

NATIONAL CONSTRUCTION COUNCIL (NCC)
(Baraza la Taifa la Ujenzi)



REPORT

**REVIEW OF ARBITRATION CASES
REFERRED TO NCC AND DETERMINED
USING NCC ARBITRATION RULES**

Prepared by:

National Construction Council
9th Floor, Samora Tower Building
Mansfield Street
P.O. Box 70039
DAR ES SALAAM
+255-22-2131321/2135553
www.ncc.go.tz

August 2019

TABLE OF CONTENTS

Page

| | |
|--|-----|
| ACRONYMS | iii |
| Executive Summary | iv |
| Chapter 1 | 1 |
| 1.0 Introduction..... | 1 |
| 1.1 Background | 1 |
| 1.2 Objectives..... | 1 |
| 1.2.1 Main Objective..... | 1 |
| 1.2.2 Specific Objectives | 1 |
| 1.2.3 Scope of the Study | 2 |
| 1.3 Deliverables..... | 2 |
| 1.4 Methodology..... | 2 |
| 1.5 Report Structure | 3 |
| Chapter 2 | 4 |
| 2.0 Methodology | 4 |
| 2.1 Desk Study | 4 |
| 2.2 Establishment of a Tool for Data Collection..... | 4 |
| 2.3 Data extraction/collection..... | 4 |
| 2.4 Analysis of the Extracted Data..... | 5 |
| Chapter 3 | 6 |
| 3.0 Study Results and Discussion | 6 |
| 3.1 Establishment of Categories of Parties to Disputes..... | 6 |
| 3.2 Establishment of Main Causes and Sources of Disputes | 8 |
| 3.3 Determination of whether the Awards are Published in Time as per the NCC Rules | 11 |
| 3.4 Determination of the Pattern of the Award Publication Favoring between Public and Private Parties..... | 14 |
| 3.4.1 Analysis of Awards in Favour of Public or Private Parties | 15 |
| 3.4.2 Analysis of Awards in Favour of Claimants or Respondents | 16 |
| 3.4.3 Analysis of 37 Cases which Involved Government against Private as Parties to Disputes | 16 |

| | | |
|------------------|--|----|
| 3.4.4 | Conclusion from the Analysis | 17 |
| 3.5 | Proposed Best Practices in Reducing Disputes Involving Public Entities | 17 |
| 3.6 | Proposed Improvement Opportunities to the Coordination Roles of NCC | 20 |
| 3.7 | Quantification of the Financial Cost of Arbitration to Projects | 22 |
| 3.8 | Qualification of the Social Economical Costs/Losses to the Public..... | 24 |
| 3.9 | Proposed Real Time ADR Systems to be Built in the Procurement/Contract Documents | 25 |
| Chapter 4 | | 28 |
| 4.1 | Study Finding(s) | 28 |
| 4.2 | Study Recommendations..... | 29 |
| References..... | | 31 |
| Appendices | | 32 |

ACRONYMS

| | |
|-------|--|
| ADR | Alternative Dispute Resolution |
| CAP | Chapter |
| CEO | Chief Executive Officer |
| CFO | Chief Finance Officer |
| COO | Chief Operation Officer |
| DAB | Dispute Adjudication Board |
| FIDIC | International Federation of Consulting Engineers |
| ICC | International Chamber of Commerce |
| LGA | Local Government Authority |
| NCC | National Construction Council |
| PPRA | Public Procurement Regulatory Authority |
| SCC | Special Conditions of Contract |
| TZS | Tanzanian Shillings |

Executive Summary

National Construction Council (NCC) is the Government institution established by Act of Parliament No. 20 of 1979 (*National Construction Council Act CAP 162 Revised Edition 2008*). The mission of the Council is to promote and provide strategic leadership for the development of the construction industry in Tanzania. The mission is implemented through the execution of 15 functions embodied in the NCC Act that includes facilitation of efficient resolution of disputes in the construction industry.

The National Construction Council has been coordinating resolution of disputes since late 1990. NCC coordinates resolution of construction project disputes, by mainly appointing conciliators, adjudicators and arbitrators. Recently, NCC found it necessary to conduct a review of arbitration cases resolved using NCC Arbitration Rules. The study mainly was based on establishment of the parties to the disputes, major sources and cause of disputes, average duration used to determine cases and publish award, determination of pattern of awards favouring the referring parties or awards favouring responding parties. Further, the review was aimed at identifying possible ways which could be used to reducing disputes in public construction projects. Similarly, it was of importance to the study that, opportunities to improve the coordination role of NCC are identified. The study also was aimed at quantification of financial, social and economic cost associated with projects consumed with disputes resulting into arbitration proceedings. The following are the main findings and recommendations as observed in the study;

Main Findings

The study has established that disputes referred to NCC are either involving public versus private, private versus private or public versus public entities. Among 61 studied disputes, 38 cases involved public institution as either the Claimant or the Respondent. This is equivalent to 62% of all 61 cases studied. This partly indicates that most construction projects referred for dispute resolution using NCC Rules are public projects implemented by public entities.

Based on the studied 61 cases, the main sources of disputes are associated with shortfalls in pre-contract stages. These are exacerbated by poor contract administration through decisions made and actions taken by Employers and Project Managers during project execution. The main causes of disputes are associated with payment issues, ambiguity of some contract clauses or documents and termination of contracts.

The study has shown that, the average time taken from the date of preliminary meeting to publication of awards was 210 days. This is three times the duration proposed in the NCC Arbitration Rules (2001 Edition). The Rules stipulates that, the duration for determining an arbitration case is 70 days. Unfortunately, the 70 days are not inclusive

of the duration required for progress and hearing meetings. This study therefore proposes that the tribunal should not spend more than 150 days from the date of the preliminary meeting to when the award is published.

Based on 61 cases reviewed in this study, most decisions were in favour of the referring part (claimants), mostly from private sector. Among 37 cases where the Government was involved, it is established that only 7 decisions were in favor of the Government while the rest of the decisions favored the private entities (equivalent to 81%).

The study has enabled identification of some areas to be improved for the purpose of reducing disputes in the construction industry. These are associated with weakness in Project Management practices, shortcomings in Tender and Contract preparations, streamlining Political Decisions into project management, and generally weakness in contract management and administration.

The study has shown opportunities for improvement of NCC coordination roles particularly in, setting guidelines for determination of Arbitrator fees, (the proposal is to review the current fee rates from TZS 30,000 to TZS 150,000 per hour). Another area for coordination improvement is with regard to duration to be taken during progress meetings and hearings (the proposal is to allow for a maximum of 28 days for progress and hearing meetings). Further improvement may be achieved by introducing a Standard Format for preparation of awards.

Based on the 61 cases considered in this study, a total of TZS. 1,506,381,573. was paid to Arbitrators and NCC. This brings an average of TZS 24,694,779.00 per case. Unfortunately, this amount does not include the costs incurred by parties during the arbitration process. It was learnt, through some 17 cases, that more often the costs incurred by parties during the arbitration process is large than the fees paid to the Arbitrator and NCC combined. Based on the 17 cases which shared the costs incurred during the arbitration process, a total of TZS. 1,949,926,113.48, was incurred, this is equivalent to an average of TZS 114,701,536.00 per case. The computed figures are normally supposed be borne by the party which loses the case.

Construction disputes are observed to cause various social, economic and financial losses to all project stakeholders. Contractors will lose business opportunities as their resources will be tied up to the project with dispute, tarnish their corporate reputation, their resources will be idle during the whole arbitration process, the project owners will lose economic opportunities that would otherwise be realized through the built infrastructure, they may tarnish their reputation with banks, and associates, their productive resources would be tied in a unfinished project, would incur huge overhead costs to resolve the disputes, lose on time value of money invested in the project, while the public suffers delay in the services that would be provided through the built environment.

The study has observed that some useful dispute avoidance procedures suggested in the PPRA forms of contract are not adequately exploited. Particularly, the study has observed that the Management Meeting clause which, would have identified problems and resolve them amicably before they escalate into complex disputes, are not used as such. Similarly, evidence indicates that, most public employers do not adhere to timelines stipulated in contract clauses when discharging their contractual obligations. Decisions are, more often, delayed and actions taken too late.

