

**INFLUENCE OF ARBITRATION ON DISPUTE RESOLUTION IN  
THE CONSTRUCTION INDUSTRY: A CASE OF  
NAIROBI COUNTY, KENYA**

**BY  
NDIRANGU ROBERT NGUYO**

**Research Project Report Submitted in Partial Fulfillment for the Requirements  
of the Award of the Degree of Master of Arts in Project Planning  
and Management of the University of Nairobi**

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## **DECLARATION**

This project is my original work and has not been presented for the award of any degree in any other University.

**Signature:.....**

**Date:.....**

**Robert NguyoNdirangu**

**Reg No: L50/68002/2011**

This project has been submitted with my approval as the University supervisor

**Signature:.....**

**Date:.....**

**Dr. Naomi Mwangi.**

**Lecturer,**

**School of Continuing and Distance Education,**

**University of Nairobi**

## **DEDICATION**

The project is dedicated to all engineers who adopt arbitration as their preferred method of dispute resolution.

## **ACKNOWLEDGEMENT**

This research project would not be successful without the assistance of some people and institutions.

First, my appreciation goes to my supervisor Dr Naomi Mwangi for her support and encouragement, for always patiently reading my draft proposal and offering invaluable input. I acknowledge her direction and guidance which ensured that I complete this project successfully.

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## **ABSTRACT**

The purpose of the study was to investigate the influence of arbitration on disputes resolution among construction industry within the Nairobi County. The objectives of the study were: To establish the influence of liberty in the processes of Arbitration on dispute resolution within the construction industry, To establish the influence of flexibility in arbitration processes on dispute resolution within the construction industry , To determine the influence of a neutrality in arbitrator in resolving disputes within the construction industry , To determine how privacy in arbitration influence disputes resolution within the construction Industry. The study adopted survey research design where respondents were required to describe their experiences on Arbitration to resolve disputes arising between the different parties involved in construction industry. The target population of the study was the senior construction participants who included architects, quantity surveyors and construction Managers, 600 who partner with the Architecture Association of Kenya, Institute of Quantity surveyor and Chartered Institute of Arbitrators in Kenya respectively practicing in Nairobi County. Simple random sampling method was used to determine the sample by using 10% of the population to give a sample size of 60 construction participants. In addition a mixed model research which involved qualitative and quantitative methods was applied and primary and secondary data was used in the analysis. A semi structured questionnaire was used to gather primary data while the secondary data was gathered by a review of existing literature on the factors influencing arbitration in the successful resolution of disputes in the construction industry. The completed questionnaire was coded and entered into SPSS version 20 for presentation. The findings of the study indicated that liberty in arbitration through the selection of an arbitrator and having a representative during the hearings influenced successful dispute resolution. The study also outlined the influence of flexibility in arbitration through the use of acceptable language and rules in dispute resolution particularly in the construction industry. Neutrality of an arbitrator in arbitration by very minimal appeals on the award issued influence in successful dispute resolution. The study recommends that the construction industry should adopt more of the arbitration process due to its outstanding characteristics like liberty, flexibility, neutrality, and privacy in solving its disputes so as to reduce the costs and time that are associated with the court processes and thus resolving the conflicts faster so as to ensure timely completion of the projects.

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## **ABBREVIATIONS AND ACRONYMS**

<b>ADR:</b>	Alternative Dispute Resolutions
<b>CIARB:</b>	Chartered Institute of Arbitrators
<b>GDP:</b>	Growth of Domestic Product
<b>UNCITRAL:</b>	United Nations Commission on International Trade Law

## **CHAPTER ONE**

### **INTRODUCTION**

#### **1.1 Background of the Study**

All modern societies have set up courts for resolution of disputes. Due to historical reasons, proceedings in courts are lengthy and conducted in a very legalistic manner. Hence those who are not lawyers often find themselves lost in litigation procedure. Hence with this motives bearing in mind that some dispute are basically technical and not legal, it calls for a satisfactory method to resolve disputes and that being through Alternative Dispute Resolutions, such as arbitration where parties involved in the disputes are able to participate on the procedures involved making easy for the judgment to be accepted with minimal appeals. Arbitration is therefore an adjudicative process in which the parties present evidence and arguments to an impartial and independent third party who has the authority to hand down a binding decision based on objective standards, (Trank, 2009).

An arbitral award is final and binding. It is equivalent to judgment of a court of law and is recognized as such. It is an important method of deciding disputes other than litigation and is regulated by fairly well established principles of law Although the law on arbitration has been part of the statutory framework for many years, it is only recently that the practice of arbitration has attracted serious attention and attempts are now being made to ensure that it takes its rightful place in the dispute resolution hierarchy, International dispute resolution involves the use of appropriate rules and customs in handling disputes between countries UNCITRAL is under the united nation office of legal affairs and its core function is to regulate International trade using the UNCITRAL model law on international commercial Arbitration. However the model law is not binding, but individual states may adopt the model law by incorporating it into their domestic law.

Many construction conflicts worldwide are due to either jurisdiction or difference in cultures hence important to have the knowledge on the international constructing law to ensure one has the necessary tools to manage and resolve conflicts arising from disputes on the construction projects. In Africa there is no doubt that the continent represents today the world's most formidable development challenge in various sectors one of them being the infrastructure. The significant growth of investments and international trade with African

countries raises the important issue of knowledge of its diverse cultures and people in order to establish solid long term relationships and development when needed besides coming up with a method to resolve its disputes successfully. Adoption of the UNCITRAL Model Law on international commercial arbitration in 2010 showed the way, (Beatty, 2010).

Today Kenya has a local chapter of the Chartered Institute of Arbitrators with a membership of about 4000 registered arbitrators. In addition to being a member, the arbitrators undergo training for six months to ensure the characteristic they display during arbitral process is unexceptional and their handling of arbitration procedures is acceptable to both parties involved in the dispute. Lamentably, most of the arbitrators are based in Nairobi. Although these developments have raised the profile of arbitration as a dispute resolution mechanism, the level of utilization of this mechanism remains dismal. In our view this state of affairs is traceable to the manner in which arbitration was introduced and the shortcomings of the successive legal frameworks, (Benjamin, 2009).The transplantation of English law through the Orders-in-Council 1900 and 1907 saw the beginning of a new historical epoch in dispute resolution in colonial Kenya.<sup>15</sup> It heralded the demise of customary practices of dispute resolution. But surprisingly, arbitration was re-introduced by the Arbitration Ordinance 1914 as an extrinsic concept.

The Ordinance was based on the English Arbitration Act 1889 whose central feature was the absolute control of the arbitral process by courts of law,(Bok, 2011).The English statute was amended in 1950 but retained the main provisions of its predecessor. After independence, Kenya's parliament promulgated a new Arbitration Act, Chapter 49 (now repealed). This Act was a carbon copy of the English Arbitration Act of 1950 and remained the operative statute until 1995 when the current Arbitration Act was proclaimed. Noteworthy, none of the successive statutes ever made reference to customary arbitration or alternative dispute resolution mechanisms. It is thus imperative to examine the suitability of the framework on arbitration and make the necessary recommendations for reforms. As arbitration and other ADR become increasingly institutionalized, it is essential that the law encapsulates the necessary policy changes, and reflect societal and global dynamics. This is inevitable if the country is to take advantage of international investment and commerce.

Undeniably, investors and traders attach a high premium on the availability of operational, neutral and flexible dispute resolution mechanisms as an alternative to the court system. Arbitration is the preferred options, owing to the privacy it offers where the dispute resolved are made non-public only known by the parties involved, and again the liberty to set the rules of engagement and venue for the proceeding to take place finally arbitration takes much less time compared to litigation ensuring businesses or projects like those in construction continue their operations soon to meet their timeline. This mechanism encourages investment and engenders growth. Our recommendations in this paper could assist policy makers, business people and legislators in formulating the future policy and legal framework on arbitration and ADR ( Brewer, Gates and Goldman, 2010).

## **1.2 Statement of the Problem**

A dispute within the construction industry covers a diverse range of issues that deserve to be addressed specifically and in depth. The construction industry is one that comprises a diversity of interests, professions and procedures which interact to create a completed project. All of those involved may share a common goal, but they inevitably have differing and often divergent purposes. In the quest to achieve their goal the chances or the likelihood of disagreement or disharmony are substantial (Gould, 1999).

If unresolved in time, construction disputes can become very expensive, considering the finances, personnel, time lost, and the opportunity costs. Quantifiable costs include hiring of attorneys, expert witnesses and the dispute resolution process itself. The less visible costs like company resources assigned to the dispute, and lost business opportunities and the intangible costs which include damage to business relationships and potential value lost due to inefficient dispute resolution are also considerable, although quite difficult or impossible to quantify. (Vermunt and Wilke, 2011).

Kenya has had laws on Arbitration from as early as 1914, is a signatory to both the New York and the Washington Conventions<sup>3</sup> and adopted UNCITRALs Model Law in 1995. Nevertheless, arbitration has yet to win the confidence of business contracts as one of the basic dispute resolution mechanisms in the country, and the continued usage of litigation to solve technical disputes like those found in the construction industry has led to untenable

backlog of cases that have diverted the judiciary from its core mandate. The level of utilization of this important method of resolving construction industry disputes is disconcerting and there is an overwhelming case for a paradigmatic shift of emphasis from litigation to arbitration. The Kenya chief justice Dr. Willy Mutunga is put into record on the March east African newspaper having encouraged Kenyans to adopt alternative methods to pursue justice other than going to courts, which are not only expensive but fuel hatred among family members, this when opening Gatundu law courts in Kiambu County.

