehearing submissions.

☐Preliminary conference.

☐Prehearing conference.

☐Condensed pleadings.

☐Clocked proceedings.

☐Closing statements.

☐Post-hearing briefs.

☐Other (specify)

____.

Rationale for choice:

____

____

1.19 On which date did the sittings commence? *Check correspondence.*

____

1.20 How long did you expect the arbitration to take? _________________________

1.21 How many sittings were held? *(Check record of proceedings).* _____________

1.22 When was the last sitting held? *(Check record of proceedings).* ____________

1.23 When was the award issued? *(Confirm from award)* ____________________

1.24 How much was awarded on the claim? *(Confirm from award. To be used for calculating the award as a percentage of the claim)*

____

1.25 How much was awarded on the counterclaim, if any? *(Confirm from award. To be used for calculating the award as a percentage of the counterclaim)*

____

1.26 How much money did you expect to spend on the arbitration?

____

1.27 How much money in total did you actually spend on the arbitration? *(Confirm from records)*

____

1.28 How do you rate the cost incurred in relation to the award value?

☐Very unreasonable. ☐Very reasonable.

1.29 Which attributes did you consider when you appointed or agreed to the appointment of the arbitrator(s) and why?

____
____
____
____
____

PART II

2.1 When compared with your expectations, the claim award was:

☐Much worse than expected.

☐About what was expected.

☐Much better than expected.

*Reasons*____
____

2.2 When compared with your expectations, the counterclaim award, if any, was:

☐Not applicable.

☐Much worse than expected.

☐About what was expected.

☐Much better than expected.

*Reasons*____
____

2.3 In your own assessment, the award on the claim was:

☐Much less than deserved.

☐As much as deserved.

☐Much more than deserved.

*Reasons*____
____

2.4 In your own assessment, the award on the counterclaim, if any, was:

☐Not applicable.

☐Much less than deserved.

☐As much as deserved.

☐Much more than deserved.

*Reasons*____
____

2.5 In your own assessment, the award on the claim was:

☐Not fair at all. ☐Fair.

*Reasons*____
____

2.6 In your own assessment, the award on the counterclaim, if any, was:

☐Not applicable. ☐Not fair at all. ☐Fair.

*Reasons*____
____

2.7 When compared with outcomes for similar disputes, in your own assessment, the award on the claim was:

☐Much worse than in other disputes.

☐As in other disputes.

☐Much better than in other disputes.

Illustrations:

____
____

2.8 When compared with outcomes for similar disputes, in your own assessment, the award on the counterclaim, if any, was:

☐Not applicable.

☐Much worse than in other disputes.

☐As in other disputes.

☐Much better than in other disputes.

Illustrations:

2.9 In your own assessment, the award on the claim was:

☐Unfavourable to the claimant.

☐Favourable to the claimant.

☐Split.

Reasons

2.10 In your own assessment, the award on the counterclaim, if any, was:

☐Not applicable.

☐Unfavourable to the respondent.

☐Favourable to the respondent.

☐Split.

Reasons

2.11 Overall, how satisfied were you with the award on the claim?

☐Dissatisfied. ☐Satisfied.

Reasons

2.12 Overall, how satisfied were you with the award on the counterclaim, if any?

☐Not applicable. ☐Dissatisfied. ☐Satisfied.

Reasons

2.13 Following the award, have you done or are you willing to engage in further business with the other party?

☐No further business. ☐Further business.

Reasons

2.14 How do you rate the time taken to resolve the dispute from the first date of sitting to the date the award was issued?

☐Very unreasonable. ☐Very reasonable.

Reasons

2.15 How did the unsuccessful party comply with the award?

☐Voluntarily. ☐Negotiated. ☐Compulsion.

Reasons

2.16 Would you refer another contractual dispute to arbitration?

☐Not at all. ☐Yes.

Reasons

3.1 How do you rate the length of submissions made by the other party?

☐Brief. ☐Reasonable. ☐Lengthy.

Illustrations based on documents:

3.2 How do you rate the length of your submissions?

☐Brief. ☐Reasonable. ☐Lengthy.

Reasons:

3.3 When did you make payment for the tribunal's advance? *(Confirm from documents when they were required to pay and when they actually paid)*:

☐Early or on time. ☐Late.

Reasons:

____

____

3.4 How did the timing indicated in Q3.3 above affect the schedule?

☐No effect.

☐Accelerated the resolution process.

☐Delayed the resolution process.

*Reasons*____

____

3.5 How do you rate the volume of documents you requested from the other party?

☐No document requests.

☐Reasonable document requests.

☐Numerous document requests.

Reasons:

____

____

3.6 How do you rate the volume of documents requested from you by the other party?

☐No document requests.

☐Reasonable document requests.

☐Numerous document requests.

Reasons:

____

____

3.7 Are there circumstances in which a party wilfully misstated any facts?

☐None. ☐Yes.

If yes, reasons or circumstances:

____

____

3.8 Did the respondent or its representative challenge the timing of the notification of the claim dispute?

☐No. ☐Yes.

If yes, reasons:

____

____

3.9 Did the claimant or its representative challenge the timing of the notification of the counterclaim dispute?

☐Not applicable ☐No. ☐Yes.

If yes, reasons:

____

____

3.10 To what extent was the tribunal available for hearings?

☐Hardly available. ☐Readily available.

If hardly available, reason?

____

____

3.11 To what extent were the representatives, if any, available for hearings?

☐Hardly available. ☐Readily available.

If hardly available, reasons?

____

____

3.12 To what extent were the experts, if any, available for hearings?

☐Not applicable ☐Hardly available. ☐Readily available.

If hardly available, reasons?

3.13 To what extent were the party representatives, if any, knowledgeable in the law and practice of arbitration?

☐Not at all. ☐To a great extent.

Explanation:

3.14 To what extent were the party representatives, if any, knowledgeable in construction disputes?

☐Not at all. ☐To a great extent.

Explanation:

3.15 Are there circumstances when the proceedings were affected by a party's delay or failure to issue instructions or to pay its representative?

☐No. ☐Yes.

If yes, specify the reasons or circumstances.

3.16 Are there circumstances when the proceedings were affected by delays, postponements and adjournments requested by party representatives which in your considered opinion were not warranted?

☐No. ☐Yes.

If yes, specify the circumstances.

3.17 Was any member of the tribunal challenged for any reason?

☐No. ☐Yes.

If yes, specify the reasons.

3.18 Are there circumstances when a party withheld some evidence?

☐No. ☐Yes.

If yes, specify the circumstances and reasons.

3.19 Are there circumstances when a party did not comply with deadlines set by the tribunal to respond to its communication?

☐No. ☐Yes.

If yes, specify the circumstances and reasons.

3.20 Are there circumstances when a party failed to produce documents when required?

☐No. ☐Yes.

If yes, specify the circumstances and reasons.

3.21 When did the parties sign the terms of reference for the tribunal?

☐Never signed.

☐One party signed late.

☐Both parties signed late.

☐All parties signed on time or in time.

If never signed or if signed late, reasons.

3.22 Are there circumstances when a party revisited an issue already decided by the tribunal?
☐No. ☐Yes.
If yes, specify the circumstances and reasons.

3.23 Are there circumstances when a party challenged the tribunal for lack of jurisdiction?
☐No. ☐Yes.
If yes, specify the circumstances and reasons.

3.24 Are there circumstances when the tribunal limited interruptions during the hearings?
☐No. ☐Yes.
If yes, specify the circumstances and reasons.

3.25 To what extent did the tribunal limit delays, postponements and adjournments?
☐Did not limit. ☐Limited.
If limited, specify how and reasons.

3.26 To what extent did the tribunal limit debate by party representatives?
☐Did not limit. ☐Limited.
If limited, specify how and reasons.

3.27 To what extent did the tribunal limit the number of hearings?
☐Did not limit. ☐Limited.
If limited, specify how and reasons.

3.28 How much time was allowed for final submissions?
☐Up to two weeks. ☐More than two weeks.
Probe if the time allowed was adequate:

3.29 To what extent did the tribunal enforce deadlines?
☐Did not enforce. ☐Flexibly enforced. ☐Strictly enforced.
Probe for rationale, if any:

3.30 To what extent did the tribunal issue and enforce sanctions?
☐Did not issue.
☐Issued but did not enforce at all.
☐Issued and strictly enforced.
Probe for reasons for not issuing or not enforcing:

3.31 Which method of exchanging written submissions was used?
☐Sequential. ☐Simultaneous.
Probe for rationale:

3.32 To what extent did the tribunal exercise control over sequential exchange of written submissions *(if used)*?

☐Not applicable

☐No control at all.

☐Flexibly controlled.

☐Strictly controlled.

Probe for reasons:

____

____

3.33 When were settlement offers made and accepted?

☐No settlement offers were made.

☐Settlement offers were made but not accepted in good time.

☐Settlement offers were made and accepted in good time.

Probe for initiator and reasons:

____

____

3.34 Which amicable settlement mechanisms were explored prior to reference to arbitration?

☐None.

☐Negotiation.

☐Adjudication.

☐Dispute Adjudication Boards.

☐Other (specify) ________________________________

Probe for reasons:

____

____

3.35 To what extent did the amicable settlement mechanisms *(if used)* strengthen your case?

☐Not applicable ☐Not at all. ☐To a great extent.

Explain how:

____

____

3.36 To what extent did you make use of senior management in the resolution process?

☐Not at all. ☐To a great extent.

Explain how:

____

____

4.1 Was a language translator used?

☐No. ☐Yes.

Reason:

____

4.2 Did any of the parties or their representatives engage in conduct that was not acceptable to the others' culture?

☐No party or its representative engaged in unacceptable conduct.

☐ At least one party engaged in unacceptable conduct.

☐ At least one party's representative engaged in unacceptable conduct.

Nature of conduct and reasons for unacceptability, if any.

____

____

5.1 What is your assessment of the tribunal's understanding of the law and practice of arbitration?

☐Poor. ☐Good.

Illustrations.

____

5.2 What is your assessment of the tribunal's ability to identify and assess issues in dispute?

☐Weak. ☐Strong.

Illustrations.

____

5.3 What is your assessment of the tribunal's ability to resolve issues in dispute?
☐Weak. ☐Strong.
Illustrations.

5.4 To what extent did the tribunal decide the dispute based on concern for time and cost?
☐Not at all. ☐To a great extent.
Illustrations.

5.5 To what extent did the tribunal treat parties politely, with dignity, courtesy, and respect?
☐Not at all. ☐To a great extent.
Illustrations.

5.6 To what extent did the tribunal decide the dispute based on facts and not personal biases?
☐Not at all. ☐To a great extent.
Illustrations.

5.7 To what extent did the tribunal decide the dispute without favouritism?
☐Not at all. ☐To a great extent.
Illustrations.

5.8 To what extent did the tribunal show consistency in the application of rules?
☐Not at all. ☐To a great extent.
Illustrations.

5.9 To what extent did the tribunal refrain from improper remarks or comments?
☐Not at all. ☐To a great extent.
Illustrations.

5.10 To what extent was the tribunal proactive in managing the case?
☐Not at all. ☐To a great extent.
Illustrations.

5.11 To what extent did the proceedings follow an advance hearing schedule?
☐No advance hearing schedule.
☐ Advance hearing schedule but not adhered to.
☐ Advance hearing schedule was adhered to.
Reasons.

5.12 To what extent did the tribunal demonstrate ability to listen attentively?
☐Not at all. ☐To a great extent.
Illustrations.

5.13 To what extent did the tribunal demonstrate ability to speak clearly?
☐Not at all. ☐To a great extent.
Illustrations.

5.14 To what extent did the tribunal understand power imbalances between the disputants?
☐Not at all. ☐To a great extent.
Illustrations.

5.15 To what extent did the tribunal show sensitivity to strongly felt values of the disputants?
☐Not at all. ☐To a great extent.
Illustrations.

5.16 To what extent did the tribunal demonstrate ability to deal with underlying emotions?

☐Not at all. ☐To a great extent.
Illustrations.

5.17 To what extent did the tribunal maintain confidentiality of the dispute?
☐Not at all. ☐To a great extent.
Illustrations.

5.18 To what extent did the tribunal handle the dispute truthfully?
☐Not at all. ☐To a great extent.
Illustrations.

5.19 To what extent was the tribunal likeable to both sides?
☐Not at all. ☐To a great extent.
Illustrations.

6.1 How would you describe the procedure and rules applied in assessing the dispute?
☐Not fair at all. ☐ Very fair.
Reasons.

6.2 How satisfied were you with the procedure and rules applied in assessing and deciding the dispute?
☐Very dissatisfied. ☐ Very satisfied.
Reasons.

6.3 To what extent did the tribunal try to be fair in the process of handling the dispute?
☐Not at all. ☐ Tried very hard.
Reasons.

6.4 How fairly was the dispute decided?
☐Not fair at all. ☐ Very fairly.
Reasons.

6.5 Did the award contain reasons?
☐Not at all. ☐ Yes.
Reasons.

6.6 Was the award challenged based on reasons provided or lack thereof?
☐Not applicable ☐Not at all. ☐Yes.
Reasons.

6.7 To what extent did the court interfere with the arbitration?
☐Not at all. ☐ To a great extent.
Circumstances.

6.8 How would you describe the court process of recognising, enforcing, and executing the award?
☐Very easy. ☐ Very difficult.
Reasons.

6.9 To what extent did the tribunal show concern for disputants' rights?
☐Not at all. ☐ To a great extent.
Circumstances.

7.1 How organised was the documentation submitted by the parties?
☐Excessive or ☐ Adequate
☐ Poorly prepared or ☐ Well arranged

☐ Irrelevant or ☐ Relevant
☐ In varying formats or ☐ In agreed formats
☐ Non-confusing or ☐ Confusing
Illustrations.

7.2 How many experts and fact witnesses were involved?
☐One fact witness for each disputant.
☐More than one fact witness for each disputant.
☐One fact witness for each disputant and one expert.
☐More than one fact witness for each disputant and one expert.
☐More than one fact witness for each disputant and more than one expert.
Reasons.

7.3 How were the expert(s) appointed?
☐Not applicable.
☐By the disputants.
☐By the tribunal.
☐By the tribunal from a list drawn by the parties
☐By the tribunal from a list drawn by the tribunal.
Reasons.

7.4 When was or were the expert(s) appointed?
☐Not applicable. ☐Late. ☐ In good time.
Reasons.

7.5 Which of the following techniques were used for preparing and presenting expert reports and witness statements?
☐Expert conferencing.
☐ Hot tubbing.
☐ Questioning by the tribunal.
☐Video conferencing.
☐ Witness conferencing.
☐ Document-only procedure.
☒Cross-examination and re-examination only
☐ Other (specify) ______________________________
Rationale.

7.6 When were the expert reports and witness statements submitted?
☐Late. ☐ In good time.
Reasons.

7.7 Which of the following methods of exchanging expert reports and witness statements was used?
☐Sequential. ☐ Simultaneous.
Reasons.