Through this study, it was learnt that NCC Form of Contract, do not include a Management Meeting clause. Similarly, the NCC Form of Contract was observed not to include an Adjudication clause as a process of dispute resolutions.

Recommendations

- a) The study has identified the main source of disputes to be weaknesses in *pre contract stages*, particularly, inadequately prepared construction documents (design details, specifications, and BoQs), inadequate preparation of procurement documents, and tender evaluation and negotiation are comprehensive enough. It is recommended that pre-contract stages should be done comprehensively, and where necessary be reviewed or audited to enable weaknesses to be identified and corrected at early stages. This could be achieved by appointing appropriately skilled personnel to undertake (or review/audit) designs, preparation of tender documents, contract documents, and evaluation and negotiations of tenders. Similarly, a summary of probable challenges/risks identified during the pre-contract stage should be prepared and used during contract management and administration. Because these skills may not be adequately available locally, it is important that such skills be imparted to adequate personnel working in the sector through training and mentorship programmes.

- b) Another major source of disputes in construction projects is weaknesses in contract management and administration. This problem is mainly associated with competence of the appointed contract management teams. This study recommends that contract management and administration should be carried out by competent skilled and experience teams. Further, these teams should be guided by the *contract management and administration plan* which is prepared in consultation with personnel involved in the pre-contract stages. Implementing institutions should formulate appropriate project management organization structure that will enable involvement of senior management positions in decision

making process. Generally, a collaborative contract management and administration approach is advised. To achieve this, training of adequate personnel in contract management and administration should be given a priority by stakeholders of the sector. Indeed, construction contract management and administration should be recognized as a profession.

- c) In order to reduce disputes, it is generally advised that project implementing agencies, consultants and private clients should ensure that projects are comprehensively prepared, appropriately procured and contractually administered. And that payments are made as required by the contract. All necessary steps should be taken to ensure timely communication of warnings, and that decisions are contractual and for the benefit of the project and not to the convenience of the client. In public projects, political interferences should be properly streamlined within the contract and project management principles.
- d) Clients are advised to exploit the Management Meeting clause. This has the advantage of collaborative project management approach where project progress (accomplishments and challenges) are discussed and decided amicably for the advantage of project performance.
- e) NCC should carry out consultative review of its Arbitration Rules and Adjudication Rules to accommodate suggested improvements in duration of dispute resolution, arbitration fees, and award format. Similarly, a consultatively review should be done on NCC Form of Contract to accommodate suggested improvement with regard to inclusion of Adjudication clause and Management Meeting clause.

CHAPTER ONE

1.0 Introduction

1.1 Background

The National Construction Council (NCC) is the Government institution established by Act of Parliament No. 20 of 1979 (*National Construction Council Act CAP 162 Revised Edition 2008*). The mission of the Council is to promote and provide strategic leadership for the development of the construction industry in Tanzania. The mission is implemented through 15 NCC functions embodied in the establishment Act. Among other functions, the Council is mandated; to promote and provide strategic leadership for the growth, development and expansion of the construction industry in Tanzania with emphasis on the development of the local capacity for socio-economic development and competitiveness in the changing global environment; to advise the government on all matters relating to the development of the construction industry and to formulate proposals and recommendations for their implementation as well as to provide advisory services and technical assistance to construction industry stakeholders on all matters related to the construction industry.

The National Construction Council (NCC) provides advisory services to various stakeholders of the construction industry in areas of, project planning, procurement, contract management and administration consultancy services, project cost management, value for money auditing, construction management and claims management. Similarly, NCC is mandated to facilitate efficient resolution of disputes in the construction industry. Through this function, the Council coordinates resolution of construction project disputes, by mainly appointing conciliators, adjudicators and arbitrators.

In line with the above functions and services, NCC is currently reviewing construction disputes that were referred to it for resolution. The purpose is to identify the main causes and sources of disputes in order to advise the industry stakeholders accordingly. The review involves disputes which were facilitated from 1990.

1.2 Objectives

1.2.1 Main Objective

The main objective of the survey was to study and review the arbitration disputes for the purpose of advising the Government and other construction industry stakeholders on the best practice of managing construction contracts.

1.2.2 Specific Objectives

The following are the specific objectives of the study:

- a) to establish main sources and causes of the disputes;

- b) to determine the average duration used to determine and publish a dispute decision;
- c) to establish factors influencing the duration taken to resolve a dispute referred to NCC;
- d) to propose what could be done to reduce disputes involving public entities;
- e) to propose improvement on the dispute resolution coordination roles of NCC;
- f) to establish financial cost of disputes to projects;
- g) to establish the social economical costs of disputes; and
- h) to propose effective real time ADR systems that can be built in the procurement/contract documents to improve efficiency of dispute resolution in construction project.

1.2.3 Scope of the Study

The study used data from disputes referred for resolution at National Construction Council (NCC) between 2002 and 2019. Data was mainly extracted from case files and published awards.

1.3 Deliverables

The study findings are the main deliverable of this work. In particular the report contains findings along the following themes:

- a) Evaluation of Referring and Responding parties to disputes, In principal, the study established that there were public versus private, private versus private and public versus public as claimants and respondents respectively.
- b) The main sources and causes of disputes; The average period of publication of award as per study results compared to the stipulations of the NCC rules.
- c) Detailed evaluation of awards of the dispute cases involving public and private parties
- d) Proposed best practices to be adapted to reduce disputes in projects implemented by public entities.
- e) Proposed improvements on the disputes coordination roles of NCC.
- f) Average cost of dispute to projects and parties,
- g) Social economic costs of disputes on public projects and private projects.
- h) The proposed possible ADR systems that can be adopted to enable real time settlement of construction disputes.

1.4 Methodology

The report is primarily based on the study of records and documents prepared and used for dispute resolution at NCC between year 2002 and 2019. In order to achieve this documentary review, the following approach was adopted:

- a) All cases referred for dispute resolution at NCC between 2002 and 2019 were identified, and those whose award decisions were published were selected;
- b) The team embarked on studying the dispute case files and their respective awards. A total of sixty one (61) disputes (listed in Appendix I) were studied. The studied dispute cases covered a period starting from 2002 to 2019. The team also went through NCC Arbitration and Adjudication Rules;
- c) In order to ensure that, all necessary data was collected, the study team established a matrix of data to be collection. The data matrix was based on Microsoft Excel Spreadsheet.
- d) Data were extracted from the case files into the data matrix tool; similarly data from respective awards was extracted.
- e) The tool developed from the excel spread sheet was used to analyze the collected data so as to meet the objectives of the study.

1.5 Report Structure

This report is made up of four chapters; Chapter One introduces the study, the approach and identifies the major output of the study. Chapter Two presents the data collection methodology adopted in carrying out the study; it further discusses the data collection tool and the data processing and analysis. Chapter Three presents results and discussion linking these to the objective of the assignment. Conclusions and Recommendations are given in Chapter Four of the report.

Chapter Two

2.0 Methodology

In order to attain the objectives of the study, the team conducted a documentary review. Documentary review was mainly for studying the arbitration cases coordinated by NCC. In order to capture required data from documentary review, a data capturing tool was prepared.

Data collected from documentary review were analyzed in response to the set objectives.

2.1 Desk Study

The team embarked on studying the case files and their respective awards. A total of sixty one (61) disputes (*listed in Appendix I*) were studied. The studied disputes covered a period starting from 2002 to 2019. Another criteria used in sampling the disputes was to consider disputes which have already been awarded. The team also reviewed NCC arbitration and adjudication rules.

2.2 Establishment of a Tool for Data Collection

In order to ensure that, all necessary data is collected for the study, the study team established an excel spreadsheet matrix for data collection. The tool was based on Microsoft Excel Programme.

2.3 Data extraction/collection

Data were extracted from dispute case files at NCC including their respective awards. The extracted data was in line with the objectives of the study. The data included the following; parties involved in the cases, project type, contract value of the project, form of contract used, project locality, date when the case/dispute was referred to NCC, date of appointment of arbitrator/adjudicator, dates for preliminary meetings as set by arbitrators, dates when awards were published, favored party in the awarded dispute, nature of dispute, causes and sources of disputes, project status during arbitration, arbitration/ adjudication cost and cost of appearance to the tribunal.