The most basic hallmark of arbitration is the liberty enjoyed by the parties in fashioning the proceedings. They have capacity to tailor the scope of the submission. They enjoy wide latitude in selecting the persons who will serve as arbitrators with the technical knowledge. This is a form of security that has no parallel in litigation. Essentially, arbitration is a private process with a significant degree of autonomy and self-sufficiency. (Thornton, 2012)

In the construction industry arbitration is characterized by countless advantages; notably, neutrality, finality, binding nature of decisions, speed and confidentiality. Although the arbitral process has several shortcomings and is unsuitable in circumstances in which the dispute involves many parties, it is commonly a perfect substitute for litigation. It does not deny the parties the right to seek judicial opinion if they so desire and more importantly, if a party is dissatisfied with the arbitral award, it is entitled to challenge the award in the High court which has jurisdiction to set the award aside (Lipsky, 2009). Amazingly, even on technical disputes like the construction industry parties to contracts undertakings prefer ordinary courts in dispute resolution. As a consequence, court diaries are perpetually clogged and cases take far too long to conclude. On average, construction cases take between two and four years to conclude others like land disputes may take as long as twenty years. Most litigants are unaware of other cost effective and reliable alternatives.

To my understanding arbitration has yet to attain the level of acceptance and utilization necessary to make it an important dispute resolution mechanism in technical areas like the construction industry in Kenya and against this background, the importance of arbitration in dispute resolution cannot be gainsaid.

### **1.3 Purpose of the Study**

The purpose of the study was to investigate the influence of arbitration in the success of dispute resolution among construction industry in the Nairobi County

### **1.4 Objectives of the study**

- i. To establish the influence of liberty in arbitration processes on dispute resolution within construction Industry.
- ii. To establish the influence of flexibility in arbitration processes on dispute resolution within construction Industry.
- iii. To determine the influence of neutrality on arbitration processes in resolving disputes within construction Industry
- iv. To determine how privacy in arbitration influences disputes resolution among construction Industry in Nairobi

### **1.5 Research Questions**

- i. What is the influence of liberty on arbitration processes in the rate at which disputes are resolved in the construction Industry?
- ii. How does flexibility in arbitration processes influence dispute resolution within the construction Industry?
- iii. To what extent does neutrality in arbitration processes contribute to dispute resolution within the construction Industry?
- iv. How does privacy in arbitration processes influence how dispute are resolved in the construction Industry?

### **1.6 Significance of the Study**

Arbitration is a realistic alternative to litigation designed to resolve disputes. Construction industry is a key pillar for nurturing economic growth for any country because it contributes greatly to the infrastructure network. In Kenya construction industry comes third after agriculture and manufacturing in contributing to the growth of domestic product (GDP) by 21.5 %.In addition social economic transformation one of the pillars in Kenya's vision 2030

has infrastructure as one of the six foundation which on the other hand incorporates construction industry.

Construction projects are bound by time, scope and budgets hence very important to eliminate and manage any obstacle like disputes that may pull them behind. In case of a disputes arising it is very important for all the parties involved to fully participate and contribute in the resolution process, an important role not found with the litigation process in the courts.

Hence against this background when construction project are carried out with minimal interruption like conflicts among the parties involved not only would it ensure that the economy of a country propagates but also aid a developing country like Kenya attain its target goals like vision 2030. In addition on not forgetting the important role construction industry plays in ensuring modern housing and decent roads are put up to cater for the social wellbeing of the raising Kenya population.

The government of Kenya would benefit significantly through supporting a well-established arbitration institution by bringing both local and foreign investors to put in resources in the construction industry, and create a lot of employment opportunity for the citizen. The findings would be useful to the Construction industry stakeholders to adopt arbitration as the preferred method to solve their disputes

### **1.7 Limitations of the Study**

The study faced a number of limitations. First, some of the respondents feared to provide information fearing that such information would be used to their disadvantage or to paint a negative image about their organization. To overcome this challenge, the researcher carried along an introduction letter from the university and assured the respondents that the information provided will only be used for academic purposes.

The researcher also encountered cases where some of the respondents were not fully truthful, and provided what they thought the researcher wanted to hear as opposed to what was the exact situation. To counter the limitation of respondent's truthfulness, the researcher sought

to assure the respondents' anonymity and confidentiality, and re-assure them that the feedback would only be used for the purpose of the study.

### **1.8 Basic Assumptions of the Study**

The study assumed that the construction firms use arbitration clauses in their tendering documents and also make use of arbitration services in case of a dispute. The study assumed the variables were not to change during the research period and questionnaires issued will be filled correctly and honest information given.

### **1.9 Delimitation of the Study**

The study was carried out in Nairobi county, and targeted senior construction participants and their respective regulating institutes of dispute resolution in Kenya who are directly involved in the construction industry.

### **1.10 Definition of Significant Terms Used in the Study**

**Arbitration:** It is one of several kinds of Alternative Dispute Resolution which provide parties with an impartial third party, known as an arbitrator to Aid them resolve their dispute out of court.

**Liberty:** The right and power to act, believe, or express oneself in a manner of one's own choosing.

**Privacy:** The quality or condition of being secluded from the view of others

**Flexibility:** Entitling the parties to define and structure their proceedings. For example, the parties may choose their arbitrators, the place and the language for arbitration, the content and structure of the evidence taking.

**Neutrality:** Not aligned with or supporting any side or position in a controversy prosecuting, defending, sentencing, and punishing those who are suspected or convicted of criminal offenses.

**Dispute Resolutions:** Extrajudicial processes used to resolve dispute and potential disputes between and among individuals, business, and governmental agencies

**Construction Industry:** Collective of different professionals involved in putting up buildings and roads.

### **1.11 Organization of the Study**

The research project proposal was presented in five chapters. Chapter One highlighted the background of the study, problem statement, purpose of the study, research objectives, research questions, basic assumptions of the study, limitation and delimitation of the study and definition of significant terms.

Chapter Two presented relevant literature based on the study objectives while Chapter Three presented the research design and methodology to be used. Chapter Four dealt with data collected from the field, its analysis, and finally the interpretation of the data. The findings were presented in form of tables. Chapter Five covered summary of findings, the discussion and conclusion drawn from the data findings aimed at achieving the objectives of the study.

## **CHAPTER TWO**

### **LITERATURE REVIEW**

#### **2.1 Introduction**

This chapter reviews related on what has been researched or written by others. It covers the overview of the most attractive factors on arbitration and methods of arbitration as an effective way to resolve disputes and ensure long term solution among parties involved. Arbitration is one of the oldest methods of resolution of disputes between the parties. It has existed, in one form or the other, in every country at all times, and as a process of dispute resolution it offers many advantages to both the parties involved.

#### **2.2 History Perspectives of Arbitration**

The historical development of the various strategies in relation to dispute resolution processes such as mediation, arbitration, negotiation or dispute reviews enhance or improve productivity and reduce wasted resources. As clearly presented in the earlier discussion conflict is an inevitable part of human behaviour (Maher, 1994). However significant developments have occurred in Australia and internationally in dispute resolution processes in the last decade and this section provides a brief overview of those developments. Court processes by means of litigation is traditionally the primary means of dispute resolution in the construction industry (Loosemore, 1999). Australia inherited the common law of England and Wales including the English court systems. Of importance is the English Arbitration Act 1697. This Act formalized arbitration in England by providing a procedure which enabled parties to a civil action to refer their matter to arbitration to be resolved as a judgement of the court (Astor & Chinki, 2002). Over time Australia has adapted to suit the needs of Australian industry and developed specialized courts and tribunal systems for resolving disputes (Fenn, 1998).

The evolution of modern dispute resolution techniques is mainly accredited to the various techniques developed and implemented by institutions in the United States (Dearlove, 2000). The Arbitration Society of America was founded in 1922 by Francis Kellor as the first formal organization to implement dispute resolution services. Two years later another organization, the Arbitration Foundation was formed. With the backing and collaboration of the

Arbitration Society the United States Arbitration Act was enacted in 1925. The Act provided the first legally enforceable framework for agreements to arbitrate over any 'controversy'. In 1926 the Arbitration Society and the Arbitration Foundation amalgamated to form the American Arbitration Association (AAA) which has become the prominent driving force for the development of dispute resolution services and guidelines. It is the AAA which provides guidance rules for arbitration clauses and procedures that the American Institute of Architects (AIA) has used arbitration in standard forms of contracts for over the past century. Despite litigations and arbitrations ability to produce a final and binding decision, the construction industry has sought the establishment of informal processes for the quick and effective resolution of disputes.