8.1 What are your suggestions on how best this arbitration should have been conducted?

Appendix II: Interview guide for party representatives

DEVELOPMENT OF A FRAMEWORK FOR EFFECTIVE CONSTRUCTTION ARBITRATION: A COMPARATIVE CASE STUDY OF CONSTRUCTION DISPUTES IN KENYA

Allan A. Abwunza

Department of Construction Management

Jomo Kenyatta University of Agriculture & Technology

INTERVIEW GUIDE FOR PARTY REPRESENTATIVES

PART I

1.1 Case Name (Optional): ____

1.2 Category of Interviewee:
☐Party Representative for the Claimant ☐Party Representative for the Respondent

1.3 What are your educational and professional qualifications? *(Probe for experience in construction and arbitration)*
____
____

1.4 How many parties were involved in the dispute?
☐Two. ☐More than two.
Reasons:
____
____

1.5 How many arbitrators were appointed to resolve the dispute?
☐Sole arbitrator. ☐Multi-member tribunal.
Reasons:
____
____

1.6 How many contract agreements were involved in the subject matter of the dispute?
☐One. ☐More than one.
Reasons:
____
____

1.7 How many arbitrations had you been involved in before this matter? *(Question to determine whether the interviewee is experienced in arbitration.*
____

1.8 On which date was the tribunal appointed? *(Seeks to establish how long it took for proceedings to commence after appointment). Copy of the appointment letter to confirm date.*
____

1.9 What were the educational and professional qualifications of the tribunal?
____
____

1.10 What was the tribunal's experience in the subject matter of the dispute? *(Verify)*
☐Less than 10 years. ☐10 or more years.

1.11 What was the nature of the dispute?
☐Quantum. ☐Contract interpretation. ☐Quantum & Contract interpretation
Details:
____

1.12 What was the claim value? ____

1.13 What was the counterclaim value, if any? ______________________________

1.14 Was the arbitration conducted on *ad hoc* basis or was it institutional?

☐*Ad hoc*. ☐Institutional.

Reason for choice:

____

1.15 Which arbitration rules were used?

☐*Ad hoc rules*. ☐CIArb Kenya Rules.

☐Other (specify) ____

Reason for choice:

____

1.16 To what extent were these rules clear?

☐Not clear at all. ☐Very clear.

Reasons and aspects considered unclear:

____

1.17 What form of arbitration was used?

☐Documents only. ☐Hearings. ☐Documents and hearings.

Reasons:

____

1.18 Which of the following techniques was applied?

☐Not applicable (no hearings).

☐Prehearing submissions.

☐Preliminary conference.

☐Prehearing conference.

☐Condensed pleadings.

☐Clocked proceedings.

☐Closing statements.

☐Post-hearing briefs.

☐Other (specify) ____.

Rationale for choice:

____

____

1.19 On which date did the sittings commence? *Check correspondence.*

____

1.20 How long did you expect the arbitration to take? ________________________

1.21 How many sittings were held? *(Check record of proceedings).* _____________

1.22 When was the last sitting held? *(Check record of proceedings).* ____________

1.23 When was the award issued? *(Confirm from award)* ______________________

1.24 How much was awarded on the claim? *(Confirm from award. To be used for calculating the award as a percentage of the claim)*

____

1.25 How much was awarded on the counterclaim, if any? *(Confirm from award. To be used for calculating the award as a percentage of the counterclaim)*

____

1.26 How much money did your client expect to spend on the arbitration?

____

1.27 How much money in total did your client actually spend on the arbitration? *(Confirm from records)*

____

1.28 How do you rate the cost incurred in relation to the award value?

☐Very unreasonable. ☐Very reasonable.

1.29 Which attributes did you consider when you advised your client to appoint or to agree to the appointment of the arbitrator(s) and why?

____

____

PART II

2.1 When compared with your expectations, the claim award was:

☐Much worse than expected.

☐About what was expected.

☐Much better than expected.

Reasons

2.2 When compared with your expectations, the counterclaim award, if any, was:

☐Not applicable.

☐Much worse than expected.

☐About what was expected.

☐Much better than expected.

Reasons

2.3 In your own assessment, the award on the claim was:

☐Much less than deserved.

☐As much as deserved.

☐Much more than deserved.

Reasons

2.4 In your own assessment, the award on the counterclaim, if any, was:

☐Not applicable.

☐Much less than deserved.

☐As much as deserved.

☐Much more than deserved.

Reasons

2.5 In your own assessment, the award on the claim was:

☐Not fair at all. ☐Fair.

Reasons

2.6 In your own assessment, the award on the counterclaim, if any, was:

☐Not applicable. ☐Not fair at all. ☐Fair.

Reasons

2.7 When compared with outcomes for similar disputes, in your own assessment, the award on the claim was:

☐Much worse than in other disputes.

☐As in other disputes.

☐Much better than in other disputes.

Illustrations:

2.8 When compared with outcomes for similar disputes, in your own assessment, the award on the counterclaim, if any, was:

☐Not applicable.

☐Much worse than in other disputes.

☐As in other disputes.

☐Much better than in other disputes.

Illustrations:

2.9 In your own assessment, the award on the claim was:

☐Unfavourable to the claimant.

☐Favourable to the claimant.

☐Split.

Reasons

2.10 In your own assessment, the award on the counterclaim, if any, was:

☐Not applicable.

☐Unfavourable to the respondent.

☐Favourable to the respondent.

☐Split.

Reasons

2.11 Overall, how satisfied were you with the award on the claim?

☐Dissatisfied. ☐Satisfied.

Reasons

2.12 Overall, how satisfied were you with the award on the counterclaim, if any?

☐Not applicable ☐Dissatisfied. ☐Satisfied.

Reasons

2.13 Following the award, have you advised, or will you advise your client to engage in further business with the other party?

☐No further business. ☐Further business.

Reasons

2.14 How do you rate the time taken to resolve the dispute from the first date of sitting to the date the award was issued?

☐Very unreasonable. ☐Very reasonable.

Reasons

2.15 How did the unsuccessful party comply with the award?

☐Voluntarily. ☐Negotiated. ☐Compulsion.

Reasons

2.16 Would you recommend that another contractual dispute be referred to arbitration?

☐Not at all. ☐Yes.

Reasons

3.1 How do you rate the length of submissions made by the other party?

☐Brief. ☐Reasonable. ☐Lengthy.

Illustrations based on documents:

3.2 How do you rate the length of your submissions?

☐Brief. ☐Reasonable. ☐Lengthy.

Reasons:

3.3 When did your client make payment for the tribunal's advance? *(Confirm from documents when they were required to pay and when they actually paid)*:

☐Early or on time. ☐One party paid late ☐Both parties paid late.

Reasons:

3.4 How did the timing indicated in Q3.3 above affect the schedule?

☐No effect.

☐Accelerated the resolution process.

☐Delayed the resolution process.

Reasons

3.5 How do you rate the volume of documents you requested from the other party?

☐No document requests.

☐Reasonable document requests.

☐Numerous document requests.

Reasons:

3.6 How do you rate the volume of documents requested from you by the other party?

☐No document requests.

☐Reasonable document requests.

☐Numerous document requests.

Reasons:

3.7 Are there circumstances in which a party wilfully misstated any facts?

☐None. ☐Yes.

If yes, reasons:

3.8 Did the respondent challenge the timing of the notification of the claim dispute?

☐No. ☐Yes.

If yes, reasons:

3.9 Did the claimant challenge the timing of the notification of the counterclaim dispute?

☐Not applicable ☐No. ☐Yes.

If yes, reasons:

3.10 To what extent was the tribunal available for hearings?

☐Hardly available. ☐Readily available.

If hardly available, reason?

3.11 To what extent were the party representatives available for hearings?

☐Hardly available. ☐Readily available.

If hardly available, reasons?

3.12 To what extent were the experts, if any, available for hearings?

☐Not applicable ☐Hardly available. ☐Readily available.

If hardly available, reasons?

3.13 To what extent were you knowledgeable in the law and practice of arbitration?

☐Not at all. ☐To a great extent.
Explanation:

3.14 To what extent were you knowledgeable in construction disputes?
☐Not at all. ☐To a great extent.
Explanation:

3.15 Are there circumstances when the proceedings were affected by a party's delay or failure to issue instructions or to pay its representative?
☐No. ☐Yes.
If yes, specify the reasons.

3.16 Are there circumstances when the proceedings were affected by delays, postponements and adjournments requested by party representatives which in your considered opinion were not warranted?
☐No. ☐Yes.
If yes, specify the circumstances.

3.17 Was any member of the tribunal challenged for any reason?
☐No. ☐Yes.
If yes, specify the reasons.

3.18 Are there circumstances when a party withheld some evidence?
☐No. ☐Yes.
If yes, specify the circumstances and reasons.

3.19 Are there circumstances when a party did not comply with deadlines set by the tribunal to respond to its communication?
☐No. ☐Yes.
If yes, specify the circumstances and reasons.

3.20 Are there circumstances when a party failed to produce documents when required?
☐No. ☐Yes.
If yes, specify the circumstances and reasons.

3.21 When did the parties sign the terms of reference for the tribunal?
☐Never signed.
☐One party signed late.
☐Both parties signed late.
☐All parties signed on time or in time.
If never signed or if signed late, reasons.

3.22 Are there circumstances when a party revisited an issue already decided by the tribunal?
☐No. ☐Yes.

If yes, specify the circumstances and reasons.

3.23 Are there circumstances when a party challenged the tribunal for lack of jurisdiction?
☐No. ☐Yes.
If yes, specify the circumstances and reasons.

3.24 Are there circumstances when the tribunal limited interruptions during the hearings?
☐No. ☐Yes.
If yes, specify the circumstances and reasons.

3.25 To what extent did the tribunal limit delays, postponements and adjournments?
☐Did not limit. ☐Limited.
If limited, specify how and reasons.

3.26 To what extent did the tribunal limit debate by party representatives?
☐Did not limit. ☐Limited.
If limited, specify how and reasons.

3.27 To what extent did the tribunal limit the number of hearings?
☐Did not limit. ☐Limited.
If limited, specify how.

3.28 How much time was allowed for final submissions?
☐Up to two weeks. ☐More than two weeks.
Probe if the time allowed was adequate:

3.29 To what extent did the tribunal enforce deadlines?
☐Did not enforce. ☐Flexibly enforced. ☐Strictly enforced.
Probe for rationale, if any:

3.30 To what extent did the tribunal issue and enforce sanctions?
☐Did not issue.
☐Issued but did not enforce at all.
☐Issued and strictly enforced.
Probe for reasons for not issuing or not enforcing:

3.31 Which method of exchanging written submissions was used?
☐Sequential. ☐Simultaneous.
Probe for rationale:

3.32 To what extent did the tribunal exercise control over sequential exchange of written submissions *(if used)*?
☐Not applicable
☐No control at all.

☐Flexibly controlled.
☐Strictly controlled.
Probe for reasons rationale:

____

____

3.33 When were settlement offers made and accepted?
☐No settlement offers were made.
☐Settlement offers were made but not accepted in good time.
☐Settlement offers were made and accepted in good time.
Probe for initiator and reasons:

____

____

3.34 Which amicable settlement mechanisms were explored prior to reference to arbitration?
☐None.
☐Negotiation.
☐Adjudication.
☐Dispute Adjudication Boards.
☐Other (specify) ____
Probe for reasons:

____

____

3.35 To what extent did the amicable settlement mechanisms *(if used)* strengthen your client's case?
☐Not applicable ☐Not at all. ☐To a great extent.
Explain how:

____

____

3.36 To what extent did your client make use of senior management in the resolution process?
☐Not at all. ☐To a great extent.
Explain how:

____

____

4.1 Was a language translator used?
☐No. ☐Yes.
Reason:

____

4.2 Did any of the parties or their representatives engage in conduct that was not acceptable to the others' culture?
☐No party or its representative engaged in unacceptable conduct.
☐ At least one party engaged in unacceptable conduct.
☐ At least one party's representative engaged in unacceptable conduct.
Nature of conduct and reasons for unacceptability, if any.

____

____

5.1 What is your assessment of the tribunal's understanding of the law and practice of arbitration?
☐Poor. ☐Good.
Illustrations.

____

5.2 What is your assessment of the tribunal's ability to identify and assess issues in dispute?
☐Weak. ☐Strong.
Illustrations.

____

5.3 What is your assessment of the tribunal's ability to resolve issues in dispute?
☐Weak. ☐Strong.

Illustrations.

5.4 To what extent did the tribunal decide the dispute based on concern for time and cost?

☐Not at all. ☐To a great extent.

Illustrations.

5.5 To what extent did the tribunal treat parties politely, with dignity, courtesy, and respect?

☐Not at all. ☐To a great extent.

Illustrations.

5.6 To what extent did the tribunal decide the dispute based on facts and not personal biases?

☐Not at all. ☐To a great extent.

Illustrations.

5.7 To what extent did the tribunal decide the dispute without favouritism?

☐Not at all. ☐To a great extent.

Illustrations.

5.8 To what extent did the tribunal show consistency in the application of rules?

☐Not at all. ☐To a great extent.

Illustrations.

5.9 To what extent did the tribunal refrain from improper remarks or comments?

☐Not at all. ☐To a great extent.

Illustrations.

5.10 To what extent was the tribunal proactive in managing the case?

☐Not at all. ☐To a great extent.

Illustrations.

5.11 To what extent did the proceedings follow an advance hearing schedule?

☐No advance hearing schedule.

☐ Advance hearing schedule but not adhered to.

☐ Advance hearing schedule was adhered to.

Reasons.

5.12 To what extent did the tribunal demonstrate ability to listen attentively?

☐Not at all. ☐To a great extent.

Illustrations.

5.13 To what extent did the tribunal demonstrate ability to speak clearly?

☐Not at all. ☐To a great extent.

Illustrations.

5.14 To what extent did the tribunal understand power imbalances between the disputants?

☐Not at all. ☐To a great extent.

Illustrations.

5.15 To what extent did the tribunal show sensitivity to strongly felt values of the disputants?

☐Not at all. ☐To a great extent.

Illustrations.

5.16 To what extent did the tribunal demonstrate ability to deal with underlying emotions?

☐Not at all. ☐To a great extent.

Illustrations.

5.17 To what extent did the tribunal maintain confidentiality of the dispute?
☐Not at all. ☐To a great extent.
Illustrations.

5.18 To what extent did the tribunal handle the dispute truthfully?
☐Not at all. ☐To a great extent.
Illustrations.

5.19 To what extent was the tribunal likeable to both sides?
☐Not at all. ☐To a great extent.
Illustrations.

6.1 How would you describe the procedure and rules applied in assessing the dispute?
☐Not fair at all. ☐ Very fair.
Reasons.

6.2 How satisfied were you with the procedure and rules applied in assessing and deciding the dispute?
☐Very dissatisfied. ☐ Very satisfied.
Reasons.

6.3 To what extent did the tribunal try to be fair in the process of handling the dispute?
☐Not at all. ☐ Tried very hard.
Reasons.