2.4 Analysis of the Extracted Data

The tool developed from the excel spreads sheet was used to analyze the collected data so as to meet the objectives of the study. Generally, the study analysis focused on;

- a) Categorizing the parties to each sampled dispute;
- b) Establishing sources and or causes of disputes;
- c) Evaluating time taken before the award is published on the sampled cases;
- d) Establishing Pattern of award publications;
- e) Establishing average cost of arbitration; and
- f) Studying the likely social economic impacts to the public.

Chapter Three

3.0 Results and Discussion

The study reviewed and analysed 61 construction project dispute resolution case files with their respective awards. The data collected was analysed based on the set objectives. This chapter describes how the collected data were processed and analysed to give the study results thereof.

3.1 Establishment of Categories of Parties to Disputes

The disputes reviewed enabled the study team to categorize the parties involved in the dispute by generally referring them as claimant and respondent. Principally these parties (*claimant and respondent*) appeared as public versus private, private versus private and public versus public. On those disputes which had one party as public, study results showed that, it was either from central Government (*ministries*), Local Government Authorities (*LGA*) or Government Agencies. The study also went further into categorizing the studied disputes in terms of project types i.e. roads, buildings, water and others. Summary of the study results is as shown in **Table 3.1.1** and **3.1.2** as well as **Figure 3.1.1** and **3.1.2**.

Table 3.1.1: Categories of Parties to Disputes

| Categories | Types of Projects | | | | |
|--------------------|-------------------|-----------|-----------------|----------|-----------|
| | Roads | Buildings | Water Resources | Others | Total |
| Private vs Private | 0 | 17 | 0 | 6 | 23 |
| Private vs Public | 13 | 13 | 9 | 2 | 37 |
| Public vs Public | 0 | 1 | 0 | 0 | 1 |
| Total | 13 | 31 | 9 | 8 | 61 |

Figure 3.1.1: Categories of Parties to Disputes

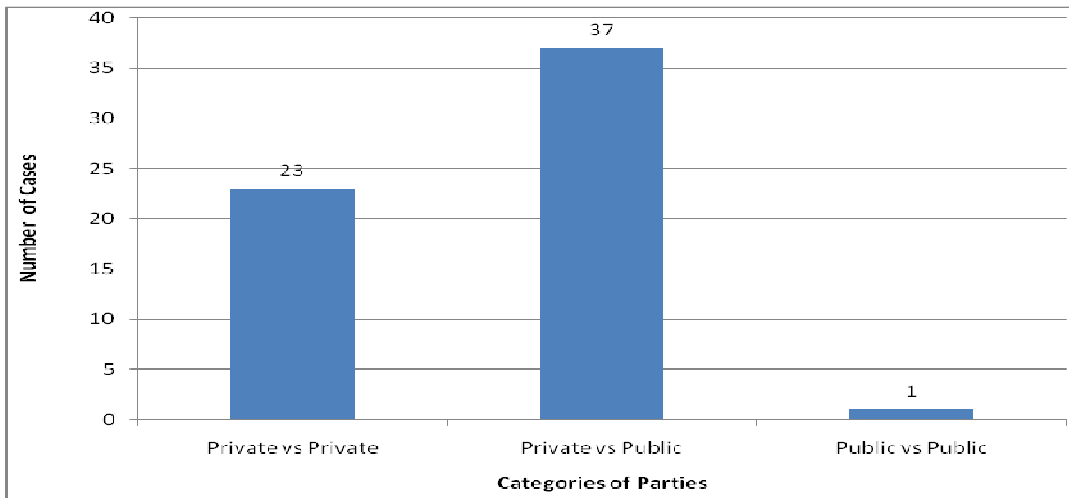
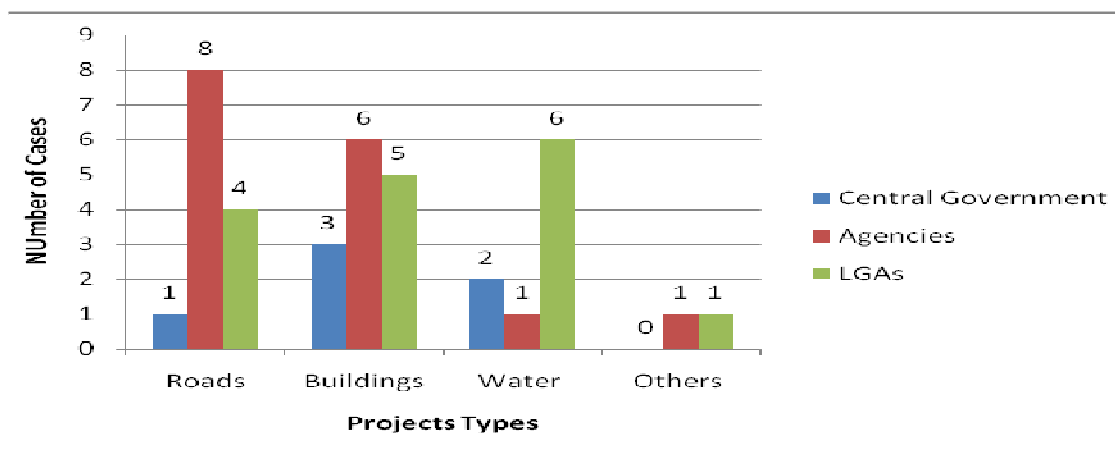


Table 3.1.2: Disputes in which one Party is Public

| | Types of Projects | | | | |
|--------------------------------------|-------------------|-----------|----------|----------|-----------|
| | Road | Building | Water | Others | Total |
| Central Government | 1 | 3 | 2 | 0 | 6 |
| Agencies | 8 | 6 | 1 | 1 | 16 |
| Local Government Authorities (LGA) | 4 | 5 | 6 | 1 | 16 |
| Private | 0 | 17 | 0 | 6 | 23 |
| Total Number of Cases Studied | 13 | 31 | 9 | 8 | 61 |

Figure 3.1.2: Disputes in which One Party is Public



From **Table 3.1.1** and **Figure 3.1.1** above; Results show that, private – public category dominates by 61% of the total studied cases. This is followed by Private – Private category by 38%. Lastly it is followed by public-public category by 1%. Generally, these results are showing that most of the construction disputes referred to NCC are between the public sector and private sector.

From **Table 3.1.2** and **Figure 3.1.2** above; In terms of projects types, results shows that there were 38 disputes in which government has been involved as Referring Party and Responding party. Generally, among the 38 disputes, there were 6 cases which involved Central Government, 16 cases involved Public Agencies and 16 cases which involved Local Government Authorities (LGAs). The frequency of cases on the side of Central Government is lower compared to Agencies and LGAs. This is due to the fact that, normally there are few projects implemented by Central Governments as compared to Agencies and LGAs.

When assessing types of projects, In roads, there was 1 case involving Central Government, 8 cases involved Agencies while 4 cases involved LGAs making a total of 13 cases involving public entities for road projects. For Buildings, there were 3 cases which involved Central Government, 6 cases involved Agencies while 5 cases involved LGAs making a total of 14 cases involving public project implementing entities for building projects. For Water projects, there were 2 cases involving Central Government, 1 case involved Agencies while 6 cases involved LGAs making a total of 9 cases involving public for water projects. Under the group of others, types of projects involved are like Data Entry, Loan Scheme, Insurance and Goods. For this group, there was 1 case which involved Agencies and 1 case which involved LGA making a total of 2 cases involving public for other types of projects.

Therefore, it can be seen that among the 61 studied disputes, 38 cases involved public party as either the Claimant or the Respondent. This is equivalent to 62%. The public party was involved as a Claimant (Referring party) in 5 cases equivalent to 8%. Among the 5 cases the public party managed to win one case.

3.2 Establishment of Main Causes and Sources of Disputes

Disputes are one of the main factors which prevent the successful completion of the construction projects. Thus, it is important to be aware of the causes and sources of disputes in order to complete the construction project in the desired time, budget and quality while all parties to the contract are satisfied.

It is a common practice that, the contractor approach the project as a business venture while the owner perceive it as a service venture. The contractor's attention therefore is in the completion of the project in accordance with specified schedule in order to make financial gain, while the owner expects an excellent facility at economical price (Susila, 2012). The purpose of each party seems contradictory in achieving their goals; such circumstances could lead to conflict. These conflicts can be caused by owners, consultants, contractors, contracts, specifications, human resources, and project conditions.