Alternative Dispute Resolution is providing various possibilities in lieu of the costly and time-consuming litigation. ADR is broadly defined as "...any method by which conflicts and disputes are resolved privately and other than through litigation in the public courts (Kovach, 2004). ADR includes both binding and non binding procedures. The development of a sliding scale of ADR techniques has evolved over the years including a progression from self-deterministic to third part impose methods including negotiation , mediation, conciliation, neutral evaluation, expert determination, adjudication, arbitration and others (Cheeks, 2003; Cheung, 2000; Jones, 1996).

Another form of ADR is the Dispute Resolution Board. From a practical perspective Dispute Boards must be established at the project outset. According to Gould (2006) this is a major challenge and one that is key to success as opposed to waiting for a dispute to arise. Potential candidates for the Board must be identified and appointed (Egan, 1998). Contractors and clients tend not to focus on disputes at the start of the project and when a dispute does arise they tend to take considerable time reaching agreement on the members and establishment of the Board. Ideally the Board should be established weeks before the project starts on site to enable them to follow and deal with arising issues. Establishing the Board can take some considerable time and therefore cannot be left until the project is underway. Board members must be impartial and have wide ranging expertise with excellent communication and management skills. It is also imperative that Board Members are available for the duration of the project to deal with matters promptly.

### **2.3 Influence of Liberty on Dispute Resolution**

In arbitration there is more control over both the process and the outcome. Both parties have the opportunity to check the background and experience of the arbitrator as specified in the dispute resolution section of their contract. Parties usually agree when they find a specialist who is knowledgeable and experienced in the field of dispute, and who is fair and equitable to both parties. (Freidson 2010) In litigation, you have no options in the choice of the judge to proceed over a case, in addition the judge's responsibility is to interpret and rule on matters of law, not the contract you agreed upon.

However there are several methods available for resolving disputes between two parties. The first and most important method is through the courts. When a dispute arises between two parties belonging to the same country, there is an established forum available for the resolution of the same, (Semelroth, 2006). The parties can get the said dispute resolved through the courts established by law in that country. Generally, this has been the most common method employed by the citizens of a country for the resolution of their disputes with the fellow citizens. When a dispute arises between two persons belonging to two different countries, the difficulty arises. One option available to the parties is to go to the domestic courts of either country for the resolution of that dispute (Trank and Rynes, 2009).

Nevertheless, this approach may have its own problems. The first is the jurisdiction of the courts. The laws relating to jurisdiction of courts in a country are not made keeping in view the transnational disputes. Normally, they are designed to resolve domestic disputes, that is, disputes arising between two citizens of the same country. The other is dissimilarity in the legal system of two countries. The problem acquires serious dimensions if the county of one party follows common law system and the country of the other party follows civil law system. In spite of tremendous work done by many international organizations and institutions, unification or uniformity of different legal systems is still a distant dream. The next is the choice of law applicable to the agreement and the consequential dispute between the parties. Availability of assets of the defendant in that jurisdiction is also a consideration for the purpose. The reason being that the enforcement of the judgment in any other

jurisdiction may be a prolonged and cumbersome process, (Van den Bos, Vermunt and Wilke, 2011).

The absence of a treaty for the enforcement of foreign judgments between the two countries may render the judgment a worthless paper. If the judgment debtor happens to be a sovereign of that other country, the execution may involve claim for sovereign immunity. In some countries, sovereign assets enjoy sovereign immunity. The establishment of the fact in the court of that very country that the sovereign has waived the immunity itself will be a titanic task, (Waddington, 2010). Apart from these difficulties, conventional difficulties, like undue delay in the dispensation of justice, complicated procedural formalities, transportation of entire evidence and witnesses from one country to the other country, high cost of litigation, judicial imperfection, etc., cannot be ignored.

In view of these and other difficulties, either party avoids going to the courts in the country of the other party. It is for these reasons that the alternative dispute resolution methods are becoming more popular for resolution of disputes between parties belonging to two different countries because of its liberty it gives. So much so that some persons have started calling them “appropriate” dispute resolution methods rather than “alternative” dispute resolution methods. (Zack, 2009).

#### **2.4 Influence of Flexibility on Dispute resolution**

There is much more room for creativity when you resolve dispute with the help of a third party, rather than going to court. People can work together to arrive at a solution that meets the needs of all parties (Hogler, 2012). A dispute often involving parties who have a business relationship and will need to continue to work together after the dispute is resolved. Hence call for a flexible way to resolve without creating enmity. Arbitration methods encourage people to work together at resolving the disagreement between relationship or organization which often results in improved business relationships and this leads in less disputes arising again. Disputes are unpleasant but unavoidable part of any organization. However, where there is dispute there must also be a flexible mechanism for resolution of these disputes.

Alternative dispute resolution in Kenya is not new and it was in existence even under the previous Arbitration Act, 1968. The Arbitration and Conciliation Act, 1995 has been enacted to accommodate the harmonization mandates of UNCITRAL Model. The act provides two alternate method of ADR: Arbitration and Conciliation. Arbitration is a method for settling disputes privately, but its decisions are enforceable by law. Arbitration offers greater flexibility in terms of, prompt settlement of national and international disputes and restricted channels of appeal than litigation, by ensuring that both parties are involved in each and every step of the hearings. (Freidson, 2010).

### **2.5 Influence of Neutrality on Dispute resolution**

It is a well-known principle of arbitration that arbitrators must be and remain independent and impartial from the parties, their counsel and the subject matter of the dispute. The arbitrator is required to be impartial and independent if the outcome of the arbitration process is to be credible and acceptable to both parties in a dispute. The concept of independence is related to the personal connection or relationship between the arbitrator and the parties or their counsel personal, social and financial. Any form of connection between the arbitrator and one of the parties, compromises the level of independence and the outcome of the arbitration process. A financial or business relationship between an arbitrator and one of the parties to arbitration is a clear basis for a challenge on the grounds of lack of independence or partiality.

The process of arbitration can start only if there exists a valid Arbitration Agreement between the parties prior to the emergence of the dispute. , such an agreement must be in writing. The contract, regarding which dispute exists, must either contain an arbitration clause or must refer to a separate document signed by the parties containing the arbitration agreement. Arbitration may be conducted ad hoc or under institutional procedures and rules both which ensures the arbitrator is neutral in the arbitration process (Bok 2011).

Institutional Arbitration is conducted under the guidance and well-tested rules of an established arbitral organization, whereas under Ad hoc arbitration, the parties have to draft their own rules and procedures to fit the needs of their dispute in a neutral manner. There are

number of national and international organizations set up with the main object of settling commercial disputes by way of Arbitration and other Alternative Dispute Resolution mechanism. These organizations lay down rules for the conduct of arbitration (Gross and Hogler, 2011).

These rules, however, cannot override the Act. These organizations handle the arbitration cases of the parties and provide valuable services like administrative assistance, consultancy and recommending names of arbitrators from the panel maintained by them. Since these organizations have experience and proper infrastructure to conduct the arbitral proceedings, it is quite often beneficial for parties to avail of their services (Hogler, Frame and Thornton, 2012).

## **2.6 Influence of Privacy on Dispute resolution.**

Arbitration is a private and confidential process and ensures absolutely no washing of dirty linen in public. No onlookers, media coverage and busy bodies are allowed at the hearings making it a highly priced aspect by disputants. Publishing of an award or arbitration deliberations can only be done with the approval of the parties. The privacy of an arbitration setting may offer significant advantages to participants, such as its' more business-like, efficient and low-profile method in settling dispute (Lipsky, 2009)

Any documentary or other evidence given by a party or witness in the arbitration shall be treated as confidential by any party whose access to such evidence arises exclusively as a result of its participation in the arbitration, and shall not be disclosed to any third party (other than a witness or expert), except as may be required by law. However, the major and attractive reason why most parties choose to arbitrate is because of the perceived confidentiality of the proceedings. Surely there are other ways by which arbitration can raise its profile as a method of dispute resolution, which does not include the publication of private awards. Publication of awards would raise concerns over trade secrets and may jeopardize on-going business relationships because of the "airing of dirty laundry".

To avoid this, it is suggests that precautions can be taken prior to the publication of awards such as redacting any potentially confidential or secret information contained in the award that is not necessary to understanding the decision (award) (Trank, 2009).