6.4 How fairly was the dispute decided?
☐Not fair at all. ☐ Very fairly.
Reasons.

6.5 Did the award contain reasons?
☐Not at all. ☐ Yes.
Reasons.

6.6 Was the award challenged based on reasons provided or lack thereof?
☐Not applicable ☐Not at all. ☐ Yes.
Reasons.

6.7 To what extent did the court interfere with the arbitration?
☐Not at all. ☐ To a great extent.
Circumstances.

6.8 How would you describe the court process of recognising, enforcing, and executing the award?
☐Very easy. ☐ Very difficult.
Reasons.

6.9 To what extent did the tribunal show concern for disputants' rights?
☐Not at all. ☐ To a great extent.
Circumstances.

7.1 How organised was the documentation submitted by the parties?
☐Excessive or ☐ Adequate
☐ Poorly prepared or ☐ Well arranged

☐ Irrelevant or ☐ Relevant
☐ In varying formats or ☐ In agreed formats
☐ Non-confusing or ☐ Confusing
Illustrations.

____

7.2 How many experts and fact witnesses were involved?
☐One fact witness for each disputant.
☐More than one fact witness for each disputant.
☐One fact witness for each disputant and one expert.
☐ More than one fact witness for each disputant and one expert.
☐ More than one fact witness for each disputant and more than one expert.
Reasons.

____

7.3 How were the expert(s) appointed?
☐Not applicable.
☐By the disputants.
☐ By the tribunal.
☐ By the tribunal from a list drawn by the parties
☐ By the tribunal from a list drawn by the tribunal.
Reasons.

____

7.4 When was or were the expert(s) appointed?
☐Not applicable. ☐Late. ☐ In good time.
Reasons.

____

7.5 Which of the following techniques were used for preparing and presenting expert reports and witness statements?
☐Expert conferencing.
☐ Hot tubbing.
☐ Questioning by the tribunal.
☐Video conferencing.
☐ Witness conferencing.
☐ Document-only procedure.
☐Cross-examination and re-examination only
☐ Other (specify) ____
Rationale.

____

7.6 When were the expert reports and witness statements submitted?
☐Late. ☐ In good time.
Reasons.

____

7.7 Which of the following methods of exchanging expert reports and witness statements was used?
☐Sequential. ☐ Simultaneous.
Reasons.

____

8.1 What are your suggestions on how best this arbitration should have been conducted?

____

____

Appendix III: Interview guide for arbitrators

DEVELOPMENT OF A FRAMEWORK FOR EFFECTIVE CONSTRUCTTION ARBITRATION: A COMPARATIVE CASE STUDY OF CONSTRUCTION DISPUTES IN KENYA

Allan A. Abwunza

Department of Construction Management

Jomo Kenyatta University of Agriculture & Technology

INTERVIEW GUIDE FOR ARBITRATORS

PART I: PRELIMINARY DATA

1.1 How were the parties represented in the arbitration?
☐Self-represented
☐Represented by attorney
☐Represented by a person other than an attorney (specify) ______________________

1.2 How many parties were involved in the dispute?
☐Two. ☐More than two.
Reason:
____
____

1.3 How many arbitrators were appointed to resolve the dispute?
☐Sole arbitrator. ☐Multi-member tribunal.
Reason:
____
____

1.4 How many contract agreements were involved in the subject matter of the dispute?
☐One. ☐More than one.
Reason:
____
____

1.5 On which date was the tribunal appointed? *(This question seeks to establish how long it took for proceedings to commence after appointment). Request copy of the appointment letter to confirm date.*
____

1.6 What were the educational and professional qualifications of the tribunal?
____
____

1.7 What was the tribunal's experience in the subject matter of the dispute? *(Verify)*
☐Less than 10 years. ☐10 or more years.

1.8 What was the nature of the dispute?
☐Quantum. ☐Contract interpretation. ☐Quantum & Contract interpretation
Details:
____

1.9 What was the claim value? ____

1.10 What was the counterclaim value, if any? ______________________________

1.11 Was the arbitration conducted on *ad hoc* basis or was it institutional?
☐*Ad hoc*. ☐Institutional.
Reason for choice:
____

1.12 Which arbitration rules were used?

☐*Ad hoc rules*. ☐CIArb Kenya Rules.

☐Other (specify) ____

Reason for choice:

____

1.13 To what extent were these rules clear?

☐Not clear at all. ☐Very clear.

Reasons and aspects considered unclear:

____

1.14 What form of arbitration was used?

☐Documents only. ☐Hearings. ☐Documents and hearings.

Reasons:

____

1.15 Which of the following techniques was applied?

☐Not applicable (no hearings).

☐Prehearing submissions.

☐Preliminary conference.

☐Prehearing conference.

☐Condensed pleadings.

☐Clocked proceedings.

☐Closing statements.

☐Post-hearing briefs.

☐Other (specify)

____.

Rationale for choice:

____

1.16 On which date did the sittings commence? *Check correspondence.*

____

1.17 How long did you expect the arbitration to take? ________________________

1.18 How many sittings were held? *(Check record of proceedings).* _____________

1.19 When was the last sitting held? *(Check record of proceedings).* ____________

1.20 When was the award issued? *(Confirm from award)* ____________________

1.21 How much was awarded on the claim? *(Confirm from award. To be used for calculating the award as a percentage of the claim)*

____

1.22 How much was awarded on the counterclaim, if any? *(Confirm from award. To be used for calculating the award as a percentage of the counterclaim)*

____

PART II: SUBSTANTIVE QUESTIONS

2.1 How do you rate the length of submissions made by the parties?

☐Brief. ☐Reasonable. ☐Lengthy.

Reasons:

____

____

2.2 When did the parties make payment for the tribunal's advance? *(Confirm from documents when they were required to pay and when they actually paid)*:

☐Early or on time. ☐One party paid late ☐Both parties paid late.

Reasons:

____

____

2.3 How did the timing indicated in Q2.2 above affect the schedule?

☐No effect.

☐Accelerated the resolution process.

☐Delayed the resolution process.

*Reasons*____

2.4 How do you rate the volume of documents requested by the parties?

☐No document requests.

☐Reasonable document requests.

☐Numerous document requests.

Reasons:

2.5 Are there circumstances in which a party wilfully misstated any facts?

☐None. ☐Yes.

If yes, reasons:

2.6 Did any party challenge the timing of the notification of the claim dispute or counterclaim dispute, if any?

☐No. ☐Yes.

If yes, reasons:

2.7 To what extent was the tribunal available for hearings?

☐Hardly available. ☐Readily available.

If hardly available, reason?

2.8 To what extent were the party representatives, if any, available for hearings?

☐Hardly available. ☐Readily available.

If hardly available, reasons?

2.9 To what extent were the experts, if any, available for hearings?

☐Not applicable ☐Hardly available. ☐Readily available.

If hardly available, reasons?

2.10 To what extent were the party representatives, if any, knowledgeable in the law and practice of arbitration?

☐Not at all. ☐To a great extent.

Explanation:

2.11 To what extent were the party representatives, if any, knowledgeable in construction disputes?

☐Not at all. ☐To a great extent.

Explanation:

2.12 Are you aware of any circumstances when the proceedings were affected by a party's delay or failure to issue instructions or to pay its representative?

☐No. ☐Yes.

If yes, specify the circumstances:

2.13 Are there circumstances when the proceedings were affected by delays, postponements and adjournments requested by party representatives which in your considered opinion were not warranted?

☐No. ☐Yes.

If yes, specify the reasons?

2.14 Was any member of the tribunal challenged for any reason?

☐No. ☐Yes.

If yes, specify the reasons?

2.15 Are you aware of any circumstances when a party withheld some evidence?

☐No. ☐Yes.

If yes, specify the circumstances and reasons.

2.16 Are there circumstances when a party did not comply with deadlines set by the tribunal to respond to its communication?

☐No. ☐Yes.

If yes, specify the circumstances and reasons.

2.17 Are there circumstances when a party failed to produce documents when required?

☐No. ☐Yes.

If yes, specify the circumstances and reasons.

2.18 When did the parties sign the terms of reference for the tribunal?

☐Never signed.

☐One party signed late.

☐Both parties signed late.

☐All parties signed on time or in time.

If never signed or if signed late, reasons.

2.19 Are there circumstances when a party revisited an issue already decided by the tribunal?

☐No. ☐Yes.

If yes, specify the circumstances and reasons.

2.20 Are there circumstances when a party challenged the tribunal for lack of jurisdiction?

☐No. ☐Yes.

If yes, specify the circumstances and reasons.

2.21 Are there circumstances when the tribunal limited interruptions during the hearings?

☐No. ☐Yes.

If yes, specify the circumstances and reasons.

2.22 To what extent did the tribunal limit delays, postponements and adjournments?

☐Did not limit. ☐Limited.

If limited, specify how and reasons.

2.23 To what extent did the tribunal limit debate by party representatives?

☐Did not limit. ☐Limited.

If limited, specify how and reasons.

2.24 To what extent did the tribunal limit the number of hearings?

☐Did not limit. ☐Limited.

If limited, specify how and reasons:

2.25 How much time was allowed for final submissions?

☐Up to two weeks. ☐More than two weeks.

2.26 To what extent did the tribunal enforce deadlines?

☐Did not enforce. ☐Flexibly enforced. ☐Strictly enforced.

Rationale:

2.27 To what extent did the tribunal issue and enforce sanctions?

☐Did not issue.

☐Issued but did not enforce at all.

☐Issued and strictly enforced.

Reasons for not issuing or not enforcing:

2.28 Which method of exchanging written submissions was used?

☐Sequential. ☐Simultaneous.

Rationale:

2.29 To what extent did the tribunal exercise control over sequential exchange of written submissions *(if used)*?

☐Not applicable

☐No control at all.

☐Flexibly controlled.

☐Strictly controlled.

Reasons:

2.30 When were settlement offers made and accepted?

☐No settlement offers were made.

☐Settlement offers were made but not accepted in good time.

☐Settlement offers were made and accepted in good time.

Probe for initiator and reasons:

2.31 Which amicable settlement mechanisms were explored prior to reference to arbitration?

☐None.

☐Negotiation.

☐Adjudication.

☐Dispute Adjudication Boards.
☐Other (specify) ____

Reasons:

____

____

3.1 Was a language translator used?

☐No. ☐Yes.

Reasons:

____

3.2 Did any of the parties or their representatives engage in conduct that was not acceptable to the others' culture?

☐ No party or its representative engaged in unacceptable conduct.
☐ At least one party engaged in unacceptable conduct.
☐ At least one party's representative engaged in unacceptable conduct.

Nature of conduct and reasons for unacceptability.

____

____

4.1 To what extent did the tribunal decide the dispute based on concern for time and cost?

☐Not at all. ☐To a great extent.

Illustrations:

____

4.2 To what extent did the tribunal decide the dispute based on facts and not personal biases?

☐Not at all. ☐To a great extent.

Illustrations:

____

4.3 To what extent did the proceedings follow an advance hearing schedule?

☐No advance hearing schedule.
☐ Advance hearing schedule but not adhered to.
☐ Advance hearing schedule was adhered to.

Reasons:

____

4.4 How would you rate your ability to identify and assess the issues in dispute?

☐Found it very easy. ☐Found it very difficult.

Illustrations:

____

4.5 How would you rate your ability to resolve the issues in dispute?

☐ Found it very easy. ☐ Found it very difficult.

Illustrations:

____

5.1 Did the award contain reasons?

☐Not at all. ☐ Yes.

Reasons:

____

5.2 Was the award challenged based on reasons provided or lack thereof?

☐Not applicable ☐Not at all. ☐ Yes.

Reasons:

____

5.3 To what extent did the court interfere with the arbitration?

☐Not at all. ☐ To a great extent.

Circumstances, if any:

____

6.1 How organised was the documentation submitted by the parties?

☐Excessive or ☐ Adequate
☐ Poorly prepared or ☐ Well arranged

☐ Irrelevant or ☐ Relevant
☐ In varying formats or ☐ In agreed formats
☐ Non-confusing or ☐ Confusing

Illustrations:

____

6.2 How many experts and fact witnesses were involved?

☐One fact witness for each disputant.
☐More than one fact witness for each disputant.
☐One fact witness for each disputant and one expert.
☐ More than one fact witness for each disputant and one expert.
☐ More than one fact witness for each disputant and more than one expert.

Reasons:

____

6.3 How were the expert(s) appointed?

☐Not applicable.
☐By the disputants.
☐ By the tribunal.
☐ By the tribunal from a list drawn by the parties
☐ By the tribunal from a list drawn by the tribunal.

Reasons:

____

6.4 When was or were the expert(s) appointed?

☐Not applicable. ☐Late. ☐ In good time.

Reasons:

____

6.5 Which of the following techniques were used for preparing and presenting expert reports and witness statements?

☐Expert conferencing.
☐ Hot tubbing.
☐ Questioning by the tribunal.
☐Video conferencing.
☐ Witness conferencing.
☐ Document-only procedure.
☐Cross-examination and re-examination only
☐ Other (specify) ______________________________

Rationale:

____

6.6 When were the expert reports and witness statements submitted?

☐Late. ☐ In good time.

Reasons:

____

6.7 Which of the following methods of exchanging expert reports and witness statements was used?

☐Sequential. ☐ Simultaneous.