This study was aimed at studying the project disputes referred to NCC to establishing the causes and sources of the construction project disputes. Based on the 61 studied cases, a number of causes and sources were established as shown in the **Table 3.2.1** below:

Table 3.2.1: Causes and sources of Disputes

| Responsible | Cause | Number of Cases | (%) |
|--------------------|---|------------------------|------------|
| Employer | i) weakness in contract management and administration associated with inadequate control and coordination of construction projects leading to: ii) Failure to appoint project manager iii) Interference of the contractors obligations iv) Failure to sign contracts on time v) Failure to relocate utilities prior to delays vi) Unlawfully Termination of contract vii) Delay of release of extension of time viii) Delaying provision of important issuance of site to contractors attracting information to contractors ix) Failure to determine responsibility in accordance with the contract | 23 | 38 |
| | x) Payments to Contractors xi) The Clients/respondents in most cases have not been honoring their contractual obligations including payments to contractors in the following aspects: xii) Over deduction and deduction | 32 | 52 |

| | | | |
|---------------------------------------|---|-----------|------------|
| | <p>prematurely of Liquidated damages</p> <p>xiii) Releasing Advance payment in time</p> <p>xiv) Delay of issuance of Interim payment certificates</p> <p>xv) Delay in release of Retention monies</p> <p>xvi) Delay in preparation of Final Accounts</p> <p>xvii) Delay of approvals and payments related to Variations</p> | | |
| Project Manager | <p>xviii) Instructions and ordering of Variations – The disputes are caused by various aspects including nonpayment of variations instructed project managers and performed by contractors without approval by the clients.</p> <p>xix) Design errors and specifications</p> <p>xx) inadequate experience of the Project Manager</p> <p>xxi) Calculation of incorrect work progress</p> <p>xxii) Errors in estimation</p> <p>xxiii)</p> | 5 | 8 |
| Contract documents and specifications | <p>xxiv) Lack of clarity of terms in the contract documents</p> <p>xxv) Presence of confusing terms in the contract documents</p> | 1 | 2 |
| Total | | 61 | 100 |

From **Table 3.2.1** above, Study results shows that there are three main sources of disputes. i.e Employers contributed by 90%, Project Managers contributed by 8% and shortfall in Pre contract stage (contract documentation) contributed by 2%. Study results showed that, on the Employers side mainly it is poor contract administration, shortfalls in payments and unlawful termination of contracts. On the side of Project Managers is as well the issue of poor contract administration. Lastly, study results showed that, there were shortfalls in pre contract stage that includes things like inadequately prepared contract documents.

Based on the information obtained during this study, it can be seen that the main sources of disputes are Employers' inadequate project management experience and weakness in contract management and administration. Similarly, there is a strong correlation between the experience of the Project Manager and decisions and actions

taken by Employers and Project Managers during project execution. Further, there are disputes which are a result of weakness in management of the pre contract stage.

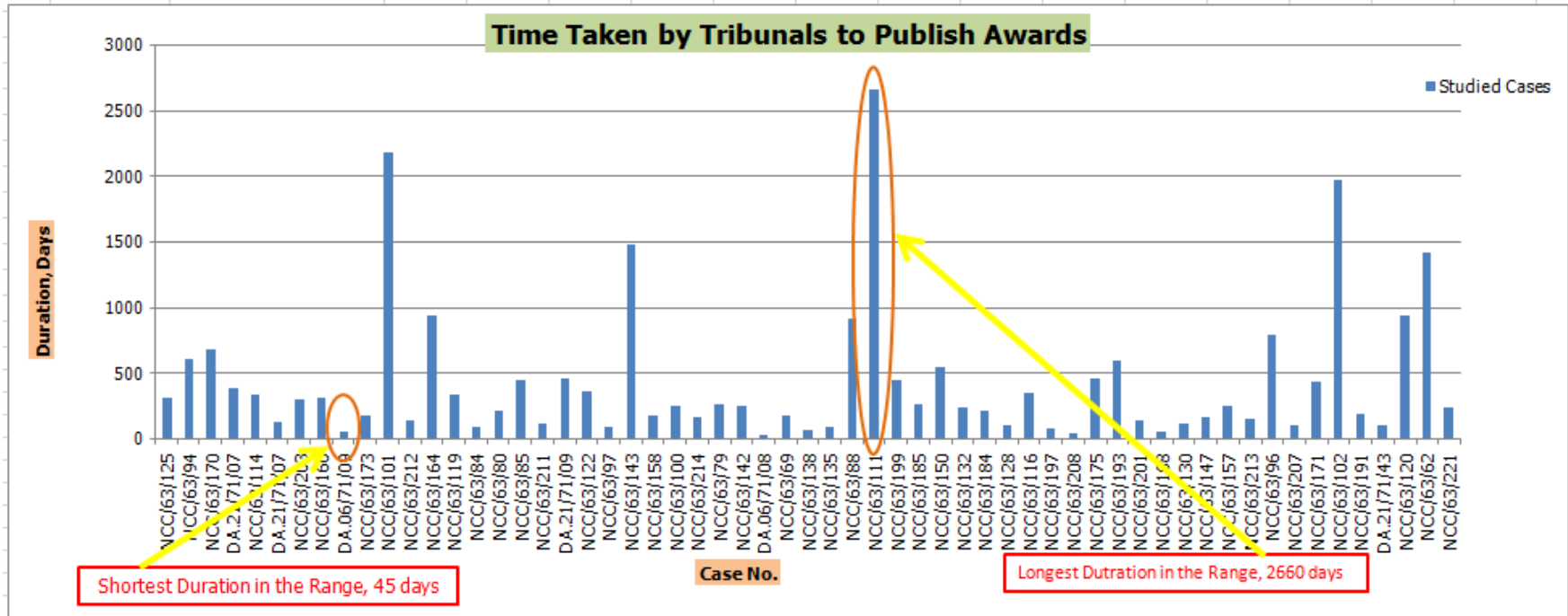
3.3 Determination of whether the Awards are Published in Time as per the NCC Rules

This study aimed at determining whether the determination of disputes and publication of awards, for cases coordinated by NCC are being published in time. Generally, it is often said that one of the advantages of arbitration over litigation is the duration used to resolve the disputes. To maintain this advantage, and ensure the cost efficiency of the arbitration, Arbitrators should ensure sufficient time has been allocated to the deliberations, drafting and rendering of the award. In addition, some institutional rules set time limits for rendering awards, which should be adhered to.¹ Although in some other jurisdictions and or authorities it is believed that "untimeliness of an award is typically not fatal to enforceability of an award" (Estreicher & Bennet, 2006). Given the circumstances "drafters of arbitration agreements and arbitration practitioners, must take special care in drafting of the arbitration agreements to ensure that their intent to obtain a timely award is implemented" (Estreicher & Bennet, 2006).

On the other hand, there comes the issue of time limitations in this context. The Arbitration Act of Tanzania does not prescribe any general limitation period applicable to arbitration proceedings. However, Part II of the Arbitration Act, which contains all substantive clauses relevant to arbitration, only applies to disputes that would be triable in the High Court of Tanzania if made the subject of a suit. A dispute that had become time-barred by operation of the Law of Limitation Act (Cap 89 Revised Edition 2002) would also become time-barred for arbitration.

Based on the foregoing, through the 61 studied cases, the time taken by each dispute from when the tribunal commenced to the time when the Arbitrator published the award were summarized. This information was then used to establish the minimum time arbitrators spent in before publishing the award. The analysis has also taken into consideration of the exceptional cases which took extremely long for the award to be published. Below is a **Figure 3.3.1** which shows the results of the time for publishing awards.

Figure 3.3.1: Time Taken in Determine cases and Publish Awards



From Figure 3.3.1 above, it was established that the average time taken from the date of the preliminary meeting to the award publication was 210 days.

(**Note:** All disputes which took more than 500 days in the studied cases were not considered in the calculation)

The study team, by the help of the timeframes provided in the NCC arbitration Rules on different stages during the proceedings could establish the minimum time to be taken by the arbitral tribunal from when the set date of the preliminary meeting to when the award is to be published. This established time was approximated 150 days. **Table 3.3.1** below presents the breakdown of how these durations were established.