## **2.7 Theoretical Framework**

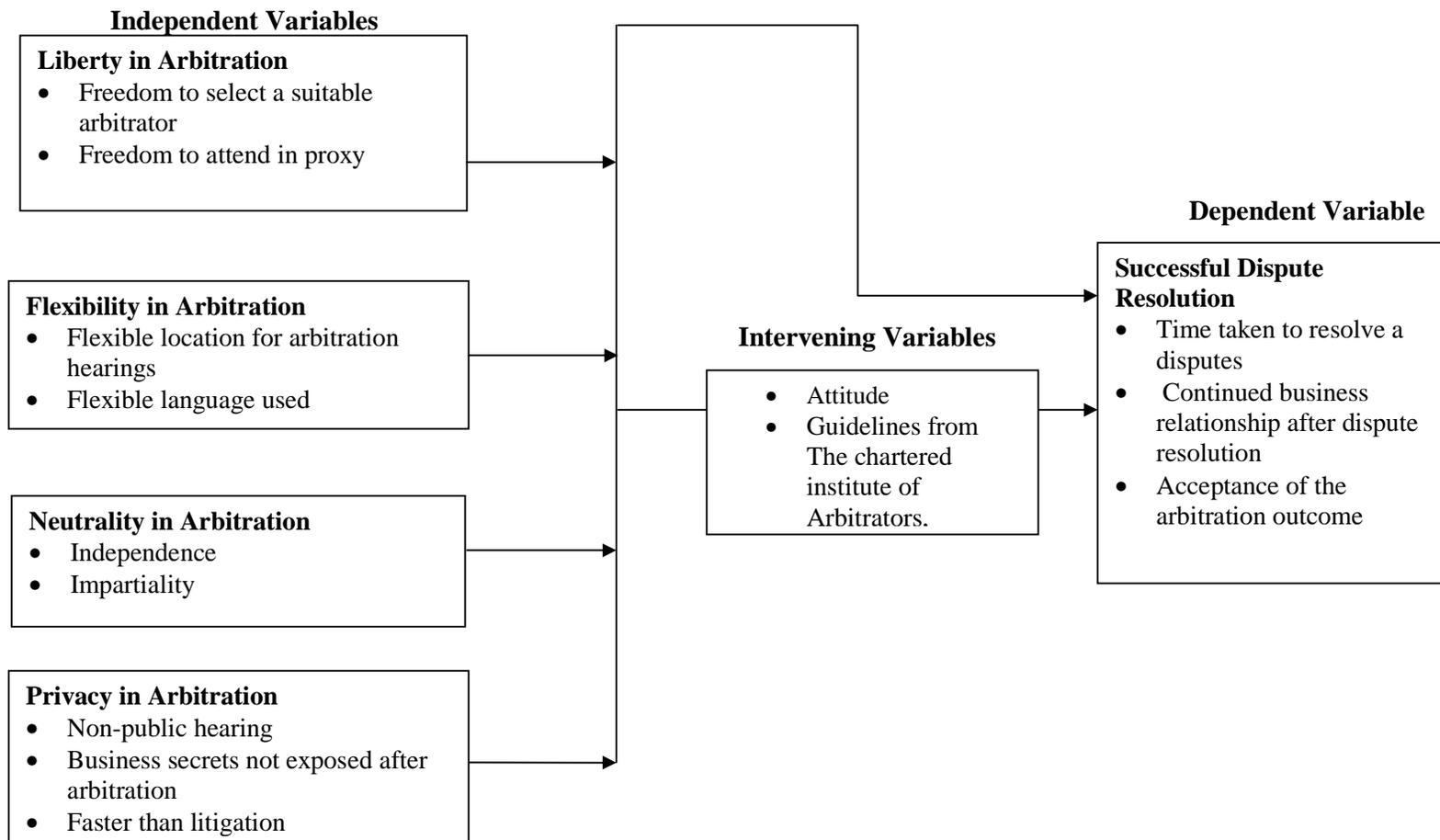
This study was based on Conflict Theory. This theory was developed by Lewis Coser (1913–2003), Improved by Ralf Dahrendorf (1929) and Randall Collins (1941). The theory is based on an argument, the Enron case, bidding on eBay, the civil rights movement, and the U. S. invasion of Iraq have in common?. They are all forms of conflict with various levels of intensity and violence. The theorists point out that society is rife with conflict which is a general social form that isn't limited to just overtly violent situations. More than that, conflict doesn't necessarily rip society apart. In fact, it might be one of the most important ways that society holds itself together.

Conflict theory has a long history in sociology. Without question, Karl Marx's work in the early to mid-1800s formed the initial statements of this perspective. As it is known, Marx was centrally concerned with class and the dialectics of capitalism. He argued that capitalism would produce its own gravediggers by creating the conditions under which class consciousness and a failing economy would come into existence. In this juncture between structure and class-based group experience, the working class revolution would take place

In general, conflict theory seeks to scientifically explain the general contours of conflict in society: how conflict starts and varies, and the effects it brings. The central concerns of conflict theory are the unequal distribution of scarce resources and power. What these resources are might be different for each theorist, but conflict theorists usually work with Weber's three systems of stratification: class, status, and power. Conflict theorists generally see power as the central feature of society, rather than thinking of society as held together by collective agreement concerning a cohesive set of cultural standards, as functionalists do.

## **2.8 Conceptual Framework**

This study adopted the conceptual framework as shown. This framework determined the suitability of arbitration as an appropriate method to resolve disputes in the construction industry compared to litigation



**Figure 1: Conceptual Framework**

The independent variables: liberty, flexibility, neutrality and privacy according to the conceptual framework will tend to stand in the way of dispute resolution. In other words the long term effect on dispute resolution will be enhanced and improved. These variables will be perceived to act through the arbitration process with the players being the arbitrator who will be directly involved in the performance of the dispute resolution.

The performance of dispute resolution will be measured in terms of time taken on the arbitration process and how the parties accept the award given by the arbitrator. In addition the government role in formulating, implementing and enforcing key policies in the arbitration process will have an overall performance in the dispute resolution processes.

## **2.9 Knowledge Gap**

This study explains lack of influence the society has towards significantly increasing knowledge on arbitration of disputing parties in the public. This chapter gave a review of literature on influence of arbitration in the success of dispute resolution on different contexts such as influence of liberty on dispute resolution, influence of flexibility on dispute resolution, influence of neutrality on dispute resolution, influence of privacy on dispute resolution, the theoretical framework, the conceptual framework which showed a diagrammatic representation of the independent and dependent variables and the research gap.

Compared to arbitration, litigation is faced with many issues that affect the outcome of dispute resolution. An example in litigation the responsibility of the judge is to interpret and rule on matter of law, not the contract you agreed upon hereafter a lot of misinterpretation can occur pushing litigation case for a longer period to get judgment. Another difficulty of using litigation in the construction industry is when a dispute arises from persons belonging to different countries where different legal systems used are different that is the common law or civil law, this poses a challenge to resolve dispute hence adoption of arbitration comes in hand with its tailor made rules to accommodate all parties involved.

## **2.10 Summary of the Chapter**

This chapter point out Arbitration as flexible and adopts privacy as one of the major characterizes hence ensures mutual respect within business partners in the construction industry and improved business relationship even after resolving their disputes These factors explain why arbitration should not only be as the alternative dispute resolution method but an appropriate dispute resolution method to be adopted in resolving arising disputes in the construction industry as compared to litigation due to its distinct advantages.

## **CHAPTER THREE**

### **RESEARCH METHODOLOGY**

#### **3.1 Introduction**

This chapter described the research design for the study, the target population, the sampling procedure to be used in conducting the study, methods of data collection, instrumentation issues with regard to validity and reliability, data collection procedure, data analysis methods, ethical considerations and finally the operational definition of variables.

#### **3.2 Research Design**

Cooper and Schindler (2011) summarizes the essentials of research design as an activity and time based plan; always based on the research question; guides the selection of sources and types of information; a framework for specifying the relationship among the study variables and outlines the procedures for every research activity. The study used survey research design as it was helpful in indicating the current status of the population with respect to the variable and enable generalization of the findings of the research study to be done (Kuter and Yilmaz, 2009). This design was considered appropriate for this study because it seeks to obtain information that describes existing phenomena by individuals filling in the questionnaires about their perception and biasness is reduced because participants complete identically worded self-reported measures (Adèr, Mellenbergh and Hand, 2010).

Mugenda and Mugenda (2003) notes that a survey research attempts to measure characteristics of a population by collecting original data for the purposes of describing a population which is too large to observe directly.

#### **3.3 Target Population**

A population is defined as a complete set of individuals, cases or objects with some common observable characteristics (Mugenda and Mugenda, 2003). The total number of senior construction participants according to the Architecture Association of Kenya, Institute of Quantity surveyor and Chartered Institute of Arbitrators in Kenya working in Nairobi is 600 Thus the target population for this study was 600 senior construction participants in Nairobi County.

### **3.4 Sample Size and Sampling Procedures**

A sample is a small group obtained from accessible population, (Mugenda and Mugenda, 2003). Sampling is the procedure a researcher uses to gather people, places or things to study, (Kombo& Tromp, 2006). It is the process of selecting a number of individuals or objects from a population such that the selected group contains elements representative of characteristics found in the entire group, (Orotho and Kombo, 2012). Simple random sampling was applied in carrying out the study, a sample of 10% of the accessible population was used therefore 60 respondents constituted the sample population for the study, according to Gay 1983 as cited by Mugenda and Mugenda, (2003) suggests that for descriptive studies at least 10% of the total population is enough. Simple random sampling ensures inclusion, in the sample, of sub groups, which otherwise may be omitted entirely by other sampling methods because of their small number of population, (Mugenda and Mugenda, 2003).

### **3.5 Research Instruments**

Questionnaires were used to gather Primary data after which they were collected immediately after the respondents are done filling them up (Mugenda and Mugenda, 1999). The instruments incorporated Likert scales to measure perception, attitude, values and behavior. The Questionnaires were self-administered.

#### **3.5.1 Pilot Testing of Research Instruments**

Pretesting of the questionnaires was done by piloting out the questionnaires to two Construction companies to help test the validity and reliability and this detected the weaknesses before rolling the instrument out to the other respondents. The questions which were not clear to the respondents were corrected and those that did not have input to the objectives were then dropped and finally the non-clear ones re phrased to simplify them.