Reasons:

____

7.1 What are your suggestions on how best this arbitration should have been conducted?

____
____
____
____

Appendix IV: List of variables in the study and how they were measured

S.No.	Construct	Conceptual definition	Operational definition			How to measure	Question Number		
			Factor	Surrogate	Sub-surrogate		Parties	Arbitrator	Party Rep.
1	Arbitral effectiveness (Effectiveness)	The extent to which arbitration fulfils disputants' aspirations in terms of the time, cost, and satisfaction with the award.	Cost-effectiveness (CEF) – Ratio of cost of resolution to the award value.	Percentage of the cost to the award value		Percentage of the cost to the claim award value.	Q1.24 Q1.27	Q1.21	Q1.24 Q1.27
						Percentage of the cost to the counterclaim award value, if any.	Q1.25 Q1.27	Q1.22	Q1.25 Q1.27
				Expected cost		Amount in Kenya Shillings	Q1.26		Q1.26
				Reasonableness of the cost		"very unreasonable," "very reasonable"	Q1.28		Q1.28
			Time efficiency	Deviation from an established standard of six months from the date of signing the terms of reference to the delivery of the final award.		"Up to six months" and "more than six months".	Q1.8 Q1.19 Q1.22 Q1.23	Q1.16 Q1.18 Q1.19 Q1.20	Q1.8 Q1.19 Q1.22 Q1.23
				Expected time		Duration in months	Q1.20	Q1.17	Q1.20
				Perceived reasonableness of the actual duration.		"very unreasonable" "very reasonable"	Q2.14		Q2.14
			Quality of the award	Award acceptability	Award challenge.	"not at all" (1) "yes"	Q6.6	Q5.2	Q6.6
					Compliance with the award	"voluntary", "negotiated", "compulsion"	Q2.15		Q2.15
				Referring future disputes to arbitration		"not at all" "yes"	Q2.16		Q2.16

Appendix IV *(cont'd)*

S.No.	Construct	Conceptual definition	Operational definition			How to measure	Question Number		
			Factor	Surrogate	Sub-surrogate		Parties	Arbitrator	Party Rep.
				Maintenance of relationships.		"no further business after the award" and "disputants engaged in further business after the award."	Q2.13		Q2.13
2	Perceived award fairness	The extent to which the award achieves distributive justice.	Award value relative to what was expected.			'much worse than expected" "about what was expected" "much better than expected"	Q2.1 Q2.2		Q2.1 Q2.2
			Award value compared with what the disputant perceived it deserved.			'much less than deserved" "as much as deserved" "much more than deserved"	Q2.3 Q2.4		Q2.3 Q2.4
			Perceived fairness of the award.			"not fair at all" "fair"	Q2.5 Q2.6		Q2.5 Q2.6
			Award compared with outcomes for similar disputes resolved in the past or at that time.			'much worse than in other disputes" "as in other disputes" "much better than in other disputes".	Q2.7 Q2.8		Q2.7 Q2.8
3	Perceived award favourability	The extent of wins or losses	Award as a percentage of the claim or			Award as a percentage of the claim	Q1.12 Q1.24	Q1.9 Q1.21	Q1.12 Q1.24

Appendix IV *(cont'd)*

S.No.	Construct	Conceptual definition	Operational definition			How to measure	Question Number		
			Factor	Surrogate	Sub-surrogate		Parties	Arbitrator	Party Rep.
			counterclaim.			Award as a percentage of the counterclaim, if any.	Q1.13 Q1.25	Q1.10 Q1.22	Q1.13 Q1.25
			Perceived level of favourability of the award.			"unfavourable" "favourable"	Q2.9 Q2.10		Q2.9 Q2.10
			Satisfaction with the award.			"dissatisfied" "satisfied"	Q2.11 Q2.12		Q2.11 Q2.12
4	Distribution of control	The extent to which a party can influence the process and outcome of the arbitration.	Nature of party representation.	How the party was represented.		"Self-represented", "Represented by an attorney", "Represented by a person other than an attorney".	Q1.3 Q3.13 Q3.14	Q2.10, Q2.11	Q1.3 Q3.13 Q3.14
				Whether the proceedings were affected by a party's delay or failure to issue instructions or to pay its representative.		"no" and "yes"	Q3.15	Q2.12	Q3.15
				Whether the proceedings were affected by unwarranted delays, postponement and adjournments requested by party representatives.		"no" and "yes"	Q3.16	Q2.13	Q3.16
			Conduct of the disputants	Length of submissions.		"brief" "lengthy".	Q3.1 Q3.2	Q2.1	Q3.1 Q3.2
				The timing of payment of arbitrator's advance.		"paid early or on time" and "paid late".	Q3.3 Q3.4	Q2.2 Q2.3	Q3.3 Q3.4

Appendix IV *(cont'd)*

S.No.	Construct	Conceptual definition	Operational definition			How to measure	Question Number		
			Factor	Surrogate	Sub-surrogate		Parties	Arbitrator	Party Rep.
				The scope of document requests.		"No document requests" "reasonable document requests" "numerous document requests".	Q3.5 Q3.6	Q2.4	Q3.5 Q3.6
				Wilfully misstatement of facts.		"none" "yes"	Q3.7	Q2.5	Q3.7
				Availability of arbitrators, counsel, and experts.		"Hardly available" "Readily available"	Q3.10 Q3.11 Q3.12	Q2.7 – Q2.9	Q3.10 Q3.11 Q3.12
				Perceived conflict of interest.		Whether the tribunal was challenged "no" and "yes"	Q3.17	Q2.14	Q3.17
				Whether a disputant wilfully withheld evidence.		"no" "yes"	Q3.18	Q2.15	Q3.18
				Compliance with deadlines set by the tribunal to respond to its communications and comments on drafts.		"did not comply" and "complied"	Q3.19	Q2.16	Q3.19
				Producing documents when required.		"did not produce" and "produced"	Q3.20	Q2.17	Q3.20
				Signing terms of reference.		"failed to sign," "both parties signed late" "one party signed late," and "signed on time or in time"	Q3.21	Q2.18	Q3.21

Appendix IV *(cont'd)*

S.No.	Construct	Conceptual definition	Operational definition			How to measure	Question Number		
			Factor	Surrogate	Sub-surrogate		Parties	Arbitrator	Party Rep.
				Revisiting matters already decided by the tribunal.		"did not revisit" and "revisited"	Q3.22	Q2.19	Q3.22
				Challenge to the timing of the claim and counterclaim dispute.		"no" and "yes"	Q3.8 Q3.9	Q2.6	Q3.8 Q3.9
				Challenges to jurisdiction.		"no" and "yes"	Q3.23	Q2.20	Q3.23
				The extent of court intervention.		"not at all" "to a great extent"	Q6.7	Q5.3	Q6.7
				Use of senior management in the resolution process.		"not at all" "to a great extent"	Q3.36		Q3.36
				The timing of settlement offers		"no settlement offers were made" "settlement offers were made but not accepted in good time" "settlement offers were made in good time to save time and costs"	Q3.33	Q2.30	Q3.33
			Repeat player effect.			"had no previous experience" and "had previous experience"	Q1.7		Q1.7
			The degree of arbitrator's use of conferred powers	Limiting interruptions during hearings.		"did not limit" to "limited"	Q3.24	Q2.21	Q3.24
				Limiting delays, postponement, and adjournments.		"did not limit" to "limited"	Q3.25	Q2.22	Q3.25
				Limiting debate by lawyers.		"did not limit" to "limited"	Q3.26	Q2.23	Q3.26

Appendix IV *(cont'd)*

S.No.	Construct	Conceptual definition	Operational definition			How to measure	Question Number		
			Factor	Surrogate	Sub-surrogate		Parties	Arbitrator	Party Rep.
				Limiting the number of hearings.		"did not limit" to "limited"	Q3.27	Q2.24	Q3.27
				Time allowed for final submissions.		"up to two weeks" and "more than two weeks"	Q3.28	Q2.25	Q3.28
				Enforcement of deadlines.		"not enforced at all" "flexibly enforced" and "strictly enforced"	Q3.29	Q2.26	Q3.29
				Issue and enforcement of sanctions.		"not issued" "issued but not enforced at all" "issued and strictly enforced"	Q3.30	Q2.27	Q3.30
				Control over the sequential exchange of written submissions.		"no control at all", "flexibly controlled", "strictly controlled"	Q3.31 Q3.32	Q2.28 Q2.29	Q3.31 Q3.32
			The extent of the pre-action protocol	Whether any amicable settlement mechanisms were explored prior to reference.		"Negotiation" "Adjudication" "Mediation" "DAB" "Other – specify" "None"	Q3.34	Q2.31	Q3.34
				The extent to which amicable settlement mechanisms strengthened disputant's case.		"not at all" "to a great extent"	Q3.35		Q3.35
5	Complexity of the dispute	Ease of resolving the dispute	Number of parties			"two parties" and "more than two parties"	Q1.4	Q1.2	Q1.4

Appendix IV *(cont'd)*

S.No.	Construct	Conceptual definition	Operational definition			How to measure	Question Number		
			Factor	Surrogate	Sub-surrogate		Parties	Arbitrator	Party Rep.
			Number of contract agreements			"one contract agreement" and "more than one contract agreement"	Q1.6	Q1.4	Q1.6
			Number of sittings			Number of sittings	Q1.21	Q1.18	Q1.21
			Nature of the cause			"quantum" "contract interpretation" and "quantum and contract interpretation"	Q1.11	Q1.8	Q1.11
			Language differences			"language translator not required" and "language translator used"	Q4.1	Q3.1	Q4.1
			Cultural differences			"no party or its representative engaged in unacceptable conduct" "at least one party engaged in unacceptable conduct" "at least one party's representative engaged in unacceptable conduct"	Q4.2	Q3.2	Q4.2
6	Competence of the arbitrator	Set of knowledge, skills and experience	Knowledge	Specialisation in the subject area of the dispute.		"not specialised" and "specialised"	Q1.9	Q1.6	Q1.9

Appendix IV *(cont'd)*

S.No.	Construct	Conceptual definition	Operational definition			How to measure	Question Number		
			Factor	Surrogate	Sub-surrogate		Parties	Arbitrator	Party Rep.
		embedded in the arbitrator, and which are the minimum standard required to resolve the dispute.		Legal knowledge.		"no" and "yes"	Q1.9	Q1.6	Q1.9
				Knowledge of the law and practice of arbitration.		"poor" "good"	Q5.1	Q1.6	Q5.1
			Skill set	Functional skills.	Ability to identify and assess issues.	"weak" "strong"	Q5.2	Q4.4	Q5.2
					Ability to resolve the identified issues.	"weak" "strong"	Q5.3	Q4.5	Q5.3
					Deciding the dispute based on concern for time and cost.	"not at all" "to a great extent"	Q5.4	Q4.1	Q5.4
					Listening attentively.	"not at all" "to a great extent"	Q5.12		Q5.12
					Ability to speak clearly.	"not at all" "to a great extent"	Q5.13		Q5.13
					Proactivity in managing the case.	"not at all" "to a great extent"	Q5.10		Q5.10
					Schedule of hearings.	"no advance hearing schedule," "advance hearing schedule but not adhered to" and "advance hearing schedule was adhered to"	Q5.11	Q4.3	Q5.11
				Interpersonal skills.	Ability to understand power imbalances.	"not at all" "to a great extent"	Q5.14		Q5.14

Appendix IV *(cont'd)*

S.No.	Construct	Conceptual definition	Operational definition			How to measure	Question Number		
			Factor	Surrogate	Sub-surrogate		Parties	Arbitrator	Party Rep.
					Sensitivity to strongly felt values of the disputants.	"not at all" "to a great extent"	Q5.15		Q5.15
					Ability to deal with underlying emotions.	"not at all" "to a great extent"	Q5.16		Q5.16
					Maintaining confidentiality	"not at all" "to a great extent"	Q5.17		Q5.17
					Affability	"not at all" "to a great extent"	Q5.19		Q5.19
			Attitudes			Attributes that were considered in the appointment of the arbitrator(s).	Q1.29		Q1.29
7	Quality of the Decision-making process				Deciding the dispute based on facts and not personal biases.	"not at all" "to a great extent"	Q5.6	Q4.2	Q5.6
					Deciding the dispute without favouritism.	"not at all" "to a great extent"	Q5.7		Q5.7
					Deciding the dispute truthfully.	"not at all" "to a great extent"	Q5.18		Q5.18
					Consistency in the application of rules.	"not at all" "to a great extent"	Q5.8		Q5.8
8	Quality of treatment-experienced				Refraining from improper remarks or comments.	"not at all" "to a great extent"	Q5.9		Q5.9
					Award reasoning.	"not at all" "yes"	Q6.5	Q5.1	Q6.5

Appendix IV *(cont'd)*

S.No.	Construct	Conceptual definition	Operational definition			How to measure	Question Number		
			Factor	Surrogate	Sub-surrogate		Parties	Arbitrator	Party Rep.
					Treating disputants politely, with dignity, courtesy, and respect.	"not at all" "to a great extent"	Q5.5		Q5.5
9	Perceived adequacy of the size of the tribunal	Number of arbitrators constituting the tribunal.	Whether the tribunal consisted of a sole arbitrator or more than one arbitrator.			"sole arbitrator" and "multi-member tribunal"	Q1.5	Q1.3	Q1.5
10	Procedural fairness	Disputants' perception of the extent to which the methods used in resolving the dispute achieve desired justice.	Fairness of the procedure.			"not fair at all" "very fair"	Q6.1		Q6.1
			Satisfaction with the procedure.			"very dissatisfied" "very satisfied"	Q6.2		Q6.2
			Whether the arbitrator tried hard to be fair.			"not at all" "tried very hard"	Q6.3		Q6.3
			Whether the dispute was decided fairly.			"not fair at all" "very fairly"	Q6.4		Q6.4
			Ease of award recognition, enforcement, and execution.			"very easy" "very difficult"	Q6.8		Q6.8
			Concern for the disputants' rights			"not at all" "to a great extent"	Q6.9		Q6.9
11	Approach to the presentation of evidence	The extent of proof.	Meticulousness of documentation.			"excessive, poorly prepared, irrelevant and in varying formats" "adequate, well arranged, relevant and non-confusing"	Q7.1	Q6.1	Q7.1

Appendix IV *(cont'd)*

S.No.	Construct	Conceptual definition	Operational definition			How to measure	Question Number		
			Factor	Surrogate	Sub-surrogate		Parties	Arbitrator	Party Rep.
			Number of experts and fact witnesses.			"one fact witness for each disputant and one expert" "more than one fact witness for each disputant and one expert" "more than one fact witness for each disputant and more than one expert"	Q7.2	Q6.2	Q7.2
			Method of appointing experts.			"by disputants" "by the tribunal" "by the tribunal from a list drawn by the parties" "by the tribunal from a list drawn by the tribunal"	Q7.3	Q6.3	Q7.3
			The timing of the expert appointment.			"late appointment" and "appointed in good time"	Q7.4	Q6.4	Q7.4
			Techniques for preparing and presenting expert reports and witness statements.			"Expert conferencing", "Hot tubbing", "Questioning by the tribunal", "Video conferencing", "Witness conferencing", "Document-only procedure"	Q7.5	Q6.5	Q7.5

Appendix IV *(cont'd)*

S.No.	Construct	Conceptual definition	Operational definition			How to measure	Question Number		
			Factor	Surrogate	Sub-surrogate		Parties	Arbitrator	Party Rep.
			The timing of expert reports and witness statements.			"late submission" and "submitted in good time"	Q7.6	Q6.6	Q7.6
			Method of exchanging expert reports and witness statements.			"sequential" and "simultaneous"	Q7.7	Q6.7	Q7.7

Appendix V: Contact summary form

CONTACT SUMMARY FORM

Category: ____

Case Name: ____

Contact Date: ____

Today's Date: ____

Written by: ____

1. What were the main issues or themes that struck you in this contact?
 ____
 ____
 ____
 ____
 ____
2. Summarize the information you got (or failed to get) on each of the target questions you had for this contact.
 ____
 ____
 ____
 ____
 ____
3. Anything else that struck you as salient, interesting, illuminating, or important in this contact?
 ____
 ____
 ____
 ____
 ____
4. What new (or remaining) target questions do you have in considering the next contact with this site?
 ____
 ____
 ____
 ____
 ____

Appendix VI: Case study protocol

DEVELOPING A FRAMEWORK FOR EFFECTIVE ARBITRATION OF CONTRACTUAL DISPUTES IN THE CONSTRUCTION INDUSTRY OF KENYA

CASE STUDY PROTOCOL

CASE No.________________

SECTION A: OVERVIEW OF THE CASE STUDY

1. Mission and Goals

The aim of this case study is to fulfil the requirements for the award of the degree of Doctor of Philosophy (Ph.D.) in Construction Management of the Jomo Kenyatta University of Agriculture and Technology.