Table 3.3.1: Proposed Duration of Arbitration Cases

| No | Arbitration Process | Duration, Days | | Remarks |
|----|---|---------------------------------------|-----------------------------|---|
| | | <i>Arbitration Rules 2001 edition</i> | <i>Established Duration</i> | |
| 1. | Submission of Statement of case by claimant | 14 | 14 | |
| 2. | Submission of statement of defense by respondent | 21 | 28 | The study team considered adding 7 more days in this stage to the respondent to allow enough time to prepare a defense unlike in the first stage where the claimant is assumed to understand his/her case from the beginning. |
| 3. | Submission of the reply to the statement of defense by claimant | 7 | 7 | |
| 4. | Submission of the statement of reply to a counter claim by claimant | 7 | 7 | |

| No | Arbitration Process | Duration, Days | | Remarks |
|----|---|---------------------------------------|-----------------------------|---|
| | | <i>Arbitration Rules 2001 edition</i> | <i>Established Duration</i> | |
| 6. | Time for Progress meetings and Hearings | 0 | 28 | The study team observed that, it is true arbitrations sometimes do have progress meetings and hearing, therefore considered that it is necessary to allocate some days to cater this provision. |
| 7. | Time for submission of Award after hearings | 14 | 56 | It was established by the study that, the 14 days are not enough for arbitrators to publish awards. |
| | Total Duration | 70 | 147 (Approx. 150) | |

There is actually a notable difference between the duration established from the actual studied cases and the duration established based on the NCC arbitration rules. The difference is of about 60 days.

Taking into considerations the provisions from other jurisdictions discussed above, this study proposes a maximum time to be spent by the tribunal from the date of the preliminary meeting to when the award is published to be 150 days. Failure of which will attract reductions in Arbitrators' fees. The study's proposal is that where awards are delivered outside the following limits, unless the delay is attributable to factors beyond the arbitrators' control or to exceptional circumstance, the Arbitrator be penalized by reducing his/her fees:

- i) two months from the date of the last substantive hearing; or
- ii) the last written submission in the case of a sole arbitrator; or
- iii) three months in the case of a three-member tribunal.

3.4 Determination of the Pattern of Awards

An arbitration award is a determination on the merits by an arbitration tribunal in arbitration. Although arbitration awards are characteristically awards of damages

against a party, tribunals usually have a range of remedies that can form a part of the award. It is referred to as an 'award' even where all of the claimant's claims fail and thus no money needs to be paid by either party, or the award is of a non-monetary nature. Therefore, the award can be in favour of the claimant or in favour of the respondent. This study looked at the pattern of how the awards were favouring between claimants and respondents. It also looked into disputes involving Government as one of the parties to the disputes against private party.

3.4.1 Analysis of Awards in Favour of Public or Private Parties

Table 3.4.1 below shows analysis of awards in favour of public or private parties. Three categories of parties were studied from the sampled cases. The first Category was Private against Government, the second category private against private and the third was between Government institutions. From the Table of analysis below, it was observed that, out of the 61 studied cases, 37 cases equivalent to 60.7% were between private against Government, while 23 cases which is equivalent to 37.7% were between private against private, while only one case equivalent to 1.6% had both parties from the Government.

When taking those cases which involved private against Government , out of 37 cases, 30 cases which is equivalent to 81% were in the favour of private parties, while only 7 cases which is equivalent to 19% were in the favour of the Government.

Table 3.4.1: Analysis of Award in Favour of Public or Private

| | Total Cases | Private vs Private | Private vs Public | Public vs Public |
|---------------------------------|--------------------|---------------------------|--------------------------|-------------------------|
| Number of Cases | 61 | 23 | 37 | 1 |
| in Favour of Privates | 51 | 21 | 30 | N/A |
| Percent of in Favour of Private | 84% | 91% | 81% | N/A |
| in Favour of Public | 8 | N/A | 7 | 1 |
| Percent of in Favour of Public | 13% | N/A | 19% | 100% |
| In Favour of None | 2 | 2 | None | None |
| Percent of in Favour of None | 3% | 9% | None | None |

3.4.2 Analysis of Awards in Favour of Claimants or Respondents

Table 3.4.2 below shows analysis of awards in favour of claimants or respondents. The study shows that out of 61 cases studied, 46 cases which is equivalent to 75.4% were in favour of the claimants while 13 cases which is equivalent to 21.3% were in favour of the respondents and 2 cases which is equivalent to 3.3% was in favour of none. of which one of the cases the claim was rejected for want of jurisdiction (arbitrator had no jurisdiction for the matter).

Table 3.4.2: Analysis of Award in Favour of Claimant and Respondent

| | Total Cases | Award Favour in of Claimant | Award Favour in of Respondent | Award Favour in of None |
|-----------------|--------------------|------------------------------------|--------------------------------------|--------------------------------|
| Number of Cases | 61 | 46 | 13 | 2 |
| Percentage | 100% | 75.4% | 21.3% | 3.3% |

3.4.3 Analysis of 37 Cases which Involved Government against Private as Parties to Disputes

Table 3.4.3 below shows analysis of 37 cases which involved Government against private where the claimant was public or private. The study shows that out of 37 cases, 5 cases equivalent to 14% the Government was the claimant and 32 cases which is equivalent to 86% the private institutions were the claimant. Among the 5 cases which the Government was the claimant only 1 case was awarded in favour of the Government and the rest 4 cases were awarded in favour of the private entities. Among the 32 cases of which the private was the claimant 6 cases were in favour of the Government and 26 cases were in favour of the private.

From this analysis, it could be urged that the Private Sector has a better understanding of the contractual rights and obligations than Government institutions. Another hypothesis here is that most decisions and actions by the Government institutions are not based on the contractual requirements.

Table 3.4.3: Analysis among 37 Cases Where Claimant was Public or Private

| | Public is a Claimant | Private is a claimant |
|---------------------------------|-----------------------------|------------------------------|
| Number of Cases | 5 | 32 |
| Percentage | 14% | 86% |
| Award in favour of public | 1 | 6 |
| Percent of in Favour of Public | 20% | 19% |
| Award in favour of Private | 4 | 26 |
| Percent of in Favour of Private | 80% | 81% |
| | | |

3.4.4 Discussion of the Findings

From the results of analysis of Table 3.4.1, it can be seen that more disputes referred to NCC involved private entity as Claimant and public institution as Respondent. This shows that there are more problems in contract administration for the projects involving private and public parties. It can also be said that disputes occur even when the parties involved are both private. This concludes that contract administration is a problem even in the private sector, as this has been a major cause of disputes to projects.

From the results of analysis of Table 3.4.2, it shows that most decisions were in favour of the claimants where most of them were from private parties. This indicates that the disputes referred for resolution are always those involving claims that Claimants are confident that are genuine and contractual.

From the results of analysis in Table 3.4.3, it can be deduced that the awards of most of the arbitration cases which involved Government entities against private entities, even when the Government was the claimant, were in favour of the private entities.

3.5 Proposed Best Practices in Reducing Disputes Involving Public Entities

Generally, construction contracts have a complex structure due to both technical and other reasons. Such complexities which may result into construction disputes are mainly experienced during project implementation stage. Nevertheless there are causes of disputes which emanate in pre contract stages.

It can take a few months or even years to complete a construction project. During such long period of time the parties may be faced by challenges that may make them more difficult to cooperate with other parties to the contract. This is mainly when certain initial contractual conditions such as labour costs or raw materials price, tax exemptions have changed or because of organization management changes.

In construction contracts, disputes are commonly frequent. These are usually caused by disagreements concerning extra works, extension of time, liquidated damages; for calling of the bonds issued by the Contractor; valuation of works, claims on loss and expenses and termination of contracts.