#### **3.5.2 Validity of Research Instruments**

Validity determines whether the research truly measures that which it was intended to measure by ensuring scientific usefulness of the findings arising from the study can be specified, Joppe, (2000). In order to ascertain the extent of the research instruments, and uphold validity the researcher discussed the content of the questionnaire with the

supervisor before going to the field. These ensured that vague and unclear questions were either eliminated or collected.

### **3.5.3 Reliability of Research Instruments**

Refers to the extent to which results are consistent over time and an accurate representation of the total population under the study, Joppe, (2010). Kirk and Miller, (2009) came up with three types of reliability which relate to quantitative research as: (1) the degree to which a measurement, given repeatedly, remains the same, (2) the stability of a measurement over time; and (3) the similarity of measurement within a given period of time. Worthen et al (2009) defines reliability as a measure of how stable, dependable, trustworthy, and consistent a test is in measuring the same thing each time.

The researcher used Cronbach Alpha to determine the reliability of the instruments which was incorporated in the SPSS version 20 analysis. The survey instrument was subjected to overall reliability analysis. A coefficient of 0.60 or more implies that there is a high degree of data reliability.

### **3.6 Data Collection Procedures**

The study used primary data. Primary data refers to that which will originally be collected for the first time for the purposes of this study. The use of primary data is supported by (Saunders et al, 2007). The type of data to be collected was informed by the objectives of the study as supported by Teddlie (2010).

After successfully defending the proposal, the researcher sought to obtain a research permit from NACOSTI. He then enlisted all respondents by obtaining their email addresses or telephone contacts. The entire data collection exercise took about 2 Months. After the data was collected, checking for errors and inconsistencies was then undertaken.

### **3.7 Data Analysis Techniques**

Data collected was analyzed using SPSS version 17 based on the themes of research objectives. The specific effect of independent variables vis-à-vis dependent variable

was tested through multivariate analysis while the significance of independent variables against the dependent variable was analyzed through ANOVA.

The quantitative data was organized, coded, and standardized and analyzed using descriptive statistics aided by Statistical Programme for Social Scientist (SPSS) version 20. While qualitative data was analyzed by first summarizing the information gathered followed by categorization and coding into emerging themes plus presentation was done in a narrative form.

### **3.8 Ethical Considerations**

Utmost caution was exercised while administering questionnaires to avoid any mistrust between the respondents and the researcher, this by informing them on the nature and purpose of the study and carrying along the permit letter from the university. All respondents information and identities was kept confidential and information acquired was only be used for the purpose of the study.

### **3.9 Operationalization of Variables**

The operational definition of variables in this study is as shown in the table 3.1

**Table 3.1: Operationalization of Variables**

Objectives	Variables		Indicators	Measurement / Level of scale	Type of Analysis
	Independent	Dependent			
To establish the influence of liberty in arbitration processes of dispute resolution within construction Industry.	Gives consent to sent a representative to attend the hearings	Dispute resolution	Number of technical experts representing each part	Nominal	descriptive
To establish the influence of flexibility in arbitration processes in dispute resolution within construction Industry	No formal rules No unchangeable rules	Dispute resolution	Frequency in change of procedure to accommodate one or both parties needs	Ordinal	descriptive
To determine the influence of neutrality of an arbitration processes in resolving disputes within construction Industry	Choice of an arbitrator from a panel.	Dispute resolution	Acceptance of the award by both parties	Nominal	descriptive
To determine how privacy in arbitration influences disputes resolution among construction Industry in Nairobi.	No onlookers No media	Dispute resolution	Number of unauthorized people knowing about the dispute.	Nominal	descriptive

## CHAPTER FOUR

### DATA ANALYSIS, PRESENTATION AND INTERPRETATION

#### 4.1 Introduction

This chapter presents data collected from the field, its analysis, and finally the interpretation of the findings on influence of arbitration in the success of dispute resolution in the construction industry in the Nairobi County.

#### 4.2 Questionnaire Response Rate

The study targeted 60 chartered arbitrators in Nairobi. Out of the targeted respondents, 43 respondents filled and returned the questionnaires giving a response rate of 72%. Mugenda and Mugenda (2003) prescribed significant response rate for statistical analysis, which they established at a minimal value of 50%.

#### 4.3 Demographic Characteristics of Respondents

The study considered seven general characteristics. These included years that the organization had been in existence, position that the respondent held in the organization, years of experience for the respondent, the regulatory body that the respondents' company reported to, total projects undertaken annually, potential dispute resolution and disputes arising. These are discussed below:

##### 4.3.1: Distribution of Respondent by Years the Organization Company.

The study also sought to establish the number of years that the organization has been in existence. The responses are shown in table 4.1.

**Table 4.1: Years of the organization.**

	Frequency	Percentage
Below 5 years	10	23
6-10 years	13	30
11-15 Years	12	27
Above 16 years	9	20
<b>Total</b>	<b>43</b>	<b>100</b>

From the findings 23% of the respondents worked for organizations that had been in existence for less than 5 years. 30% for 6-10 years, 27% for 11-15 years and 20% for

above 16 years. The study used respondents from organizations that had been in existence for different years thus each bringing a different level of experience into the study.

#### 4.3.2: Position in the company

The study also sought to find out the position within the construction company/projects the respondent was working as. The responses are shown below.

**Table 4.2: Position in the organization**

	<b>Frequency</b>	<b>Percentage</b>
Quantity survey	7	16
Architect	16	37
Construction Manager	15	35
others	5	12
<b>Total</b>	<b>43</b>	<b>100</b>

The responses show that 16% of the respondents were quantity surveyors, 37% were architects, 35% were construction managers and 12% listed as others. Those who said others were administrative assistants, project managers and project accountants

#### 4.3.3: Years in the Construction Industry

The study also sought to find out the numbers of years the respondents had worked in the construction industry. The responses are in table 4.3

**Table 4.3: Number of Years in the Construction Industry.**

	<b>Frequency</b>	<b>Percentage</b>
Below 5 years	9	21
6 to 15 years	10	23
15 to 30 years	11	26
above 30 years	13	30
<b>Total</b>	<b>43</b>	<b>100</b>

From the responses 21% of the respondents had been in the industry for less than 5 years, 23% had been in the industry for 6-15 years, 26% had been in the industry for 15-30 years and 30% had been in the industry for above 30 years.

#### 4.3.4: Regulatory Body Reported To

The respondents were asked which regulatory body they reported to. The responses are shown in the table below.

**Table 4.4 Regulatory Body Reported To**

	<b>Frequency</b>	<b>Percentage</b>
County Government	12	28
Kenya National Highway Authority (KenHa)	18	42
Environmental Management Authority (NEMA)	13	30
<b>Total</b>	<b>43</b>	<b>100</b>

The respondents who report to the County Government were 28%, 42% reported to the Kenya National Highway Authority (KenHa) and 30% reported to Environmental Management Authority (NEMA).

#### 4.3.5: Projects Annually

The respondents were asked on average how many projects they participated annually. The responses are shown in the table below.

**Table 4.5: Projects Annually**

	<b>Frequency</b>	<b>Percentage</b>
Below 5	5	12
Between 6-10	20	47
11 and Above	18	42
<b>Total</b>	<b>43</b>	<b>100</b>

From the responses 12% handled less that 5 projects annually, 47% handled between 6-10 projects annually and 42% handled more than 11projects in a year.

#### 4.3.6 Potential Dispute Resolution

The study sought to establish whether the respondents included a section on a potential dispute resolution mechanism in the contract agreement before starting a project. The responses are shown in the table 4.6.

**Table 4.6: Potential Dispute Resolution**

	<b>Frequency</b>	<b>Percentage</b>
No	2	5
Yes	41	95
<b>Total</b>	<b>43</b>	<b>100</b>

The respondents who said they included a section on potential dispute resolution in their projects were 95% and only 5% said they did not.

#### 4.3.7 Disputes Arising

The respondents were asked whether their organizations tried to avoid disputes from arising. The responses are shown in table 4.7.

**Table 4.7: Disputes Arising**

	<b>Frequency</b>	<b>Percentage</b>
Yes	43	100
No	0	0
<b>Total</b>	<b>43</b>	<b>100</b>

All the respondents agreed that they tried to avoid disputes from happening. The study further sought to establish the strategies used that reduced the cases of disputes from happening. The responses given included that the organizations ensure they acquire the quality materials needed for the project implementation, the respondents also said that they ensured that during the negotiations the contract is clearly discussed and once signed it is binding. The respondents also said that they ensured that all legal and due processes are followed.

#### 4.4 Influence of Liberty on Disputes Resolution

The study sought to establish the extent to which the respondents agreed with the statement in the table 4.8.