It is a University requirement that a full-time Ph.D. degree must be conducted over a period of three years, at the end of which the candidate must submit a thesis that makes ***"a distinct, significant and substantial contribution*** to the knowledge and show understanding of the subject and display originality of thought."

This case study shall make its contribution to the knowledge over the stipulated period by establishing the relationship between the effectiveness of arbitration and its influencing factors, by demonstrating how and why these factors influence such effectiveness and by developing a framework for effective arbitration of contractual disputes in the construction industry.

2. The Research Team

Allan A. Abwunza (Ph.D. Candidate), JKUAT
Dr. Titus Kivaa Peter, Supervisor, JKUAT
Dr. Kariuki Muigua, Supervisor, University of Nairobi

3. Objectives

1) To establish the effectiveness of construction arbitration in Kenya.
2) To describe the factors influencing the effectiveness of construction arbitration.
3) To explain the relationship between the effectiveness of the arbitration process and its influencing factors.
4) To develop a framework for effective arbitration of contractual disputes in construction.
5) To validate the framework for effective construction arbitration.

4. Main Proposition

Effectiveness of arbitration is influenced by ten key factors namely: (i) distribution of control, (ii) complexity of the dispute, (iii) competence of the arbitrator, (iv) perceived adequacy of the size of the tribunal, (v) procedural fairness, (vi) the approaches to the presentation of evidence, (vii) quality of the decision-making process, (viii) quality of treatment, (ix) award fairness, and (x) award favourability.

5. Significance

The study shall not only make a significant contribution to knowledge but also establish a framework that will help in the effective arbitration of contractual disputes in the construction industry in Kenya.

6. Theoretical framework

One possible way towards explaining the effectiveness of construction arbitration is to focus on the behaviour of disputants. Such behaviour plays a key role in the process of resolving construction disputes. Aibinu (2007) identified four different but interrelated perspectives that explain disputing behaviour: (i) economic and quasi-economic perspective, (ii) transaction cost economics perspective, (iii) social-legal and political perspective, and (iv) organisational justice perspective.

2.2.1 Economic and Quasi-economic Perspective

The economic and quasi-economic viewpoint is concerned with the cost-benefit analysis of the dispute resolution technique (Bebchuck, 1984). This viewpoint operates on the basic assumption that disputants are self-interested, and they dispute on the understanding that the outcome will benefit them personally and socially (Black, 1987; Priest & Klein, 1984). In this context, disputants react to the outcome of dispute resolution techniques based on their assessment of the benefits accrued against the cost incurred. Their reactions depend on the award value, the extent to which the award favours them, the time spent, and cost incurred. Thus, their satisfaction with the award and their decisions to accept or contest the award depends on these factors.

2.2.2 Transaction Cost Economics Perspective

The Transaction Cost Economics (TCE) perspective is based on the TCE theory. This theory consists of five elements: governance structure, contractual incompleteness and the consequent ex-post adjustments, asset specificity, opportunism, and credible commitments.

The TCE perspective posits that organisations enhance efficiency in their operations by choosing governance structures that minimise transaction costs (Williamson, 1981). These transaction costs are anchored on two behavioural assumptions: bounded rationality and opportunism. Generally, human actors are self-interested (opportunistic) and bounded by rationality (Williamson, 1981, 1998, 2008). This latter characteristic means that the transactional contracts are unavoidably incomplete and executed under conditions of uncertainty (Williamson, 1998). Consequently, and as contingencies arise ex-post, one or both parties may engage in such opportunistic, deceitful, and non-cooperative behaviour as lying, stealing, and cheating because of which transaction costs escalate.

However, asset specificity ensures that parties adopt credible commitments that cope with the opportunistic behaviour arising from such incomplete contracts by acceding to a governance structure that ensures their working relationship is sustained until the transaction is concluded (Williamson, 1998, 2008). The governance structure adopted must accord with the complexity of the transaction (Yates, 1998). In essence, a transactional contract creates a bilateral dependency relationship that renders the assets involved in the transaction virtually non-transferrable (Tadelis & Williamson, 2010). This attribute increases the possibility of a party engaging in opportunistic behaviour that creates conflict (Yates, 1998). However, both parties' cooperative approach toward the transaction essentially helps them address arising contract hazards.

In arbitration, the transaction costs of resolving the dispute are diverse and include direct and indirect costs. Participants in the arbitral process have a duty to ensure that the dispute is resolved efficiently. However, by relying on the party autonomy principle, at least one of the parties may engage in opportunistic behaviour that increases transaction costs directly or through delayed resolution. Such behaviour includes taking advantage of an obviously losing party to escalate costs, extensive discovery requests arising from incomplete documentation and the tendency to delay the proceedings by the party that is likely to pay. However, the parties find themselves entangled in an adjudicative process from which they cannot escape. Thus, they must cede to the intricacies of this delicate process until they agree to a consent award or until the arbitrator issues the final award.

As hostilities escalate, the chance of resolving the dispute diminishes, increasing the time and cost of resolution. The TCE viewpoint thus provides a useful framework that explains the efficiency of arbitration as one aspect of effectiveness. However, applying the TCE perspective is rather difficult because of challenges associated with quantifying intangible costs such as costs associated with opportunistic and non-opportunistic behaviour (Walker, 2015). Nevertheless, there has been some effort to apply the TCE theory to the study of conflicts and disputes in the construction industry. For instance, Yates (1998) and Ntiyakunze (2011) attributed conflicts and disputes to opportunistic behaviour arising from incomplete contracts.

2.2.3 Social-legal and Political Perspective

Under the social-legal and political perspective, a party names the event causing the damage, assigns blame to the other party for the breach and claims compensation for the damage suffered (Felstiner et

al., 1980-1981). If the other party accepts responsibility and pays or rejects the claim and the claimant accepts the rejection, the claim is settled. However, a dispute arises if the claim is rejected and the rejection is not accepted by the claimant (Kumaraswamy, 1997). Unless the disputants amicably settle or abandon the dispute, a neutral third party, such as an arbitrator, must step in. It is in the process of the arbitrator trying to resolve the dispute that time is spent, and cost incurred as disputants precipitate their arguments on naming, blaming, and claiming or challenging the claims.

2.2.4 Organisational Justice Perspective

Organisational justice is rooted in the theory of justice, which was first conceptualised by Rawls (1958). One of the most fundamental principles upon which the theory is predicated upon is the principle of fairness (Rawls, 1971). This principle requires a person to do his part as defined by the rules of an institution when the institution satisfies the two principles of justice and he has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests. The two principles of justice require institutions to be just or fair. Under the first principle, each person is entitled to the most extensive scheme of basic equal liberties compatible with a scheme of equal liberties for others (Rawls, 1958, 1971). The second principle requires social and economic inequalities to be arranged so that they are reasonably expected to be to everyone's advantage and attached to positions and offices open to all. Based on these principles, disputants expect arbitration as an institution to be fair or just in the process of resolving their dispute.

In organisational settings, people tend to be naturally concerned about the fairness of decisions because such decisions affect them. The term organisational justice refers to people's perception of the fairness of decision-making processes and procedures within organisational settings (Folger & Cropanzano, 1998; Greenberg, 1996). This perception determines their reactions to these decisions and shapes their feelings, behaviour, and attitudes towards the organisation. When such decisions and their procedures are consistently judged to be unfair, people affected by those decisions react negatively and vice versa (Brockner & Wiesenfeld, 1996; Folger & Cropanzano, 2001). In the end, these reactions shape the effectiveness of the organisation.

The fairness theory assumes that these reactions seek to assign blame to someone who should be held to account for any social injustice (Folger & Cropanzano, 2001). Such injustice is felt when a person's material or psychological well-being is threatened. The fairness theory requires a decision-maker to try to be fair both in the process and in the outcome (Folger & Cropanzano, 2001). The fairness theory is thus the foundation upon which the various facets of organisational justice are established.

Just like organisational effectiveness, organisational justice is a multidimensional construct. It has been associated with four different components (also known as dimensions): (i) outcome favourability, (ii) distributive justice, (iii) procedural justice, and (iv) interactional justice.

a) Outcome favourability

Outcome favourability is rooted in the economic exchange theory. This theory postulates that people are self-interested and seek to maximise material gains in their group interactions (Blau, 1964; Brockner & Wiesenfeld, 1996; Tyler & Blader, 2000). Such people may only cooperate and accept decisions from these groups when they perceive those decisions to be favourable (Adams, 1965; Blau, 1964). This aspect is critical to the effectiveness of arbitration in the sense that sometimes people challenge arbitral awards because they perceive those awards to be unfavourable.

b) Distributive justice

The distributive justice component advanced by Adams (1965) suggests that disputants evaluate dispute resolution procedures by considering the perceived fairness of the outcomes. Disputants' perception of outcome fairness is higher when the allocation of the outcome is consistent with their aspirations (Colquitt, 2001). Distributive justice is thus concerned with the outcomes of the dispute resolution process (Folger & Cropanzano, 2001). It is predicated upon three principles: equity, equality and need (Tyler & Blader, 2000). The equity principle requires equally deserving people to receive equal amounts of what they merit (von Platz, 2018). The equality principle requires all people to have the same while the need principle requires people to have sufficient resources and

opportunities. Thus, distributive justice requires distribution of outcomes to conform to some standard. In a dispute, a third-party neutral must allocate resources in a manner that ensures disputants' goals are realised. However, this aim remains difficult to achieve in arbitration where disputants' aims are grossly at variance and must thus be harmonised by the arbitrator.

Arbitrators deal with matters that disputants have been unable to resolve. These matters are difficult to resolve because of the underlying emotions (Tyler, 1997). These emotions, coupled with the scheduling challenges faced by the different entities participating in the arbitral process, contribute to the delays and high costs of resolving the dispute. At the end of the proceedings, disputants may not necessarily get what they expected or feel they deserved. Consequently, at least one of the disputants is likely to be dissatisfied with the arbitration.

Distributive justice consists of two main theories: equity theory and the relative deprivation theory. According to the equity theory, people evaluate decision-making procedures by assessing the ratio of inputs to outcomes and comparing against a similar ratio for a referent other (Folger & Cropanzano, 2001). Outcomes are perceived to be fair when one's input-outcome ratio is approximately equal to the referent other's (Adams, 1965). This degree of equality affects people's perception of the fairness of the outcome (Tyler, 1988). Thus, the extent of perceived inequality between the input-outcome ratios influences the perception of outcome fairness.

When people perceive inequality, they experience some averse emotional state. This experience depends on whether a person is under-rewarded or over-rewarded. Under-rewarded people react with anger and resentment while over-rewarded people react with feelings of guilt, which reactions provide the much-needed impetus to resolve the inequity (Folger & Cropanzano, 2001). However, people can readily compare their input-outcome ratio provided they have not exaggerated their expectations or their inputs. Unfortunately, exaggeration of expectations and inputs is a common practice in arbitration (Choi et al., 2014).

The relative deprivation theory relies on the assumption of the expectations people have in the decision-making process. Under this theory, people evaluate their outcomes by comparing such outcomes against an expected standard (Tyler & Blader, 2000). These expectations are socially constructed and shape people's choice of comparison standards (Tyler, 2000; Tyler & Blader, 2000). People tend to be more satisfied with outcomes that are fairly distributed when such outcomes are compared to others' outcomes (Tyler & Blader, 2000). Thus, when people compare their outcomes to others' outcomes, they expect to get what they deserve. When such expectations are violated, feelings of injustice are experienced (Adams, 1965; Tyler & Lind, 1992). The relative deprivation theory is thus concerned with individuals' allocations about their own expectations without paying attention to whether such allocations comply with rules of equity. However, like the equity theory, the relative deprivation theory explains why conflict is sustained when disputants consider their expectations, exaggerated or otherwise, to have been violated.

c) Procedural justice

The third component, procedural justice, originating from studies by Thibaut and Walker (1975) recognises that there are no objective standards against which decisions can be evaluated. Instead, people's perception of the fairness of outcomes is influenced by the perceived fairness of the procedures used to arrive at the outcome (Lind & Tyler, 1988; Tyler & Lind, 1992). The quality of decisions is thus evaluated based on the fairness of such procedures used to process those decisions (Tyler & Lind, 1992).

People's perception of the fairness of decision-making procedures plays a key role in fostering positive relations among group members (Thibaut & Walker, 1975). These positive relations encourage long-term commitment to the decision-making groups if the people believe the authorities are trying to be fair in dealing with the disputants and their matters (Tyler, 1997) and show concern for the rights of the disputants (Tyler, 1988). Hence, procedural justice moderates people's reactions to decisions in situations where they can accept unfavourable or unfair decisions (Folger & Cropanzano, 2001; Tyler & Blader, 2000).

Procedural justice is made up of two models: the self-interested and the group value model. The self-interested or control or instrumental model assumes that disputants seek to control processes to ensure that outcomes favour them (Lind & Tyler, 1988; Thibaut & Walker, 1978; Tyler & Lind, 1992). This model is rooted in the social exchange theory, which postulates that people react to organisations based on the resources they receive or expect to receive from such organisations. Generally, disputants aim to maximise self-gain through process or outcome control (Tyler & Blader, 2000). Thibaut and Walker (1978) delineated process control as "control over the development and selection of information" crucial to the resolution of the dispute and decision control as the degree to which one of the disputants may "unilaterally determine the outcome of the dispute" (p. 546). Thus, people are inclined to choose procedures and methods that are likely to increase the chance of securing favourable outcomes.

Outcome control is influenced by process control, which can be realised through opportunities available for participation in the decision-making process, otherwise known as representation or voice (Folger & Cropanzano, 2001; Tyler, 1988, 2000; Tyler & Blader, 2000). Generally, a voice in the decision-making process demonstrates that one is respected (Folger & Cropanzano, 2001; Tyler & Blader, 2000). People seek to control procedures in situations where they do not have control over the outcome. Such process control has a bearing on decision control as it increases the chance of securing fair or favourable outcomes (Brockner & Wiesenfeld, 1996; Thibaut & Walker, 1978).

The group value or relational model, with roots in the expectancy theory and social identity theory, assumes that disputants value their relationships with others (Brockner & Wiesenfeld, 1996; Lind & Tyler, 1988; Tyler & Blader, 2000). Hence disputants will evaluate procedures in terms of their (i) neutrality – honesty, impartiality, and objectivity; (ii) trust – sincerity; and (iii) how such procedures preserve disputants' dignity (Tyler, 2000; Tyler & Lind, 1992). These attributes suggest that the relational model addresses bias suppression and ethicality. Disputants will thus react negatively to unfavourable outcomes when they perceive as unfair the procedures used to arrive at those outcomes because such unfair procedures diminish the dignity held by the group members.