Based on the above introduction, the following are the proposed best practices means of reducing construction disputes;

a) Contract Management and Administration

This requires that everyone involved in the contract (i.e. project manager, site engineer, project supervisors, etc) act in an interdisciplinary and cooperative way by observing the stipulated rights and obligations of the parties to the contract. This can be discussed in the following aspects;

- i) Scope of work (ie the real object of the contract): it is on the basis of the Scope of Works (including specifications) as described in the contract that the correct or incorrect performance of the Contractor is evaluated;
- ii) Payment terms and their relationship with the construction timescale (negative cash flow is one of the first causes of contract failure);
- iii) Bonds that should be provided by the Contractor or by the Owner and their conditions (unconditional bonds at first demand are the most common and their unfair or abusive calling can cause the failure not only of the contract but of the contractor itself);
- iv) Variations: If the procedures for change orders or variations are not well regulated by the contract, there is a risk to end up with a dispute;
- v) Completion and pre-completion tests: various disputes arise from late or unjustified execution of the tests or from the failure to properly regulate the procedure and the timing for their execution;
- vi) Termination of the contract and in particular the precise identification of the causes that entitle the parties to terminate the contract and the compensation

that the Contractor is entitled to receive in case of termination of the contract without reason or at the Owner's convenience;

- vii) Applicable law: Also in such case the contract must be analyzed while recognizing the law of the land. Contracts ought to be legal, since there might be certain legal requirement which overrule the provisions in the contract.

b) Tender/Contract Documentation

Analysis of tender/contract in its entirety should be done to make sure that contracts are "self-regulating", meaning that they include every aspect of the relation between the parties to avoid disputes as much as possible, that every clause should have its weight. The contracts are usually very complex, but (often) the good thing is that usually they are based on standard form of contracts (tested) (i.e. NCC, PPRA and FIDIC) commonly used locally.

c) Proper Contract Documentation

Best contract management practice insist that every event related to the contractual relationship should be accurately documented in the form that leaves records and where available should be supported with factual evidences. Too often when dealing with the Owner, a Contractor believes that a phone call is better than a formal letter. Not only it is recommended to keep track of the correspondence with the Owner, but also to take note of any kind of event and meeting (both internal and with the Owner or the suppliers) through detailed minutes of meetings. Also there should be proper records of any instructions given by the Project Manager. In case of disputes, only a punctual and precise "documentary records" of the facts will allow you to reconstruct and prove the events.

d) Notification/Early warning

The contractor should immediately notify the Owner/Project manager any kind of event that may give the right to extend the completion period or to demand any increase of contract price. Under many standard forms contract (i.e. NCC, PPRA and FIDIC contracts) there is a precise timing to file a claim. Be sure to include a timing also in your contract bearing in mind that, under the applicable law, the Contractor might lose its right to submit any claim due to statute of limitation;

e) Project Time Schedule

Contractually, the Project Managers should ensure the project is implemented according to the approved updated programme of works. The milestones and critical activities should be continuously monitored against the schedule. Early warning

should be issued and instruction to recover lost time should be saved to contractors. the project time schedule updated and use it as a live record of the events that have any impact on the execution of the project. This will allow you to prove any event that caused a delay and any related responsibility. The timescale shall not be considered as a “static” document, that can be left aside once filled out. Instead, it is one of the fundamental instruments to prove that an event might have caused a delay and to recognize any connected responsibility.

f) Political Influences

There has been a tendency of political leaders to interfere implementation of the projects by giving orders of instructing the contractors to either stop the works or vacate the site. Contractually, political leader are not part of the contract therefore, they do not have powers and obligations to give such orders and instructions to the contracts. Appropriate contractual channels should be followed where necessary to issue instructions to contractors or consultants.

3.6 Proposed Improvement Opportunities to the Coordination Roles of NCC

One among the core function of NCC is to facilitate efficient resolution of disputes in the construction industry. In fulfilling this function, NCC has been coordinating resolution of construction disputes under the umbrella of her arbitration and adjudication rules since the year 2001 and 2017 respectively. The coordination role of NCC is mainly anchored on ensuring that, arbitration and adjudication proceedings are carried out efficiently. This includes;

- i) Selection/appointment of arbitrator/adjudicator
- ii) Administering the preliminary meeting
- iii) Becoming the central point for communication (impartial transmitter of correspondences)
- iv) Administering the progress meetings and hearing sessions
- v) Administering arbitration/adjudication billing and payments
- vi) Release of arbitration awards and adjudication decisions.

In carrying out the above coordination roles, NCC has observed some gaps particularly in the Arbitration Rules that need to be addressed. The results of this study have shown that there is a need to improve NCC coordination rules. The following are the proposed areas for improvement;

- i) Arbitrator’s fee (Clause 14.3)

- Clause 14.3 stipulates that, “The Arbitrator’s fee will be paid to the National Construction Council calculated by reference to the work done by him in connection with the arbitration and will be charged at rates appropriate to the particular circumstance of the case including its complexity and any special qualifications of the arbitrator. The rates shall be established, reviewed and published by the National Construction Council from time to time”.
- The existing rates are:
 - Time for meetings or hearings –Shs. 30,000.00 per hour
 - Other time spent on the arbitration outside the time for meetings or hearings – Shs. 30,000.00 per hour.
- The above rates include the National Construction Council administrative costs but do not include other expenses. In accordance with the study and several references made by the study team to different professional boards with regards to professional fees, it was found that the existing rates of TShs.30,000.00 per hour is outdated. Currently, the minimum hourly rates for professionals are USD 60 which is approximately TShs. 150,000.00. Therefore, the study proposes that, the minimum rate for arbitrator’s fee be TShs. 250,000.00.

ii) Meetings and Hearings (Clause 10.0)

Through the study it was observed that, NCC Arbitration Rules had a gap on timings for meetings and hearings, while the time for rest of the events has been set. The team also found that it was necessary to establish the maximum duration for the tribunal to determine the case and publish the award. It has been established by the team that, the time for the meetings and hearings to be a maximum of 35 working days as stipulated in Section 3.3 of this report.

iii) Format of the Award

Arbitrators should keep in mind at all times that awards are first and foremost written for the parties. The clearer the award is, the more likely it is to be accepted by the parties and the less likely it is to be challenged. Therefore the awards should be prepared in a format and layout which aids the communication of the arbitrators’ decisions and invites reading.

Arbitrators should consider using short sentences. As soon as sentence ceases to have a clear and logical link to the preceding sentence, arbitrators’ should write a new paragraph. Arbitrators should use numbered paragraphs. The award should also include informative headings and subheadings.

The team proposes that, the arbitration practice guideline be prepared and the proposed information should be included therein.

3.7 Quantification of the Financial Cost of Arbitration to Projects

For the purpose of the following analysis, arbitration costs are the sum of arbitrators' fees and expenses; lawyers' fees, and other expenses related to the presentation and defense of cases, as well as the presentation of witnesses and experts; and administrative fees charged by NCC.

The arbitrators' hourly rates are set by NCC in accordance with the NCC Arbitration rules. The hourly rate is set having regard to the circumstances of the case. In accordance with the NCC Arbitration Rules 2001 edition, the rate is capped at TZS 30,000 per hour. Based on the study results and current professional fees, this rate is not realistic and currently not in use.

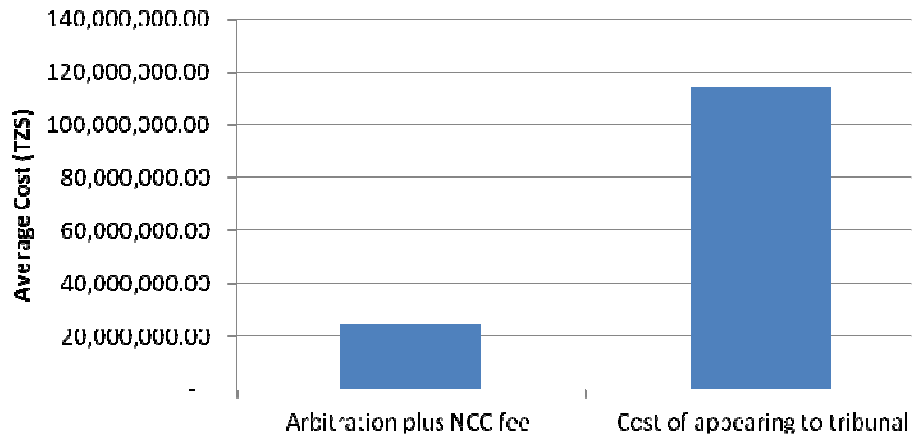
In principal, the arbitration costs are not controlled by NCC, which does not make a final determination of the total arbitration costs rather, everything has been left to the parties and arbitrators.