**Table 4.8: Influence of Liberty on Dispute Resolutions.**

<b>Statements</b>	<b>Mean</b>	<b>Std. Dev</b>
Arbitration allows parties in a dispute to assess the capability and qualifications of their arbitrator	4.210	0.0214
Liberty to choose an arbitrators improves the parties confidence in the dispute resolution	4.685	0.3152
Liberty to choose an arbitrator increases the level of acceptance in the outcome (Award)	4.521	0.952
Provisions to attend in proxies increases the rate of dispute resolution in arbitration	3.921	0.125

On whether Arbitration allows parties in a dispute to assess the capability and qualifications of their arbitrator, the respondents agreed with a mean of 4.210. The responses are consistent with the findings of Freidson (2010) who argued that parties usually agree when they find a specialist who is knowledgeable and experienced in the field of dispute. The arbitrator needs to be knowledge on the matter at hand. On whether liberty to choose arbitrators improves the parties' confidence in the dispute resolution, the respondents strongly agreed with a mean of 4.685. There is need for parties in disagreement to feel that the judgment made was fair and equitable to both parties (Freidson 2010). The respondents also strongly agreed that liberty to choose an arbitrator increases the level of acceptance in the outcome (Award) with a mean of 4.521. The respondents also agreed that provisions to attend in proxies increases the rate of dispute resolution in arbitration with a mean of 3.921. Waddington, (2010) found out that less procedural formalities and conventional difficulties from following the court processes has made it easier for more organizations to opt for arbitration.

##### 4.4.1: Arbitration Process

The study sought to establish the extent to which the liberty in the arbitration process affects the success of arbitration process. The responses are shown in the table below.

**Table 4.4: Liberty on Arbitration Process**

	<b>Frequency</b>	<b>Percentage</b>
Very great extent	20	47
Great extent	10	23
Moderate extent	5	12
Little extent	6	14
No extent	2	5
<b>Total</b>	<b>43</b>	<b>100</b>

From the respondents, 47% said that the liberty in the arbitration process affects the success of arbitration process to a very great extent 23% said to a great extent, 12% said to a moderate extent , 14% said to a little extent and 5% said to no extent at all. The majority of thr respondents agreed the liberty influences the arbitration process greatly. According to Zack (2009), dispute resolution methods are becoming more popular for resolution of disputes between parties belonging to two different countries because of its liberty it gives

#### **4.5: Influence of Flexibility on Disputes Resolution**

The respondents were asked the extent to which they agreed with the statements in the table 4.9 on the influence of flexibility

**Table 4. 5: Flexibility on Disputes Resolutions**

<b>Statements</b>	<b>Mean</b>	<b>Std. Dev</b>
Arbitration involves high levels of creativity on all parties	3.456	0.231
creativity in dispute resolution speeds up the arbitration process	3.869	0.521
Flexibility allows for better resolution of contractual disputes without creating enmity of the parties involved	4.231	0.624
Flexibility encourage parties to work together for a quick resolution of the dispute	4.451	0.985
Flexibility of the arbitration process ensure originations in its resolution	3.982	0.456
Flexibility allows parties to a dispute determine the pace of dispute resolution	2.654	0.145

The respondents agreed that creativity in dispute resolution speeds up the arbitration process and that flexibility allows for better resolution of contractual disputes without creating enmity of the parties involved with means of 3.869 and 4.231 respectively. Hogler (2012) established that room for creativity when you resolve dispute with the help of a third party, rather than going to court was one of the benefits of arbitration. The respondents also agreed that flexibility encourage parties to work together for a quick resolution of the dispute with a mean of 4.451 and that flexibility of the arbitration process ensure originations in its resolution with a mean of 3.982 respectively. These findings support those of Freidson, (2010) who established that arbitration offers greater flexibility in terms of, prompt settlement of national and international disputes and restricted channels of appeal than litigation The respondents were however indecisive as to whether flexibility allows parties to a dispute determine the pace of dispute resolution with a mean of 2.654.however according to Freidson (2010), arbitration ensures that both parties are involved in each and every step of the hearings and thus an agreement can be made faster with the corporation of both parties.

**4.5.1: Extent of Influence of Flexibility on Arbitration.**

The respondents were asked to what extent flexibility in the arbitration process affects the success of arbitration process. The responses are shown in the table 4.10.

**Table 4.6: Extent of Influence of flexibility on Arbitration**

	Frequency	Percentage
Very great extent	13	30
Great extent	12	28
Moderate extent	7	16
Little extent	6	14
No extent	5	12
<b>Total</b>	<b>43</b>	<b>100</b>

The respondents who said that flexibility in the arbitration process affects the success of arbitration process to a very great extent were 30% while 28% said to a great extent. Those who said to a moderate extent were 16%, 14% said to a little extent and 12% to no extent at all. Arbitration offers greater flexibility in terms of, prompt

settlement of national and international disputes and restricted channels of appeal than litigation, by ensuring that both parties are involved in each and every step of the hearings (Freidson, 2010).

#### 4.6 Influence of Neutrality on Dispute Resolution

The study sought to establish the influence of neutrality on dispute resolution. The responses are in the table 4.11.

**Table 4.7: Influence of Neutrality on Dispute Resolution**

<b>Statements</b>	<b>Mean</b>	<b>Std. Dev</b>
Independence of the arbitrator contribute the success of dispute resolution	2.658	0.231
The impartiality of the arbitrator leads to quick dispute resolution	2.825	0.521
The Past relationship between the arbitrators and either of the parties notified in advance to determine their suitability	4.215	0.231
Arbitration process offers satisfactory solutions to disputes	4.235	0.145

Asked whether independence of the arbitrator contribute the success of dispute resolution the respondents were neutral with a mean of 2.658. According to Bok (2011), a well known principle of arbitration that arbitrators must be and remain independent and impartial from the parties, their counsel and the subject matter of the dispute. The respondents were also neutral on whether the impartiality of the arbitrator leads to quick dispute resolution with a mean of 2.825. The respondents agreed that the past relationship between the arbitrators and either of the parties notified in advance to determine their suitability with a mean of 4.215. This is important because any form of connection between the arbitrator and one of the parties, compromises the level of independence and the outcome of the arbitration process. The respondents agreed that the arbitration process offers satisfactory solutions to disputes with a mean of 4.235. Bok (2011) established that arbitration is conducted under the guidance that parties have to draft their own rules and procedures to fit the needs of their dispute in a neutral manner

#### 4.6.1: Extent of Influence of Neutrality on Dispute Resolution

The respondents were asked to what extent neutrality in the arbitration process affects the success of arbitration process. The responses are shown in the table 4.12.

**Table 4. 8: Extent of Influence of Neutrality on Dispute Resolution.**

	Frequency	Percentage
Very great extent	10	23
Great extent	16	37
Moderate extent	7	16
Little extent	6	14
No extent	4	9
<b>Total</b>	<b>43</b>	<b>100</b>

From the responses, the respondents who said that neutrality in the arbitration process affects the success of arbitration process to a very great extent were 23%, 37% said to a great extent, 16% said to a moderate extent, 14% said to a little extent and 9% said to a no extent at all. The arbitrator is required to be impartial and independent if the outcome of the arbitration process is to be credible and acceptable to both parties in a dispute (Bok, 2011).

#### 4.7: Influence of Privacy on Arbitration Success

The study sought to establish the influence of privacy on dispute resolution. The responses are in the table 4.13.

**Table 4.9: Influence of Privacy on Arbitration Success**

Statements	Mean	Std. Dev
Arbitration process runs in a private and confidential manner	4.125	0.241
Confidentiality in arbitration enhances the goodwill from each party to the dispute	4.035	0.345
Privacy of arbitrations allows for quick resolution of disputes	3.862	0.652
Privacy ensures friendship and business is maintained by disputed parties	3.472	0.145
loss of privacy in the Arbitration process jeopardizes the arbitration outcome	4.417	0.521

On whether Arbitration process runs in a private and confidential manner the respondents agreed with a mean of 4.125. According to Lipsky (2009) private and confidential process and ensures absolutely no washing of dirty linen in public. Whether Confidentiality in arbitration enhances the goodwill from each party to the dispute the respondents agreed with a mean of 4.035. This is a result that privacy of an arbitration setting offers significant advantages to participants since its efficient and low-profile method in settling dispute (Lipsky, 2009).

The respondents also agreed that loss of privacy in the Arbitration process jeopardizes the arbitration outcome with a mean of 4.417. The respondents were neutral on whether privacy ensures friendship and business is maintained by disputed parties with a mean of 3.472. There is need for privacy as it will prevent sharing of the conflict details to other outside parties thus protecting the companies interested (Trank,2009).

#### **4.7.1: Extent of Influence of Privacy**

The respondents were asked the extent to which privacy in the arbitration process affect the success of arbitration process. The responses are shown in the table 4.14.

**Table 4.10: Extent of Influence of Privacy**

	<b>Frequency</b>	<b>Percentage</b>
Very great extent	15	35
Great extent	12	28
Moderate extent	7	16
Little extent	6	14
No extent	3	7
<b>Total</b>	<b>43</b>	<b>100</b>

The respondents who said that privacy in the arbitration process affect the success of arbitration process to a very great extent were 35%, 28% said to a great extent, 16% said to a moderate extent, 14% said to a little extent and 7% said to no extent. These findings are consistent with those of Lipsky (2009) who established that privacy of an arbitration setting may offers significant advantages to participants, such as it's more business-like, efficient and low-profile method in settling dispute.

#### 4.8 Successful Dispute Resolution

The respondents were asked the extent to which they agreed with the statements below on successful dispute resolution.