In the context of arbitration, parties have greater control over the process than the outcome (Burch, 2010). They can exercise control over the process by their choice of party representatives and how these representatives handle the proceedings, their conduct, pre-arbitration attempts and prior arbitration experience (Besaiso et al., 2018; Gebken II, 2006; Moza & Paul, 2017; Torgbor, 2013). The extent to which the tribunals exercise their powers has a bearing on the balance of process control. Disputants also have the latitude to select procedures that give them greater control over the outcome (Tyler et al., 1999). While such procedures help to secure favourable outcome (Thibaut & Walker, 1975), disputants' evaluation of the fairness of such procedures determines their acceptance and deference to the award, the likelihood of post-dispute conflict and enforcement costs (Burch, 2010; Kazemi et al., 2015). Gluck (2012) explicitly observed that "an unsatisfactory proceeding, no matter how short and inexpensive, is always too long and expensive" (p. 241). Thus, disputants' perception of procedural fairness has an impact on the effectiveness of arbitration.

Most contractual disputes and arbitration statutes provide that the award arising from the arbitration process is final and binding to the disputants. This finality requires disputants to cede decision-making authority to the arbitrator, creating room for the exploitation of the disputants. According to the fairness heuristic theory, this possibility makes disputants uncertain about their relationship with the arbitrator and raises questions on whether the arbitrator can be trusted to render a fair outcome (Lind, 2001; Lind & Tyler, 1988; van den Bos et al., 2001). This trust determines how disputants will react to the award arising from the arbitration. They will react positively if they perceive the dispute to have been decided fairly (Tyler & Blader, 2000), and vice versa. Thus, disputants react to the award depending on their assessment of the procedural and award fairness.

Both distributive justice and procedural justice are central to determining the effectiveness of arbitration. One of the theories that have been developed to explain the interactive effect of both justice aspects is the referent cognitions theory (RCT), developed by Robert Folger in 1986. The RCT assumes that individuals evaluate dispute resolution procedures by comparing their outcomes to referent outcomes (Folger & Cropanzano, 2001). These referent outcomes provide the standard against which disputants evaluate how their outcomes should be. When their outcomes, favourable or

otherwise, are as they should be, disputants do not experience injustice. This feeling, also known as the fair process effect, provides that disputants may consider favourable outcomes to be fair and may even accept negative outcomes arising from fair procedures (Skitka et al., 2003). Additionally, studies have shown that the perception of procedural fairness is higher when outcomes are favourable than when they are unfavourable if such procedures are marred by impropriety (Lind & Lissak, 1985).

However, injustice is experienced when a negative outcome is inconsistent with the referent outcome and the procedures leading to those outcomes are unfair (Brockner & Wiesenfeld, 1996). When one disputant feels such injustice, conflict intensifies, and resolution becomes more difficult. A series of experimental studies performed by Thibaut and Walker (1975) established that disputants' satisfaction with outcomes is shaped by their perception of procedural fairness. Hence, the assessment of procedural justice is critical to disputants' perception of distributive justice.

Unfortunately, arbitration remains a confidential process under which it is difficult for disputants to establish suitable referent standards against which to compare their outcomes. First-time disputants in arbitration can only compare their outcomes against similar outcomes obtainable through the competing dispute resolution mechanisms such as mediation, adjudication, DABs, and litigation. While repeat disputants can readily compare their current outcomes to their previous arbitration outcomes, disputes are one-off, and different disputes display different patterns that make it difficult to establish reasonable referent standards. Thus, relying on the distributive and procedural justice aspects only to evaluate the effectiveness of arbitration is rather simplistic and may not provide an adequate framework for meaningful analysis. Therefore, an evaluator must consider interactional aspects of the economic exchange.

d) Interactional justice

The interactional justice component advanced by Bies and Moag (1986) is concerned with the relationship between participants in the dispute resolution process. Interactional justice refers to the experience people receive as group authorities enact formal procedures (Bies & Moag, 1986; Colquitt, 2001). It is concerned with the quality of the relationship or the exchange taking place between people (Kazemi et al., 2015). It provides that disputants' reaction to the outcomes arising from the dispute resolution process is influenced by their perception of how they were treated and the quality of the decision-making process (Tyler & Blader, 2000). Interactional justice provides a useful explanation of why mistreated disputants might feel unfairly treated even after receiving favourable outcomes arising from fair procedures (Bies & Moag, 1986). It is governed by two principles: truth and human dignity (Bies, 2015). Thus, interactional justice is concerned with the social aspect of the dispute resolution process.

Colquitt (2001) conceptualised interactional justice as a component consisting of two aspects. The first aspect is interpersonal justice, which refers to the perceived degree of dignity and respect shown by decision-makers (Colquitt, 2001; Greenberg, 1993). Treating disputants politely, with dignity, courtesy and respect is one way of achieving interpersonal justice (Tyler & Blader, 2000). These are attributes of the quality of treatment experienced. While some authors (e.g. Lind & Tyler, 1988; Tyler & Blader, 2003; Tyler & Lind, 1992) argue that interpersonal justice relates to the relational model of procedural justice, for conceptual clarity, this researcher takes the view by Bies and Moag (1986) that interactional justice (which includes interpersonal justice) is a distinct form of organisational justice. The second aspect of interactional justice is informational justice, which refers to the perceived adequacy and thoroughness of the explanations for decisions and outcomes (Colquitt, 2001; Greenberg, 1993). It requires decision-makers to handle disputes truthfully and to justify their decisions. Thus, informational justice relates to the quality of the decision-making process. Despite this distinction, the two interactional justice components are related (Cropanzano et al., 2001).

Disputes requiring the tribunal to supply a reasoned award are costlier and more time consuming as they expect the tribunal to analyse all documents and evidence submitted, with a view to establishing the extent to which such documents support their reasons (Kangari, 1995; Stipanowich, 2012; Wiezel, 2011). While these reasons promote greater fairness by enhancing the transparency of the award, they may also necessitate the employment of stenographers to transcribe the proceedings (Holt, 2008). Thus, these arbitrations require a proper balance between efficiency against demands for reasoned awards to enhance the overall effectiveness of arbitration.

Interactional justice influences people's behavioural reactions to authorities and decisions. In this regard, disputants have the tendency to accept decisions arising from processes where interactional justice is fostered (Colquitt, 2001). For instance, Tyler and Blader (2000) established that the quality of the decision-making process influenced employees' willingness to accept decisions in organisational settings. According to Folger (1993), interactional justice interacts with outcome favourability and procedural justice, to the extent that arbiters must not only enact fair procedures and foster equitable outcomes but also treat disputants respectfully. Consequently, disputants receiving unfavourable outcomes will react resentfully toward the decision-maker if they perceive the decision maker's conduct to be improper (Brockner & Wiesenfeld, 1996). In the context of arbitration, acceptance of awards not only plays a key role in influencing the cost and duration of resolving the dispute but also depends on the interpersonal skills of the arbitrator, which define the way the arbitrator handles the dispute and treats the disputants.

Giorgetti (2013) argues that an arbitrator can never be independent and impartial, adding that while an arbitral decision should be guided by the merits of the case, the arbitrators' decisions are influenced by their moral, cultural, professional education and experience. Hence, some parties may nominate arbitrators capable of delivering predictably favourable outcomes, even if such outcomes are wrong or imperfect (Brekoulakis, 2013; Colvin, 2011; Puig, 2014). This preference means that such parties would like to exercise some degree of control over the outcome, creating a bias effect against the opposing party. An arbitrator appointed in this manner is under a duty to disclose such grounds that may give rise to justifiable doubts as to his impartiality (Stipanowich, 2012). However, there have been calls for such party nominations, which include repeat nominations, to be regulated in order to reduce the perception of bias (White & Case & Queen Mary, University of London, 2015). Such regulation is not only likely to provide guidelines that may assist the parties but may also ensure that nominated arbitrators accept such appointments on the understanding that they will conduct their arbitrations to acceptable ethical standards.

Lim and Loosemore (2017) asserted that people are likely to work harmoniously and to collaborate in resolving problems when they believe their economic exchanges are fair. Their online survey of 135 consultants, contractors, subcontractors, and suppliers in Australia indicates that project managers can enhance project performance by treating project participants with politeness, respect, and dignity. Politeness, respect, and dignity are facets of interactional justice (Loosemore & Lim, 2015) indicative of the quality of treatment experienced and hence determine contractor's conflict intensity and potential to dispute (Aibinu, 2007). Conflict intensity and potential to dispute remain critical aspects of the extent to which a dispute can be readily resolved, thus determine the time, cost, and acceptability of the resolution outcome.

Interactional justice manifests in arbitration in two forms. The first form, embedded in Section 19 of the Kenyan Arbitration Act is the requirement for equal treatment of the disputants. This Section requires the tribunal to treat each disputant equally and to grant each disputant a fair and reasonable opportunity to present its case. A similar provision is contained in Section 33 of the English Act. The second form of interactional justice, informational justice is contained in Section 32(3) of the Kenyan Act and Section 52(4) of the English Act. These sections require the award to contain reasons (explanations) that form the basis upon which the tribunal made the award. Upon agreement, the parties, however, may dispense with such reasons. Unfortunately, this approach may deprive disputants of the ability to assess whether informational justice is fostered.

e) Interactions among the justice components

From the above discussion, it is apparent that each of the components of organisational justice is concerned with one aspect. Notably, the four dimensions are concerned with either outcomes or the process. While outcome favourability and distributive justice are concerned with outcomes, procedural and interactional justice are concerned with the process leading to those outcomes. However, while interactional justice determines the disputants' reactions to arbiters, procedural justice determines the disputants' reactions to the resolution system (Bies & Moag, 1986). Further, both procedural and interactional justice have been found to influence arbitrator selection in labour and management disputes (Posthuma et al., 2000). In addition, interactional justice influences the disputants' perception of procedural justice (Tyler & Blader, 2000). Similarly, disputants who are

fairly treated are unlikely to accept such fair treatment if they consider the outcome of the process as unreasonable (Gross & Black, 2008; Lind & Tyler, 1988; Naimark & Keer, 2002). Rawls (1971) cautioned against assessing a conception of justice by its distributive role alone, arguing that its wider connections must be considered. Thus, the four components are not only distinct but also closely related.

Based on the fairness heuristic theory, disputants respond to justice by relying on information relating to different components of justice based on overall fairness rather than specific components of justice (Lind, 2001). The four components of justice may not only affect each other (Cropanzano et al., 2001) but also have been found to be significant predictors of overall justice judgements (Ambrose & Schminke, 2009). For instance, a study on the perception of 41 building and civil engineering contractors in Singapore established that the extent to which the contractor exercised control over the decision-making process, outcome favourability, the perceived quality of treatment-experienced and the quality of the decision-making process largely predicted perception of decision outcome fairness (Aibinu et al., 2011). The study also established that procedural justice depends on three main dimensions of organisation justice: perceived quality of decision-making process, outcome favourability and decision outcome fairness. Separately, Lim and Loosemore (2017) established that not only did the two aspects of interactional justice positively affect perception of distributive and procedural justice, but also perception of interpersonal justice positively affected project participants' perception of informational justice. Thus, evaluating outcomes only without considering the process leading to those outcomes does not provide a holistic view of why those outcomes result in the stated effects. Hence, an evaluator must consider the four components in determining the effectiveness of the process.

2.2.5 Relevance of the Perspectives to Dispute Resolution

The four perspectives discussed above provide a useful guide for explaining the effectiveness of arbitration. However, other than the organisational justice perspective, the three other perspectives are concerned with the outcome of the dispute resolution process. For instance, the economic and quasi-economic perspective is like the equity theory of distributive justice as both are concerned with the comparison of inputs and outputs. The TCE and social-legal and political perspectives are more inclined to the way disputes arise, rather than the ex-post approaches to the resolution of such disputes. The different components of the organisational justice perspective are comprehensive enough to address both outcome and process aspects of a dispute resolution process such as arbitration. Thus, organisational justice provides a solid foundation for carrying out a study on the effectiveness of arbitration.

A contractual dispute is the product of the systemic collapse of the process of economic and social exchange. Whereas economic exchange is anchored on short-term transactional activities, social exchange focuses on long-term relationships based on parties trusting that each will fairly discharge its obligations (Holmes, 1981). Essentially, social exchange theory engenders reciprocal interdependent actions among the parties to the exchange process (Cropanzano & Mitchell, 2005). The degree of success of such interactions has the potential to cause enduring commitments among the parties (Blau, 1964). The relationship between the parties has an influence on the type of exchange much as the exchange influences the relationship (Cropanzano & Mitchell, 2005). Hence, parties to an arbitral process may opt to engage in future business depending on the degree of hostility established during the arbitral process.

The degree of such hostility may determine whether each party is likely to consider referring future disputes to arbitration. As demonstrated by Organ (1988), the "exchange relationship binding an individual to a collective body can take on the quality of [the] covenant" (p. 69). Arbitration is a collective body that seeks a third party to provide a final and binding solution to the dispute. It consists of an interdependent structure in which arbitrators depend on the referred disputes for economic gain. Arbitrators also depend on the parties to adduce evidence that will enable them to render awards that are fair and acceptable to the parties. However, disputants depend on the arbitrators' expertise to determine the dispute in an impartial manner. This interaction, evaluated by the disputants based on the process and the award, determines parties' trust in and commitment to arbitration and has a significant bearing on the effectiveness of arbitration.

The organisational justice perspective has been the subject of attention in studies that evaluate the effectiveness of dispute resolution procedures. For example, an evaluation of the Pittsburgh arbitration programme established that the programme was not only cost-effective but also the three components of organisational justice interacted in determining disputants' satisfaction with the outcome and the process (Adler et al., 1983). Later, MacCoun et al. (1988) evaluated the effectiveness of court-annexed arbitration in 1000 auto negligence cases filed in New Jersey courts and found that arbitration procedures were viewed as fair, more efficient than litigation and that cases received high-quality treatment. Lind et al. (1990) found that tort litigants' subjective evaluation of the outcome, cost, and delay and subjective perception of the process accounted for 54-59 percent of the variation in procedural justice judgements and 57-82 percent of the variation in outcome satisfaction in Bucks Bounty in Pennsylvania, USA. While these three studies demonstrate the importance of organisational justice in the evaluation of the effectiveness of arbitration, they only focused on court-annexed arbitration programmes. Thus, they did not consider non-court-annexed construction arbitration.

The importance of the concept of organisational justice in construction cannot be underestimated. This emerging concept has been the subject of several recent studies, the majority of which have mainly focused on the assessment of fairness in the decision-making process. For example, fairness perceptions in project relations (Kadefors, 2005), organisational justice in the claims handling process (Aibinu, 2007; Aibinu et al., 2011; Aibinu et al., 2008), intra- and inter-organisational justice within the construction industry (Loosemore & Lim, 2015; Loosemore & Lim, 2016), the effect of inter-organizational justice perceptions on organizational citizenship behaviours (Lim & Loosemore, 2017) and the importance of organisational justice in dispute negotiation (Lu et al., 2017). Despite these concerted efforts, there is no documented evidence of a study that has applied the concept of organisational justice to explaining arbitral effectiveness in the construction industry.

7. Setting

This study examines contractual disputes arbitrated in the construction industry of Kenya.