According to this study, across all 61 cases, a total of arbitrators' and NCC fees is TZS. 1,506,381,573. This brings an average of TZS 24,694,779. There were 17 cases over which the cost for appearing to the tribunal was submitted. This amounted to TZS. 1,949,926,113.48. This brings an average of TZS 114,701,536.

From the analysis, it shows that, the cost appearing to the tribunal is much higher as compared to the arbitrator's fees. It is the observation of the study that, the cost of appearing to the tribunal includes charges imposed by counsels. In most cases, the counsels are from the private side, where the practice indicates that, charges are pegged to the originally submitted claimed amount. While, the fact is, this originally claimed amount is subject to changes during the decisions made by the arbitrator.

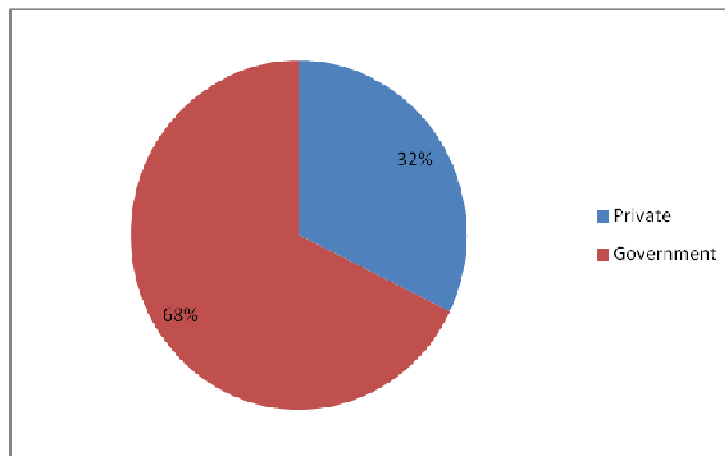
When analyzing the costs of 38 cases which included government as parties, among them 37 cases were between government vs private and 1 case was between government vs government, the total cost for arbitrators' and NCC fees was TZS. 866,672,322.7 with the average of TZS 22,807,166.39 per case. The cost of appearing to tribunal was established to be TZS. 1,660,061,719.48. However, there were only 11 cases of which their costs were submitted to arbitrators, hence this makes the average costs of appearing to tribunal to be TZS. 150,914,701.77 per case.

Fig 3.7.1: Arbitration Cost



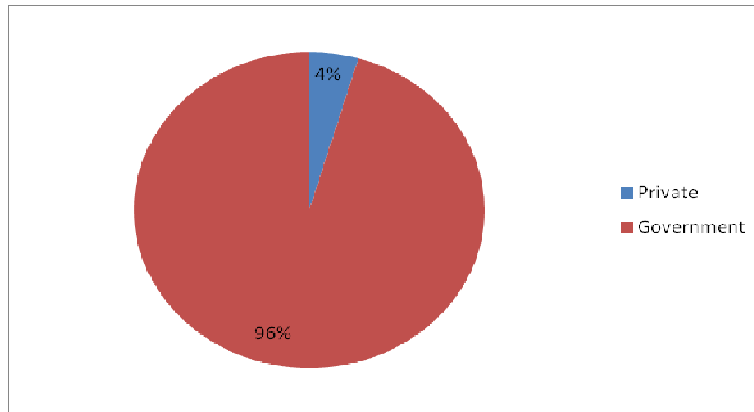
When analysing the arbitration costs (arbitrators' and NCC fees) ordered to be paid by either the government or the private parties for those 38 cases involved government, the study has established that out of TZS 866,672,322.7 of arbitration costs (arbitrators' and NCC fees), TZS. 587,368,660.35 which is equivalent to 68% was ordered to be paid by the government parties while TZS. 279,303,662.35 which is equivalent to 32% was ordered to be paid by the private parties.

Fig. 3.7.2: Arbitration Costs (arbitrators' and NCC fees) for 38 Cases which the Government was Involved



Likewise, when analysing the tribunal appearing costs ordered to be paid by either the government or the private parties for those 38 cases involved government, the study has established that out of TZS 1,660,061,719.48 of tribunal appearing costs, TZS. 1,585,426,804.48 which is equivalent to 96% was ordered to be paid by the government parties while TZS. 74,634,915.00 which is equivalent to 4% was ordered to be paid by the private parties.

Fig. 3.7.3: Tribunal Appearing Costs for 38 Cases which the Government was involved



From the above analysis, it can be concluded that the average costs of appearing to the tribunal is higher than the average arbitration costs (arbitrators' and NCC fees). The average cost of appearing to tribunal is approximately 5 times the average for arbitrators' and NCC fees.

From the above analysis, it can be seen that, the government has been on the losing end. Therefore, it has been paying arbitration costs more than the private parties. Thus this might have led to the increase of project costs. It is important to note that, this paid arbitration costs are normally not budgeted for.

3.8 Qualification of the Social Economical Costs/Losses to the Public

Disputes affect the cash flows of the company and also affects relationships between parties (Nashwama N.X, C, & D, 2015). But also not only affecting companies and or relationships between parties, disputes can equally cause social economic losses to the public. This is because; most of the construction projects are for social benefits. These projects are like road construction, public schools, hospitals and or

dispensaries, railways, construction of airport, water supply systems, construction of abattoirs. The said social economical losses can be in the following forms;

- i) *Delay in completion of the project:* This is true especially when a dispute has arisen when a project has not been completed and or it has been terminated. In whichever form of the dispute, time must be consumed before the dispute has been settled. Most projects which will enter into a dispute while the projects has not been completed, will eventually suffer from project time overruns. Simply because dispute resolution is a process and it takes time to complete. In principal when the project is delayed, it implies that, the society will suffer the losses of services anticipated from the said project.
- ii) *Monetary losses:* As per discussions in some sections above, disputes have resulted into public entities to pay more monies at the expenses of resolving the disputes. It is to be noted that, the more monies that are being paid were not budgeted for the purposes. This money could have been spent to provide other services to public.
- iii) *Tied up money:* In most cases, projects are being financed from borrowed monies. Once a project enters into a dispute and the works stops the implication is that, there is no cash flow or no production. To that effect, the project is not generating money to enable pay back the borrowed monies to the lenders.
- iv) *Company Reputation:* Tendency of a company to enter into disputes with clients can result into tarnishing its image. In such circumstances, it will create difficulties in securing more jobs for the company. This will eventually result into retrenchment of employees.
- v) *Effect to Local Businesses:* Normally in any project there are a number of businesses that are done by local venders. When disputes to the project arise, it may cause stoppage of works. This may affect the local venders as well.

3.9 Proposed Real Time Alternative Dispute Resolution (ADR) Systems to be Built in the Procurement (or/and Contract) Documents

The term "alternative dispute resolution" or "ADR" is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full-scale court processes. The term can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems that look and feel very much like a courtroom process. ADR systems may be generally categorized as negotiation, conciliation/mediation, or arbitration systems.

Negotiation systems create a structure to encourage and facilitate direct negotiation between parties to a dispute, without the intervention of a third party. Mediation and conciliation systems are very similar in that they interject a third party between the disputants, either to mediate a specific dispute or to reconcile their relationship. Mediators and conciliators may simply facilitate communication, or may help direct and structure a settlement, but they do not have the authority to decide or rule on a settlement. Arbitration systems authorize a third party to decide how a dispute should be resolved.

Before the real time ADR are proposed, let's see first what the current ADR systems are. If we go through the current Procurement/Contract Documents prepared by PPRA we can see that the document contains three categories of ADR systems which are amicably through mutual consultations and negotiation, adjudication and arbitration. These categories can be found under clause 30 of General Conditions of Contract of standard tendering document for procurement of medium and large works.

The clause states that *"In the event of any dispute arising out of this contract, either party shall issue a notice of dispute to settle the dispute amicably. The parties hereto shall, within twenty eight (28) days from the notice date, use their best efforts to settle the dispute amicably through mutual consultations and negotiation. Any unsolved dispute may be referred by either party to an adjudicator nominated by the appointing Authority specified in the SCC"*.