**Table 4.11: Successful Dispute Resolution**

Statements	Mean	Std. Dev
Arbitration process saves quantifiable costs and intangible costs of a construction institution	3.698	0.231
Arbitration brings out the causes of disputes in the construction industry to avoid future conflict	4.231	0.451
There are challenges of Arbitration process in the construction industry	4.256	0.245
Opting for Arbitration method leads to timely completion of construction projects	4.231	0.854

The respondents agreed on the statement that arbitration process saves quantifiable costs and intangible costs of a construction institution with a mean of 3.698. Gould, (1999) established that construction disputes can become very expensive, considering the finances, personnel, time lost, and the opportunity costs and thus successfully settling the disputes save the company a lot of loss. They also agreed that arbitration brings out the causes of disputes in the construction industry to avoid future conflict with a mean of 4.231. On whether there are challenges of Arbitration process in the construction industry, the respondents agreed with a mean 4.256 and whether opting for arbitration method leads to timely completion of construction projects with a mean of 4.231. Gould (1999) established that a major challenge facing arbitration in the construction industry is the expenses that come with the dispute such as include hiring of attorneys, expert witnesses and the dispute resolution process itself. He also cited that settling using an arbitrator will lessen the procedural requirements of the courts and thus it's faster.

**CHAPTER FIVE**  
**SUMMARY OF THE FINDINGS, DISCUSSION, CONCLUSION AND**  
**RECOMMENDATIONS**

**5.1 Introduction**

This chapter provides the summary of the findings from chapter four, and also the conclusions and recommendations of the study based on the objectives of the study. The objective of this study was to investigate the influence of arbitration in the success of dispute resolution among construction industry in the Nairobi County

**5.2 Summary of the findings**

Regarding the influence of liberty on disputes resolution, the study found out that majority of the respondents agreed that arbitration allows parties in a dispute to assess the capability and qualifications of their arbitrator. The study also found out that majority of the respondents strongly agreed that liberty to choose arbitrators improves the parties' confidence in the dispute resolution. Majority of the respondents also strongly agreed that liberty to choose an arbitrator increases the level of acceptance in the outcome (Award). The study further established that majority of the respondents agreed that provisions to attend in proxies increases the rate of dispute resolution in arbitration.

On the influence of flexibility on disputes resolution, the study found out that majority of the respondents agreed that creativity in dispute resolution speeds up the arbitration process and that flexibility allows for better resolution of contractual disputes without creating enmity of the parties involved. The study also found out that majority of those interviewed agreed that flexibility encourage parties to work together for a quick resolution of the dispute. The respondents were however indecisive as to whether flexibility allows parties to a dispute determine the pace of dispute resolution. On the extent of influence of flexibility on arbitration, the study found out that the respondents who said that flexibility in the arbitration process affects the success of arbitration process to a very great extent were 30% while 28% of the respondents indicated to a great extent. 16% to a moderate extent, 14% indicated to a little extent while 12% to no extent at all.

Regarding the influence of neutrality on dispute resolution, majority of the respondents were neutral that independence of the arbitrator contributes to the success of dispute resolution. The studies also found out that majority of the respondents were neutral on whether the impartiality of the arbitrator leads to quick dispute resolution. Majority of the respondents agreed that the past relationship between the arbitrators and either of the parties notified in advance to determine their suitability.

The study established that the respondents agreed that the arbitration process offers satisfactory solutions to disputes. Regarding influence of privacy on arbitration success, the study found out that, the study established that the respondents who indicated that neutrality in the arbitration process affects the success of arbitration process to a very great extent were 23%, the study found out that 37% of the respondents indicated to a great extent, 16% of the respondents indicated to a moderate extent, 14% to a little extent while 9% of the respondents indicated to a no extent at all.

On the extent of influence of privacy, the study found out that the respondents who indicated that privacy in the arbitration process affects the success of arbitration process to a very great extent were 35%, 28% of the respondents indicated to a great extent, 16% indicated to a moderate extent, 14% indicated to a little extent while 7% of the respondent indicated to no extent.

On successful dispute resolution, the study found out that majority of the respondents agreed on the statement that arbitration process saves quantifiable costs and intangible costs of a construction institution. The study also found out that the respondents agreed that arbitration brings out the causes of disputes in the construction industry to avoid future conflict. On whether there are challenges of Arbitration process in the construction industry, the study found out that majority of the respondents agreed while majority of them also agreed that opting for arbitration method leads to timely completion of construction projects.

### **5.3 Discussions**

The study findings revealed that most of the organizations the respondents worked for had been in existence for 6-10 years. The findings also showed that the majority of those interviewed were architects and project managers the least were quantity survey and others. Most of the respondents had been in the construction industry for more than thirty years followed by those that had existed for between 15-30 years. The respondents reported to either County Government, Kenya National Highway Authority (KenHa) or the Environmental Management Authority (NEMA). Majority of the respondents' handled between 6-10 projects in a year. All the respondents stated that their organizations tried to avoid disputes from rising.

On the influence of liberty the findings showed that Arbitration allowed parties in a dispute to assess the capability and qualifications of their arbitrator. Freidson (2010) argued that parties usually agree when they find a specialist who is knowledgeable and experienced in the field of dispute. The findings also revealed that the liberty to choose arbitrators improves the parties' confidence in the dispute resolution. Respondents opted to choose arbitrators who they felt were competent for the task since increases the level of acceptance in the outcome as the findings showed (Waddington, (2010). The findings also showed that liberty influenced the arbitration process to a great extent. According to Zack (2009), dispute resolution methods are becoming more popular for resolution of disputes between parties belonging to two different countries because of its liberty it gives.

On the influence of flexibility the study findings revealed that flexibility allows for creativity in dispute resolution speeds up the arbitration process and that flexibility allows for better resolution of contractual disputes without creating enmity. Hogler (2012) established that room for creativity when you resolve dispute with the help of a third party rather than going to court was one of the benefits of arbitration since it has limited procedures and a judgment can be delivered faster. This was supported by the findings of the study that revealed flexibility encourages parties to work together for a quick resolution of the dispute.

The findings also revealed that flexibility influences the arbitration process to a great extent. According to Freidson (2010), Arbitration offers greater flexibility in terms of, prompt settlement of national and international disputes and restricted channels of appeal than litigation, by ensuring that both parties are involved in each and every step of the hearings

On neutrality the findings showed that past relationship between the arbitrators and either of the parties is notified in advance. This is important as was concluded by Bok (2011) that any form of connection between the arbitrator and one of the parties, compromises the level of independence and the outcome of the arbitration process. The findings showed that neutrality affected the arbitration process to a great extent as was revealed by Bok (2011) who cited that arbitrator is required to be impartial and independent if the outcome of the arbitration process is to be credible and acceptable to both parties in a dispute.

On the influence of privacy on the arbitration process the study findings showed that arbitration process runs in a private and confidential manner. This findings support those of Lipsky (2009) who concluded that private and confidential process ensures absolutely no washing of dirty linen in public. The Findings revealed that loss of privacy in the Arbitration process jeopardizes the arbitration outcome. The findings established that there is need for for privacy as it will prevent sharing of the conflict details to other outside parties thus protecting the companies interested (Trank,2009). The findings revealed that privacy influences the arbitration process to a great extent as was cited by Lipsky (2009) who established that privacy of an arbitration setting may offers significant advantages to participants, such as it's more business-like, efficient and low-profile method in settling dispute.

On successful dispute resolutions, the findings showed that the arbitration process saves quantifiable costs and intangible costs of a construction institution. Gould, (1999) established that construction disputes can become very expensive, considering the finances, personnel, time lost, and the opportunity costs. The findings also revealed that there are challenges of Arbitration process in the construction industry and that arbitration leads to timely completion of construction projects.

Settling using an arbitrator will lessen the procedural requirements of the courts and thus it's faster process (Gould, (1999).

#### **5.4 Conclusions of the Study**

The study made the following conclusions:

From the findings the study concludes that liberty is an important aspect of the arbitration process. Liberty of the arbitration influences the process to a great extent. The study also concludes that liberty is popular for resolution of disputes between parties belonging to two different countries because of its liberty it gives.

On the influence of flexibility, the study concludes that flexibility is an important aspect of the arbitration process. The study concludes that it influences the process to a great extent. The findings are show that flexibility encourages creativity and promotes a faster resolution.

The study concludes that neutrality as an important aspect of the arbitration process influences the process to a great extent. The study also concludes that impartiality in judgments brings about a fair and credible judgment that will be accepted by both parties.

The study concludes there is need for privacy in the arbitration process as it influences the process to a great extent. The study also concludes that privacy prevents publicizing of the dispute case and thus protecting the operations of the organizations.

#### **5.5 Recommendations**

The study makes the following recommendations.

- 1.** From the findings it was established that one of the major benefit of the arbitration was the expenses that were associated with the dispute. The study established that through liberty of the arbitration process, parties in a dispute were allowed to assess the capability and qualifications of their arbitrator, it improved the parties' confidence in the dispute resolution and that Liberty to choose an arbitrator increases the level of acceptance in the outcome (Award). The study therefore recommends that the construction industry adopts more of the arbitration process in solving its disputes so as to reduce the costs and time that are associated with the court processes and thus resolving the conflicts faster so as to ensure timely completion of the projects.