8. Case and participant selection

A total of five cases were purposefully selected from a list of cases for recognition, enforcement and execution of arbitral awards as posted on www.kenyalaw.org by the National Council for Law Reporting (Kenya Law). Targeted participants for data collection include claimants, respondents, party representatives and arbitrators.

9. Key Readings

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SECTION B: DATA COLLECTION PROCEDURES

1. **Access Considerations**

The parties in the cases selected for data collection include private and public entities. In either case, gaining access requires the researcher to establish contact and to manoeuvre through gatekeepers. Two of the cases involve some parties where the researcher already has established contacts. Access to the parties to these cases will be established through these contacts. In the rest of the cases, the researcher will call the firms directly or try to gain access through some of the arbitrators involved in the cases.

2. **Field resources**

Field resources required include a sound recorder, notebook and pens. The researcher shall make use of his private office in Westlands, Nairobi for writing notes privately.

3. **Procedure for calling for assistance**

For challenges experienced during the fieldwork which cannot be dealt with by the researcher, the researcher shall call his supervisors for guidance.

4. **Data collection schedule**

Pilot Interviews shall be conducted for a period of ten weeks between 4 November 2017 and 16 January 2018.

The main Interviews shall be conducted between 1 May 2018 and 30 November 2018.

Unless otherwise agreed with the interviewee, interviews shall be conducted during working hours. The researcher shall conduct not more than two Interviews per day.

5. **Risk management**

It is recognised that Interviewees may occasionally be unavailable for scheduled Interviews. In case this issue arises during the fieldwork, the researcher shall request the Interviewee to accept a request to reschedule the Interview to another convenient date.

Another possible risk is likely to arise from the complete unavailability of one of the critical participants. For example, the claimant may have been interviewed but the respondent declines. While every effort shall be made to persuade the declining party to accept the researchers' request to participate, and since every participant shall be required to voluntarily give his consent to participate in the interviews, the researcher shall not compel such a party to accept to be interviewed. Rather, the researcher shall note that the participant declined to participate and shall make inferences as appropriate.

Finally, a participant may opt to terminate the Interview before it is completed. In such cases, the researcher shall make every effort to convince the Interviewee of the importance of the study and highlight the reasons why completing such an interview will be helpful in achieving the aim of the research. The researcher shall also try to establish the Interviewee's reasons to terminate the interview and shall make every effort to address those reasons with the interviewee. However, no interviewee shall be compelled to complete an interview against his or her wishes.

6. **Collection of Documents**

All documents to be collected shall be noted down during the interviews. Copies of such documents shall be collected as soon as the interview is completed.

7.1 *Plain Language Statement*

JOMO KENYATTA UNIVERSITY
OF
AGRICULTURE AND TECHNOLOGY
DEPARTMENT OF CONSTRUCTION MANAGEMENT
P.O. BOX 62000-00200, NAIROBI, KENYA. TEL: (020)-8008485
Fax: (067)-5353711 EXT 2475 Thika. Email: conmgmt@sabs.jkuat.ac.ke

8 May 2018

Mr/Mrs/Ms/Dr/Prof.______________________________

____

____

INVITATION TO PARTICIPATE IN A RESEARCH PROJECT

***Project title*: DEVELOPING A FRAMEWORK FOR EFFECTIVE ARBITRATION OF CONTRACTUAL DISPUTES IN THE CONSTRUCTION INDUSTRY OF KENYA**

Dear ______________________________

My name is Allan A. Abwunza, a student undertaking a research study in construction as part of a Doctor of Philosophy degree in Construction Management. You are invited to participate in this research project. This information sheet describes the project in plain English. Please read the sheet carefully so that you may understand the project well enough to participate effectively. I am undertaking this research study under the supervision of Dr. Titus Peter Kivaa of the Jomo Kenyatta University of Agriculture and Technology (JKUAT) and Dr. Kariuki Muigua of the University of Nairobi. The project has been approved by the National Council for Science and Technology (NACOSTI).

You have been selected to participate in this study, from the list of arbitration cases reported by the National Council for Law Reporting (Kenya Law) because of your involvement in construction arbitration in Kenya, in the matter:

____

The research aims to develop a framework for effective arbitration of contractual disputes in the construction industry of Kenya. The data for the study will be interviews of the participants in the selected contractual arbitrations and documents which the interviewees may willingly provide. About fifty interviewees are expected to participate in the study.

If you agree to participate, you will be required to attend a one hour interview on the process of arbitration involving contractual disputes in the construction industry. The interview will be conducted at your place of work or at a mutually convenient place of your choice. Additional information relating to this arbitration may be sought from your documents. Your participation has no risks associated with it but it will be a great contribution to advancement of knowledge in Construction. The information you give will be kept anonymous.

Any information that you provide can be disclosed only if (1) it is to protect you or others from harm, (2) a court order is produced, or (3) you provide the researchers with written permission.

As a participant, you have the right to (i) withdraw your participation at any time, without prejudice; (ii) have any unprocessed data withdrawn and destroyed, provided it can be reliably identified, and provided that doing so does not increase risk for you and (iii) have any questions regarding the research answered at any time.

A report of the project outcomes will be provided to the National Council for Science and Technology (NACOSTI) and the JKUAT, both in Kenya. The data will be stored securely in the Department of Construction Management for at least five years and then destroyed in accordance with the JKUAT procedures for destruction of records.

If you are willing to be interviewed, please complete and return the attached Consent Form. Please contact me directly or my supervisors on the telephone numbers listed below, if you require any further information.

Yours faithfully,

Allan A. Abwunza
PhD Candidate
JKUAT
aabwunza@sabs.jkuat.ac.ke
Tel. +254 736 672262

Dr. Titus Peter Kivaa
Supervisor
JKUAT
tkivaa@jkuat.ac.ke
Tel. +254 705 072906

Dr. Kariuki Muigua
Supervisor
University of Nairobi
admin@kmco.co.ke
Tel. +254 722 789890

7.2 Interviews Consent Form

Name of participant: ____

Project Title: **DEVELOPING A FRAMEWORK FOR EFFECTIVE ARBITRATION OF CONTRACTUAL DISPUTES IN THE CONSTRUCTION INDUSTRY OF KENYA**

Name(s) of PhD Candidate: (1) **Allan A. Abwunza** Phone: +**254 736 672262**

Names of Supervisors: (1) **Dr. Titus Peter Kivaa** Phone: +**254 705 072906**

(2) **Dr. Kariuki Muigua** Phone +**254 722 789890**

1. I have received a statement explaining the Interviews involved in this project.
2. I consent to participate in the above project, the particulars of which - including details of the Interviews or questionnaires - have been explained to me.
3. I authorise the investigator or his or her assistant to Interviews me or administer a questionnaire.
4. I acknowledge that:
    a. Having read the Plain Language Statement, I agree to the general purpose, methods and demands of the study.
    b. I have been informed that I am free to withdraw from the project at any time and to withdraw any unprocessed data previously supplied.
    c. The project is for the purpose of research and/or teaching. It may not be of direct benefit to me.
    d. The privacy of the personal information I provide will be safeguarded and only disclosed where I have consented to the disclosure or as required by law.
    e. The security of the research data is assured during and after completion of the study. The data collected during the study may be published, and the project outcomes will be provided to the National Council for Science and Technology (NACOSTI) and the Jomo Kenyatta University of Agriculture and Technology, both in Kenya. Any information which will identify me will not be used.

Participant's Consent

Participant: ________________________________ ____________________

(Signature) *Date*

Name of Interviewer:

____

________________________________ ____________________

(Signature) *Date*

7.3 Thank you statement

JOMO KENYATTA UNIVERSITY
OF
AGRICULTURE AND TECHNOLOGY
DEPARTMENT OF CONSTRUCTION MANAGEMENT
P.O. BOX 62000-00200, NAIROBI, KENYA. TEL: (020)-8008485
Fax: (067)-5353711 EXT 2475 Thika. Email: conmgmt@sabs.jkuat.ac.ke

Date____

Mr/Mrs/Ms/Dr/Prof.________________________________

____

____

THANK YOU STATEMENT

***Project title*: DEVELOPING A FRAMEWORK FOR EFFECTIVE ARBITRATION OF CONTRACTUAL DISPUTES IN THE CONSTRUCTION INDUSTRY OF KENYA**

Dear ____

On behalf of the entire research team, I wish to thank you for agreeing to take part in this Study by responding to the interview questions.

Your participation shall play a critical role in shaping the study and in informing the conclusions and recommendations arising from the study.

If you have any questions about the research at any stage, please do not hesitate to contact us.

Yours Sincerely,

Allan A. Abwunza
PhD Candidate
JKUAT
aabwunza@sabs.jkuat.ac.ke
Tel. +254 736 672262

JKUAT is ISO 9001:2008 Certified
Setting trends in higher Education, Research and Innovation

SECTION C: DATA COLLECTION QUESTIONS

1. Questions asked of specific Interviewees

1.1 Disputants and their Representatives

S.No.	Question	Interview Guide Questions		Answer
		Parties	**Representative**	
1.	**Effectiveness of arbitration**			
1.1	How satisfied were the disputants with the following aspects of the arbitration:			
	(a) The award?	2.1 – 2.13	2.1 – 2.13	
1.2	Was this arbitration			
	(a) Time efficient?	1.19 – 1.23, 2.14	1.19 – 1.23, 2.14	
	(b) Cost effective?	1.12 – 1.13 1.24 – 1.28	1.12 – 1.13 1.24 – 1.28	
2.	**Distribution of control**			
2.1	To what extent did any party possess and exercise greater control than the other?	1.3, 1.7, 3.1 – 3.2, 3.5 – 3.6, 3.10 – 3.35, 5.7	1.7, 3.1 – 3.2, 3.5 – 3.6, 3.10 – 3.35, 5.7	
2.2	How did such control, if any, work to the advantage of the party in control?	1.12 – 1.13 1.24 – 1.28 1.3, 1.7, 3.1 – 3.2, 3.5 – 3.6, 3.13 – 3.17	1.12 – 1.13 1.24 – 1.28 1.3, 1.7, 3.1 – 3.2, 3.5 – 3.6, 3.13 – 3.17	
2.3	How did such control, if any, work to the disadvantage of the other party?	1.12 – 1.13 1.24 – 1.28 1.3, 1.7, 3.1 – 3.2, 3.5 – 3.6, 3.13 – 3.17	1.12 – 1.13 1.24 – 1.28 1.3, 1.7, 3.1 – 3.2, 3.5 – 3.6, 3.13 – 3.17	
2.4	If a disputant wilfully misstated any facts, why?	3.7	3.7	
2.5	How satisfied were the parties with the way the court interfered with the arbitration?	6.7	6.7	
2.6	How did the court applications affect the parties' ability to engage in future business?	2.13	2.13	
3.	**Competence**			
3.1	Did the tribunal's concern for both time and cost guide the party's	5.4	5.4	

S.No.	Question	Interview Guide Questions		Answer
		Parties	Representative	
	approach to the resolution process? If yes, how?			
3.2	Did any party feel mistreated by the tribunal? How did this feeling affect their approach to the resolution of the dispute?	5.5	5.5	
3.3	If any of the parties felt that the dispute was not handled truthfully, how did this affect the party's satisfaction with the award?	5.9, 2.1 – 2.13	5.9, 2.1 – 2.13	
4.	**Procedural fairness**			
4.3	How did the fairness of the procedures used affect the parties' perception of arbitral effectiveness?	2.1 – 2.13 6.1 – 6.4	2.1 – 2.13 6.1 – 6.4	
5.	**Approaches to the presentation of evidence**			
5.1	What was the party's intention in the way the evidence was presented?	7.1	7.1	

1.2 Tribunal

S.No.	Question	Q.No. (Arbitrator)	Answer
1.	**Distribution of control**		
1.1	Why did the tribunal take that long to write the award after the conclusion of the hearings?	1.19 – 1.20	
1.2	How did the disputants' late signing or failure to sign the terms of reference affect the proceedings?	2.18	
1.3	How did the disputants' late payment of the advance affect the proceedings?	2.2	
1.4	If hardly available, why? How did this availability affect the proceedings?	1.16 – 1.20 2.7	
1.5	If the tribunal limited interruptions during the proceedings, why? How did this affect the proceedings?	1.16 – 1.20 2.21	
1.6	Why did the tribunal limit	1.16 – 1.20	

S.No.	Question	Q.No. (Arbitrator)	Answer
	delays, postponements and adjournments? How did this affect the proceedings?	2.22	
1.7	Why did the tribunal limit debate by lawyers? How did this affect the proceedings?	1.16 – 1.20 2.23	
1.8	Did the lawyers conduct the proceedings differently from litigation? How did this affect the proceedings?	1.16 – 1.20 2.21 – 2.23	
1.9	If the tribunal limited the number of hearings, why? How did this affect the proceedings?	1.16 – 1.20 2.24	
1.10	If the tribunal found it difficult to enforce deadlines, why? How did this affect the proceedings?	1.16 – 1.20 2.26	
1.11	If the tribunal did not issue or enforce any sanctions, why? How did this affect the proceedings?	1.16 – 1.20 2.27	
1.12	Did the tribunal feel in control of the method of exchanging written submissions? How did this affect the proceedings?	1.16 – 1.20 2.28 – 2.29	
2.	**Complexity**		
2.1	If a party engaged in conduct that was unacceptable to the other (specify conduct), how did this conduct affect the proceedings?	3.2	
3.	**Competence**		
3.1	If the tribunal decided the dispute based on concern for both time and cost, why? How did this affect the proceedings? Was the aim achieved?	4.1	
3.2	If any of the parties felt the tribunal decided the dispute based on personal biases, what were these biases? Why?	4.2	
3.3	Is there any reason the tribunal may have favoured one party?	Interpretation of parties' Interviews schedule	
3.4	If no advance hearing schedule,	4.3	

S.No.	Question	Q.No. (Arbitrator)	Answer
	why?		
3.5	If an advance hearing schedule was not followed, why?	4.3	
4.	**Approaches to the presentation of evidence**		
4.1	How did the parties' approaches to the presentation of evidence affect the tribunal's work?	6.1 – 6.7	

2. Questions asked of the individual case

S.No.	Question	Answer
1.	How *effective* was this arbitration?	
2.	How was *control* distributed across the disputants? How did this distribution affect the effectiveness of the arbitration?	
3.	How *complex* was this arbitration? How did this complexity affect the effectiveness of the arbitration?	
4.	Was the *size* of the tribunal adequate for the complexity of this case? How did this size affect the effectiveness of the arbitration?	
5.	How long did the tribunal take to write the award after the conclusion of the hearings? How did this affect the effectiveness of the case?	
6.	How did the tribunal's attempt to limit the following affect the effectiveness of the case?	
	(a) interruptions	
	(b) delays, postponements, and adjournments	
	(c) debate by lawyers	
	(d) the time allowed for final submissions	
7.	How were the issues under Q.6 above challenged?	
8.	If any of the parties felt the tribunal decided the dispute based on personal biases, how did this affect the effectiveness of the arbitration?	
9.	How did the perception of favouritism affect the effectiveness of the arbitration?	
10.	How did the tribunal's *competence* affect the effectiveness of the arbitration?	
11.	How did the court's interference affect the effectiveness of the arbitration?	
12.	What was the parties' perception of the *fairness* of the procedures used?	
13.	How did the parties' *evidence* affect the effectiveness of the arbitration?	
14.	How did the factors affect each other during the process?	