The clause states further that *"After the dispute has been referred to the adjudicator, within 30 days, or within such other period as may be proposed by the Parties, the Adjudicator shall give its decision. The rendered decision shall be binding to the Parties"*.

It goes on to state that *"If either Party is dissatisfied with the Adjudicator's decision may, within days specified in the SCC refer the dispute for arbitration. If either party within the period mentioned in the SCC has not referred the matter for arbitration the decision shall become final and binding to the Parties"*. The clause also states that *"The arbitration shall be conducted in accordance with the arbitration procedure published by the Institution named and in the place shown in the SCC"*.

The above three categories with exception of the first one were already tested as they were also included in the previous procurement documents. The first category (amicably through mutual consultations and negotiation) was not officially tested as was not included in previous PPRA documents of which some of the disputed projects in this study also used the same document.

The study also reviewed the NCC form of contract for building (Agreement and Schedule of Conditions of Building Contracts with Quantities). It was further observed that, the document also has provisions for ADR system which are amicable settlement and arbitration (Clause 40.0). However, it lacks the adjudication as one of the ADR systems.

Further observation in the form has revealed that, there is no clause for management meetings. From the study, the proposed really time ADR systems to be Built in the Procurement/Contract Documents are as follows:

High level management meeting: This is made up of senior-level executives of an organization, or those positions that hold the most responsibility with jobs titles such as Chief Operating Officer (COO), Chief Executive Officer (CEO), Chief Financial Officer (CFO), President, or Vice President of the organizations. As most disputes occur due to disagreement, the involvement in some of management meetings of these senior executives during project implementation will ease tension to the project and will lead into smooth execution of the project.

Dispute Adjudication Board (DAB): typically comprising three independent and impartial persons selected by the contracting parties. The significant difference between DAB and most other Alternate Dispute Review techniques is that the Dispute Review Board is appointed at the commencement of a project before any disputes arise and, by undertaking regular visits to the site, is actively involved throughout the project and possibly any agreed period thereafter.

A Dispute Adjudication Board becomes a part of the project administration and thereby can influence, during the contract period, the performance of the contracting parties. It has 'real-time' value. The idea behind a standing Dispute Resolution Board is that it may be called upon early in the evolution of any dispute which cannot be resolved by the parties and be asked to publish decisions or recommendations on how the matters in issue should be settled. Therefore, the study team proposes this sort of ADR to be used in large projects. There are several examples where this has been used successfully including the project for construction of the Mwalimu Nyerere Bridge and the Millenium Challenge road Construction project in the Southern Regions.

Chapter Four

This chapter summarizes the findings of the study and proposed recommendations for specific and general improvements for efficient implementation of construction projects with reduced occurrences of disputes thereof. Below are the findings and recommendations of the study;

4.1 Study Finding(s)

The study has observed that categories of parties to disputes are either public versus private, private versus private or public versus public. Also it was found that, among the total of 61 studied cases of disputes, 38 cases involved public party as either the claimant or the respondent. This is equivalent to 62% which also concludes that, public dominates construction disputes.

Based on the study, it was found that main sources of disputes are Employers and project managers' conducts during project execution and shortfalls in pre contract stage. The main causes of disputes are poor contract administration, payment issues, and termination of contracts and lack of clarity as well as presence of confusing terms in the contract documents.

The Arbitration Rules 2001 edition indicates that, duration of arbitration cases is 70 days. However, the 70 days did not include the periods for progress and hearing meetings. The study has shown that, the average time taken from the date of preliminary to the award publication was 210 days. This study therefore proposes a maximum time to be spent by the tribunal from the date of the preliminary meeting to when the award is published to be 150 days. The 150 days are in accordance with NCC arbitration rules by also covering the noted gaps.

Study results shows that most decisions were in favour of the claimants where most of them were from private parties. This indicates that the claims from the claimants were genuine. In the 37 cases where the government was involved, decisions were in favors of the Government in 7 cases equivalent to 19% while the rest of the decisions favored the private parties which is equivalent to 81%.

The study has observed that, there are areas to be improved for the purpose of reducing disputes in the construction industry. These include inadequate Project Management, weaknesses in preparation of Tender/Contract documents, consideration of nation of Contract Specific Clauses, improper Contract Documentation, untimely

issuance of Notification/Early warning, non adherence to Project Time Schedule, existence Political Influences to projects.

The results of this study have shown that there is a need to improve NCC coordination roles in areas including; Arbitrator's fees from TZS 30,000 to TZS 150,000 per hour, Time to be taken during progress meetings and hearings 28 days and introduction of Standard format of the Award.

According to this study, across all 61 cases, a total of arbitrators' and NCC fees was TZS. 1,506,381,573. This brings an average of TZS 24,694,779.00. Also, there were 17 cases over which the costs for appearing to the tribunal were submitted. This amounted to TZS. 1,949,926,113.48, bringing an average of TZS 114,701,536.00. The computed figures are normally supposed be borne by the losing party. These ads up to project cost.

The study has observed that, construction disputes are causing various social economic cost/losses to the public including; delay or total loss of the anticipated social services, monetary losses, causing money to be tied up, loss of companies reputations and loss of opportunities to the surrounding local businesses.

4.2 Study Recommendations

- a) The study has identified the main source of disputes to be weaknesses in *pre contract stages*, particularly, inadequately prepared construction documents (design details, specifications, and BoQs), inadequate preparation of procurement documents, and tender evaluation and negotiation are comprehensive enough. It is recommended that pre-contract stages should be done comprehensively, and where necessary be reviewed or audited to enable weaknesses to be identified and corrected at early stages. This could be achieved by appointing appropriately skilled personnel to undertake (or review/audit) designs, preparation of tender documents, contract documents, and evaluation and negotiations of tenders. Similarly, a summary of probable challenges/risks identified during the pre-contract stage should be prepared and used during contract management and administration. Because these skills may not be adequately available locally, it is important that such skills be imparted to adequate personnel working in the sector through training and mentorship programmes.

- b) Another major source of disputes in construction projects is weaknesses in contract management and administration. This problem is mainly associated with competence of the appointed contract management teams. This study recommends that contract management and administration should be carried out by competent skilled and experience teams. Further, these teams should be guided by the *contract management and administration plan* which is prepared in consultation with personnel involved in the pre-contract stages. Implementing institutions should formulate appropriate project management organization structure that will enable involvement of senior management positions in decision making process. Generally, a collaborative contract management and administration approach is advised. To achieve this, training of adequate personnel in contract management and administration should be given a priority by stakeholders of the sector. Indeed, construction contract management and administration should be recognized as a profession.
- c) In order to reduce disputes, it is generally advised that project implementing agencies, consultants and private clients should ensure that projects are comprehensively prepared, appropriately procured and contractually administered. And that payments are made as required by the contract. All necessary steps should be taken to ensure timely communication of warnings, and that decisions are contractual and for the benefit of the project and not to the convenience of the client. In public projects, political interferences should be properly streamlined within the contract and project management principles.
- d) Clients are advised to exploit the Management Meeting clause. This has the advantage of collaborative project management approach where project progress (accomplishments and challenges) are discussed and decided amicably for the advantage of project performance.
- e) NCC should carry out consultative review of its Arbitration Rules and Adjudication Rules to accommodate suggested improvements in duration of dispute resolution, arbitration fees, and award format. Similarly, a consultatively review should be done on NCC Form of Contract to accommodate suggested improvement with regard to inclusion of Adjudication clause and Management Meeting clause.

References

Estreicher, S., & Bennet, S. (2006). Untimely Arbitration Awards. 235-No. 59.

Nashwama N.X, C, A., & D, T. (2015). Evaluating the impact of construction dispute and the use of ADR in the Swaziland construction industry. 2015.

Susila, H. (2012). Causes of Conflict in the Implementation of Project Construction, Journal of Engineering and Architecture, Faculty of Engineering, University of Surakarta Tunas Development, 11(15).

NCC Arbitration Rules 2001Edition reprinted 2017

NCC Adjudication Rules, Dar es Salaam, (2016)

NCC Agreement and Schedule of Conditions of Building Contracts with Quantities, Dar es Salaam, (2000)

Standard Tendering Document - Procurement of Medium and Large Works Public (Procurement Regulatory Authority - PPRA), Dodoma, December 2018

APPENDICES

Appendix I: Table for Data Collection