**2.** On flexibility the study established that arbitration involves high levels of creativity on all parties which speeds up the arbitration process, flexibility allows for better resolution of contractual disputes without creating enmity of the parties involved, flexibility encourage parties to work together for a quick resolution of the dispute and that flexibility of the arbitration process ensures originations in dispute resolution. The findings of the study also revealed that some of the respondents did not include a section on a potential dispute resolution mechanism in the contract agreement. This can be very risky and lead to losses should a conflict arise. The study therefore recommends that these organizations draft up contracts that will include a section on a potential dispute resolution mechanism.

**3.** On neutrality the study established that the Past relationship between the arbitrators and either of the parties was notified in advance to determine their suitability and that arbitration process offers satisfactory solutions to disputes. The study also established that Independence of the arbitrator may not necessarily contribute the success of dispute resolution and that the impartiality of the arbitrator may lead to quick dispute resolution. This study therefore recommends that to ensure confidence in the arbitration process and increase the chances of acceptance of the arbitration outcome, neutrality of the arbitrators is key and needs to be notified early.

**4.** The study established that, confidentiality in arbitration enhances the goodwill from each party to the dispute, privacy of arbitrations allows for quick resolution of disputes, privacy ensures friendship and business is maintained by disputed parties and that loss of privacy in the arbitration process jeopardizes the arbitration outcome. This study therefore recommends that the parties to a dispute maintain high levels of confidentiality.

**5.** The study established that arbitration process saved quantifiable costs and intangible costs of a construction institution, arbitration brings out the causes of disputes in the construction industry to avoid future conflict, there are challenges of arbitration process in the construction industry and that opting for Arbitration method leads to timely completion of construction projects. The study therefore recommends that more parties resort to arbitration to save money and decongest Kenyan Courts.

## **5.6 Suggested Areas for Further Research**

1. The purpose of this study was to investigate the influence of arbitration in the success of dispute resolution among construction industry in the Nairobi County. The study focused on the construction industry alone and thus the findings cannot be generalized across all industries. This study therefore recommends that in the future a study on the same be conducted across all the industry in the economy so as to generalize the findings.

2. The study investigated the influence of arbitration alone. In the future a study should be done to evaluate the embracing of effective use of alternative dispute resolution in organizations. This will be important in analyzing how effective the process is and what changes need to be made in its applications.

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**APPENDIX I**

**LETTER OF TRANSMITTAL OF DATA COLLECTION INSTRUMENTS**

Robert Nguyo Ndirangu  
University of Nairobi  
NAIROBI, KENYA

Dear respondent,

**RE: INFLUENCE OF ARBITRATION ON DISPUTE RESOLUTION IN CONSTRUCTION INDUSTRY -**

I thank you for your willingness to participate in this research. My names are Nguyo Ndirangu and I'm pursuing a Master's degree in Project Planning and Management at the University of Nairobi. You have been selected for the purpose of the study, given the role you play in the construction industry. The attached questionnaire is aimed at determining the influence of arbitration on dispute resolution in the construction industry. Kindly take time to complete the questionnaire and your genuine response will be appreciated. High level of confidentiality will be assured and the information obtained will be used purely for academic reasons.

Thank you in advance

Yours faithfully,

Nguyo Ndirangu.

University of Nairobi

**APPENDIX II:**

**QUESTIONNAIRE FOR SENIOR CONSTRUCTION EXPERTS**

You are kindly requested to complete the questionnaire honestly and possible give as much details as possible. Where possible tick appropriately.

**INFLUENCE OF ARBITRATION AS A DISPUTE RESOLUTION METHOD IN THE KENYAN CONSTRUCTION INDUSTRY.**

**Part 1: General information**

1. Name of your organizational (Optional) \_\_\_\_\_
2. Number of years that the organization has been in existence  
Below 5 years (    )      6-10 years (    )  
11-15 Years (    )      above 16 years(    )
3. What is your position within the construction company/projects you are working for at the moment?  
Construction Manager (    )      Architect (    )      Quantity survey (    )  
Other (Please specify) (    )      \_\_\_\_\_
4. How many years have you worked in the construction industry.  
Below 5 years (    )      6-15 years (    )  
15-30 Years (    )      above 30 years(    )
5. Which regulatory body do you report to? Please indentify all that apply  
Environmental Management Authority (NEMA) (    )  
Kenya National Highway Authority (KenHa) (    )  
County Government (    )  
Other (Please specify) (    )  
  
\_\_\_\_\_
6. How many construction projects do you participate in annually on average?  
Below 5 (    )      Between 6-10 (    )      11 and Above (    )
7. Do you include a section on a potential dispute resolution mechanism in the contract agreement before starting a project?  
Yes (    ) No (    )  
If yes, What does it say?.....
8. Do you try to avoid disputes arising?

Yes ( ) No ( )

If yes, Please indentify a few strategies you employ to avoid disputes

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**PART 3: INFLUENCE OF LIBERTY ON DISPUTES RESOLUTION**

9. Below are several statements on liberty and how it influences the success of arbitration process in the construction industry. Kindly indicate the extent to which you agree with each. (Please use a scale of 1-5 where 1= strongly disagree, 2= disagree, 3= neutral, 4= agree and 5= strongly agree)

Statements	1	2	3	4	5
Arbitration allows parties in a dispute to assess the capability and qualifications of their arbitrator					
Liberty to choose an arbitrators improves the parties confidence in the dispute resolution					
Liberty to choose an arbitrator increases the level of acceptance in the outcome (Award)					
Provisions to attend in proxies increases the rate of dispute resolution in arbitration					

10. In general, to what extent does flexibility in the arbitration process affect the success of arbitration process?

- Very great extent ( )
- Great extent ( )
- Moderate extent ( )
- Little extent ( )
- No extent ( )

**PART 3: INFLUENCE OF FLEXIBILITY ON DISPUTES RESOLUTION**

11. Below are several statements on flexibility and how it influences the success of arbitration process in the construction industry. Kindly indicate the extent to which you agree with each. (Please use a scale of 1-5 where 1= strongly disagree, 2= disagree, 3= neutral, 4= agree and 5= strongly agree)

Statements	1	2	3	4	5
Arbitration involves high levels of creativity on all parties					
What existence does creativity in dispute resolution speeds up the arbitration process?					
Flexibility allows for better resolution of contractual disputes without creating enmity of the parties involved					
Flexibility encourage parties to work together for a quick resolution of the dispute					
Flexibility of the arbitration process ensure originations in its resolution					
Flexibility allows parties to a dispute determine the pace of dispute resolution					

12. In general, to what extent does flexibility in the arbitration process affect the success of arbitration process?

- Very great extent (     )
- Great extent (     )
- Moderate extent (     )
- Little extent (     )
- No extent (     )

**PART 4: INFLUENCE OF NEUTRALITY ON DISPUTE RESOLUTION**

13. Below are several statements on neutrality and how it influences the success of arbitration process in the construction industry. Kindly indicate the extent to which you agree with each. (Please use a scale of 1-5 where 1= strongly disagree, 2= disagree, 3= neutral, 4= agree and 5= strongly agree)

Statements	1	2	3	4	5
Independence of the arbitrator contribute the success of dispute resolution					
The impartiality of the arbitrator leads to quick dispute resolution					
Is the Past relationship between the arbitrators and either of the parties notified in advance to determine their suitability					
Arbitration process offers satisfactory solutions to disputes					

14. In general, to what extent does neutrality in the arbitration process affect the success of arbitration process?

- Very great extent (     )
- Great extent (     )
- Moderate extent (     )
- Little extent (     )
- No extent (     )

**PART 5: INFLUENCE OF PRIVACY ON ARBITRATION SUCCESS**

15. Below are several statements on privacy and how it influences the success of arbitration process in the construction industry. Kindly indicate the extent to which you agree with each. (Please use a scale of 1-5 where 1= strongly disagree, 2= disagree, 3= neutral, 4= agree and 5= strongly agree)

Statements	1	2	3	4	5
Arbitration process runs in a private and confidential manner					
Confidentiality in arbitration enhances the goodwill from each party to the dispute?					
Privacy of arbitrations allows for quick resolution of disputes					
Privacy ensures friendship and business is maintained by disputed parties					
loss of privacy in the Arbitration process jeopardizes the arbitration outcome					

16. In general, to what extent does privacy in the arbitration process affect the success of arbitration process?

- Very great extent ( )
- Great extent ( )
- Moderate extent ( )
- Little extent ( )
- No extent ( )

**PART 6: SUCCESSFUL DISPUTE RESOLUTION**

17. Below are several statements on successful of arbitration process in the construction industry. Kindly indicate the extent to which you agree with each. (Please use a scale of 1-5 where 1= strongly disagree, 2= disagree, 3= neutral, 4= agree and 5= strongly agree)

Statements	1	2	3	4	5
Arbitration process saves quantifiable costs and intangible costs of a construction institution					
Arbitration brings out the causes of disputes in the construction industry to avoid future conflict					
What is the challenge of Arbitration process in the construction industry					
Opting for Arbitration method leads to timely completion of construction projects					

**THANK YOU FOR YOUR ASSISTANCE**