3. Questions asked of the pattern of findings

S.No.	Question	Answer
1.	To what extent do the findings show any semblance of consistency across the cases?	

4. **Questions asked of the entire study**

S.No.	Question	Answer
1.	To what extent are the findings explained by the various theories of organisational justice?	
	(a) Distributive justice	
	(b) Procedural justice	
	(c) Interactional justice	

5. **Normative questions about policy recommendations**

S.No.	Question	Answer
1.	What policy interventions are required to address each of the following aspects of the arbitration process?	
	(a) Appointment of the arbitrator	
	(b) Arbitration rules	
	(c) Conduct of the parties	
	(d) Arbitration agreements	
	(e) Competence of the arbitrator	
	(f) Powers of the tribunal	
	(g) Size of the tribunal	
	(h) Presentation of evidence	
2.	Which arbitrations are amenable to resolution:	
	(a) documents-only procedure	
	(b) hearings	
3.	To what extent should the court interfere with arbitration? Are the current provisions of the law too restrictive or too relaxed?	
4.	What interventions are necessary to ease the process of award recognition, enforcement, and execution?	
5.	What interventions are required in the process of appointing experts?	

6. **Sources of Evidence**

Question No.			Evidence	Source
Parties	**Representatives**	**Arbitrator**		
1.2	1.2		Category of Interviewee	Interviews
1.3	1.3		Representation	Interviews
1.4	1.4	1.2	Number of parties in dispute	Interviews, Pleadings
1.5	1.5	1.3	Number of arbitrators	Interviews, Pleadings
1.6	1.6	1.4	Number of contract agreements	Interviews, Pleadings
1.7	1.7		Number of arbitrations previously involved in.	Interviews
1.8 & 1.19	1.8 & 1.19	1.5	Duration taken for proceedings to commence.	Appointment letter, Order for
1.9	1.9	1.6	Educational and professional	

Question No.			Evidence	Source
Parties	Representatives	Arbitrator		
			qualifications of the tribunal.	Directions No. 1 Interviews, Appointment letter, Terms of reference
1.10	1.10	1.7	Tribunal's experience in the subject matter of the dispute	Interviews
1.11	1.11	1.8	Nature of the dispute.	Interviews, Pleadings
1.12 & 1.13	1.12 & 1.13	1.9 & 1.10	Claim and counterclaim (if any) values	Interviews, Pleadings
1.14	1.14	1.11	*ad hoc* basis or was it institutional?	Interviews, Appointment letter
1.15	1.15	1.12	Arbitration rules	Interviews, Orders for Directions
1.16	1.16	1.13	Clarity of rules	Interviews
1.17	1.17	1.14	Form of arbitration	Interviews, Orders for Directions
1.18	1.18	1.15	Techniques applied	Interviews
1.20	1.20	1.17	Expected length of proceedings	Interviews
1.19, 1.21, 1.22, 1.23	1.19, 1.21, 1.22, 1.23	1.16, 1.18, 1.19, 1.20	Actual length of the arbitration	Orders for Directions, Schedule (if any)
1.22 & 1.23	1.22 & 1.23	1.19 & 1.20	Date of award issue	Arbitrator's notification, Award, Delivery Note
1.24 & 1.25	1.24 & 1.25	1.21 & 1.22	Claim and counterclaim (if any) award	Interviews, Award
1.26	1.26		Expected expense	Interviews
1.27	1.27		Actual expense	Interviews, Payment vouchers
1.28	1.28		Reasonableness of the cost incurred	Interviews
2.1 & 2.2	2.1 & 2.2		Claim or counterclaim (if any) award expectation	Interviews
2.3 & 2.4	2.3 & 2.4		Whether the claim or counterclaim (if any) award was deserved	Interviews
2.5 & 2.6	2.5 & 2.6		Fairness of the claim or counterclaim (if any) award	Interviews
2.7 & 2.8	2.7 & 2.8		Comparison of the claim or counterclaim (if any) award with outcomes for similar disputes	Interviews
2.9 & 2.10	2.9 & 2.10		Favourability of the claim or counterclaim (if any) award	Interviews
2.11 & 2.12	2.11 & 2.12		Satisfaction with the claim or counterclaim (if any) award	Interviews

Question No.			Evidence	Source
Parties	Representatives	Arbitrator		
2.13	2.13		Maintenance of relationships	Interviews, Subsequent contracts
3.1 & 3.2	3.1 & 3.2	2.1	Length of submissions	Pleadings, Interviews
3.3	3.3	2.2	The timing of payment for the tribunal's advance	Payment receipts
3.4	3.4	2.3	Effect of payment timing on the schedule	Interviews
3.5 & 3.6	3.5 & 3.6	2.4	Volume of documents requested	Interviews, Discovery requests
3.7	3.7	2.5	Misstated facts	Interviews
3.8 & 3.9	3.8 & 3.9	2.6	The challenge to the timing of notification of the claim or counterclaim	Interviews
3.10 - 3.12	3.10 - 3.12	2.7 – 2.9	Availability for hearings	Interviews
3.13	3.13	2.10	Party representatives' knowledge of the law and practice of arbitration	Interviews
3.14	3.14	2.11	Party representatives' knowledge of construction disputes	Interviews
3.15	3.15	2.12	Effect of delay or failure to issue instructions or to pay party representatives	Interviews
3.16	3.16	2.13	Effect of delays, postponements and adjournments requested by party representatives	Interviews
3.17	3.17	2.14	Challenge to tribunal	Interviews
3.18	3.18	2.15	Withheld evidence	Interviews, Discovery requests
3.19	3.19	2.16	Compliance with deadlines	Interviews, Orders for Directions
3.20	3.20	2.17	Failure to produce required documents	Interviews, Orders for Directions
3.21	3.21	2.18	Delay or failure to sign terms of reference	Interviews, Terms of reference
3.22	3.22	2.19	Revisiting issues already decided	Interviews
3.23	3.23	2.20	The challenge to tribunal's jurisdiction	Interviews
3.24	3.24	2.21	Limiting interruptions	Interviews
3.25	3.25	2.22	Limiting delays, postponements, and adjournments	Interviews
3.26	3.26	2.23	Limiting debate by lawyers	Interviews
3.27	3.27	2.24	Limiting the number of hearings	Interviews
3.28	3.28	2.25	Time allotted for final submissions	Interviews, Order for Directions
3.29	3.29	2.26	The extent to which the tribunal enforced deadlines	Interviews
3.30	3.30	2.27	The extent to which the tribunal issued	Interviews,

Question No.			Evidence	Source
Parties	Representatives	Arbitrator		
			and enforced sanctions	Orders for Directions
3.31	3.31	2.28	Method of exchanging written submissions	Interviews, Orders for Directions
3.32	3.32	2.29	The extent to which the tribunal exercised control over the sequential exchange of written submissions	Interviews
3.33	3.33	2.30	The timing of settlement offers	Interviews, Offer letters
3.34	3.34	2.31	Amicable settlement mechanisms that were explored prior to the reference	Interviews, letters exchanged
3.35	3.35		The extent to which the amicable settlement mechanisms *(if used)* strengthen your case	Interviews
4.1	4.1	3.1	If language translator was used	Interviews
4.2	4.2	3.2	Parties or their representatives engaging in conduct that was not acceptable to the other	Interviews
5.1	5.1		Assessment of the tribunal's understanding of the law and practice of arbitration	Interviews
5.2	5.2		Assessment of the tribunal's ability to identify and assess issues in dispute	Interviews
5.3	5.3		Assessment of the tribunal's ability to resolve issues in dispute	Interviews
5.4	5.4	4.1	The extent to which the tribunal decided the dispute based on concern for time and cost	Interviews
5.5	5.5		The extent to which the tribunal treated parties politely, with dignity, courtesy, and respect	Interviews
5.6	5.6	4.2	The extent to which the tribunal decided the dispute based on facts and not personal biases	Interviews
5.7	5.7		The extent to which the tribunal decided the dispute without favouritism	Interviews
5.8	5.8		The extent to which the tribunal showed consistency in the application of rules	Interviews
5.9	5.9		The extent to which the tribunal handled the dispute truthfully	Interviews
5.10	5.10		The extent to which the tribunal was proactive in managing the case	Interviews
5.11	5.11	4.3	The extent to which the proceedings followed an advance hearing schedule	Interviews, Hearing schedule
6.1	6.1		Fairness of the procedure and rules applied in assessing the dispute	Interviews
6.2	6.2		Satisfaction with the procedure and rules applied in assessing and deciding the	Interviews

Question No.			Evidence	Source
Parties	Representatives	Arbitrator		
			dispute	
6.3	6.3		The extent to which the tribunal tried to be fair in the process of handling the dispute	Interviews
6.4	6.4		How fairly the dispute was decided	Interviews
6.5	6.5	5.1	Whether the award contained reasons	Interviews, Award
6.6	6.6	5.2	Whether the award was challenged based on reasons provided or lack thereof	Interviews, court filings
6.7	6.7	5.3	The extent to which the court interfered with the arbitration	Interviews, court rulings
6.8	6.8		Ease of the court process of recognising, enforcing, and executing the award	Interviews
7.1	7.1	6.1	Meticulousness of documentation	Interviews, Pleadings
7.2	7.2	6.2	Number of experts and fact witnesses involved	Interviews, Expert reports, Witness Statements
7.3	7.3	6.3	Method of appointing experts	Interviews, Order for Directions
7.4	7.4	6.4	The timing of experts' appointment	Interviews, Order for Directions, Hearing schedule
7.5	7.5	6.5	Techniques used for preparing and presenting expert reports and witness statements	Interviews
7.6	7.6	6.6	The timing of expert reports and witness statements	Interviews, Orders for Directions, Hearing Schedule
7.7	7.7	6.7	Methods of exchanging expert reports and witness statements	Interviews
8.1	8.1		How the arbitration should have been conducted	Interviews

SECTION D: GUIDE FOR THE CASE STUDY REPORT

1. Audience

(a) Thesis committee

2. Topics

1. Introduction
    - (a) Background
    - (b) Statement of the Problem
    - (c) Purpose
    - (d) Aim and objectives
    - (e) Research Propositions
    - (f) Justification and significance
    - (g) Scope and limitations
    - (h) Assumptions
    - (i) Limitations
    - (j) Definition of key terms
    - (k) Organisation of the study
2. Literature review
    - (a) Introduction
    - (b) Organisational effectiveness and arbitration
    - (c) Theories of disputing behaviour
    - (d) Dimensions of arbitral effectiveness
    - (e) Effectiveness of the arbitral process
    - (f) Factors influencing arbitral effectiveness
    - (g) Conclusion (Knowledge gap, theoretical framework, and conceptual framework)
3. Research Methodology
    - (a) Introduction
    - (b) Research strategy and design
    - (c) Case and participant selection procedures
    - (d) Data collection procedures
    - (e) Operationalisation of constructs
    - (f) Data analysis strategy
    - (g) Validity and reliability
    - (h) Ethical considerations
    - (i) Conclusion
4. Data Analysis and Results
    - (a) Introduction
    - (b) Case description
    - (c) Participant characteristics
    - (d) Explaining the factors influencing the arbitral process
    - (e) Relationship between the effectiveness of the arbitral process and its influencing factors
    - (f) Framework for effective arbitration of contractual disputes in Kenya
    - (g) Validation
    - (h) Conclusion
5. Conclusions and Recommendations
    - (a) Introduction
    - (b) Conclusions about the research aim and objectives
    - (c) Conclusions about the research problem
    - (d) Implications for theory
    - (e) Implications for policy and practice
    - (f) Research Limitations
    - (g) Further research
6. References
7. Appendices

(a) Interviews guides

(b) Case Summary

(c) Contact summary form

(d) Case study protocol

(e) Research permit

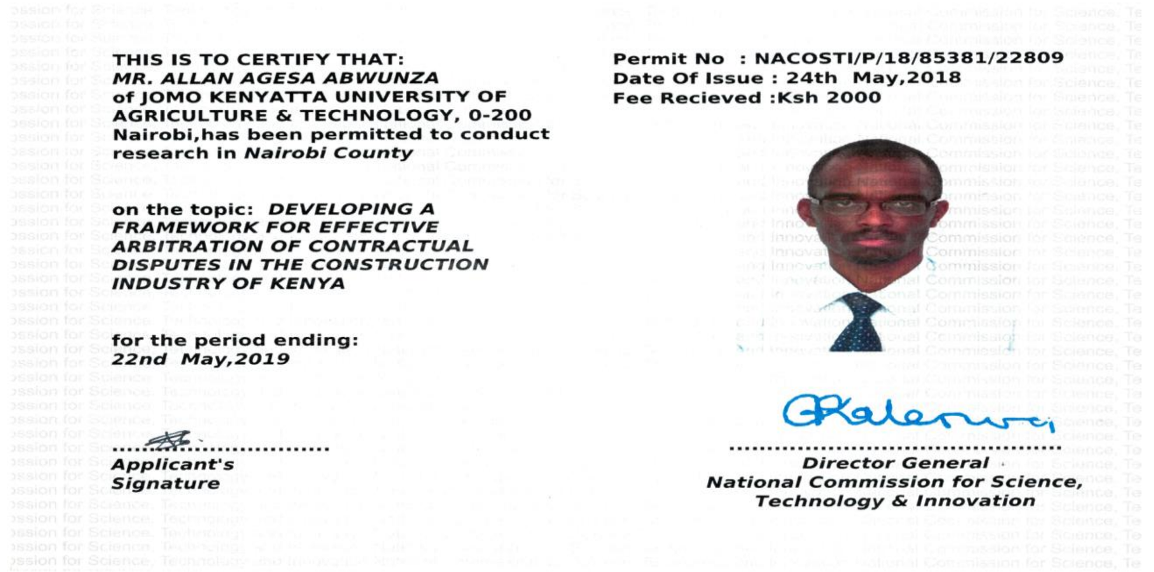
3. Length of the final case study report

The word count in the final thesis shall not exceed 100,000 words.

4. Publications

At least two articles shall be submitted to refereed journals for publication prior to submission of the thesis.

Appendix VII: Research permit



THIS IS TO CERTIFY THAT:
MR. ALLAN AGESA ABWUNZA
of JOMO KENYATTA UNIVERSITY OF AGRICULTURE & TECHNOLOGY, 0-200 Nairobi,has been permitted to conduct research in *Nairobi County*

on the topic: *DEVELOPING A FRAMEWORK FOR EFFECTIVE ARBITRATION OF CONTRACTUAL DISPUTES IN THE CONSTRUCTION INDUSTRY OF KENYA*

for the period ending:
22nd May,2019

Applicant's Signature

Permit No : NACOSTI/P/18/85381/22809
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Director General
National Commission for Science, Technology & Innovation