

Interviews with our Editors: A Chat with the Registrar and CEO of the Nairobi Centre for International Arbitration, Mr. Lawrence M. Ngugi

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Welcome to the Kluwer Arbitration Blog, Mr. Ngugi! We are grateful for this opportunity to learn more about the Nairobi Centre for International Arbitration - NCIA, the type of disputes it handles and the way it is facing recent developments, such as the COVID-19 crisis.



1. Please give our readers a brief background of yourself and your journey to NCIA.

I attribute my profession to my faith in God, support from my wife Karen and our four children. I am an advocate of 20 years having started off as a litigator with a bias for commercial disputes. I got a flavour of arbitration in my seventh year of practice and from then my interest in arbitration has remained steadfast. I regularly acted as counsel in domestic and international arbitrations and became acquainted with the work of the UNCITRAL Working Groups II and III which are shaping development and reform in international arbitration whilst heading the Commercial and Arbitration division of the Attorney General's Office in Kenya. In 2014, I was asked to start the NCIA.

2. What is the general composition of cases that the NCIA has administered? How many cases are currently ongoing with the NCIA?

There has been a mix of different kinds of disputes, including supply contracts, employment, infrastructure development and construction, and shipping. Construction disputes have been on the upward trend with the main areas being road, aerodrome, and other infrastructure projects. Currently, we have about 40 active cases at various stages of proceedings and with the total value in dispute above Kenya Shillings 21 Billion or USD 210 Million.

3. *What difference do you see that the NCIA has made in the seven years since its establishment to arbitration in Africa and particularly in Kenya?*

We are the premier arbitral institution in Kenya that has a dedicated case administration service complete with its own arbitration rules. As a result, we have broadened the choices of parties with regard to administered arbitration using institutional rules developed in Kenya for both domestic and international arbitration. Prior to NCIA, parties had a limited choice of adapting ad-hoc arbitration or institutional arbitration rules from outside Kenya. The NCIA has given an opportunity to develop arbitration further in Kenya. We are mindful that our remit is global hence we have forged partnerships with other arbitration centers and initiatives on the African continent to provide a much-needed catalyst to the growth of international arbitration. To this end we have entered into co-operation agreements with CRCICA- Cairo, the PCA- Hague, the China-Africa Joint Arbitration Centre framework amongst others. We have ventured into networking conferences, training and mentorship including an annual Moot Program for Regional Universities in East Africa. These are essential for emerging markets to shore up capacity and for exposure.

The SOAS Africa Arbitration Survey for 2020 ranked the NCIA amongst the top 5 arbitral institutions on the Continent.

4. *A common observation of the arbitration community is that African heritage arbitrators are under-represented in arbitrations that concern disputes in Africa. What are your thoughts on this? What are your observations from arbitrations administered by NCIA? Any figures on the appointment of African arbitrators that you could provide?*

There is a history to this concern. It is no doubt that post-independent African nations have developed expertise in various facets of international law including arbitration. The African continent has contributed a fair share of cases for adjudication through international arbitration. However, it is also true that not many arbitrators of Africa's nationalities have been appointed to adjudicate those

disputes that have a nexus with the continent. In my view, this situation is both a factor of systemic problems of international arbitration and wrong perceptions of the realities within the different jurisdictions on the continent. But with the surge in Africa based institutions, initiatives such as the African Promise, Africa Arbitration Survey, and Africa Arbitration Association amongst others these perceptions are changing.

As an institution we have deliberately promoted the advancement of Africa's talent and this is evidenced by the number of NCIA panel arbitrators who are from Africa. The arbitrator appointments have also reflected a similar trend of having arbitrators from the African continent.

5. *What is the approach of Kenyan courts towards arbitrations in Kenya? Do they play a supportive or interventionist role?*

Kenya is an arbitration friendly jurisdiction by every score. Kenyan courts have taken a minimalist approach and maintained a supportive stance towards arbitration. The underpinning of Alternative Dispute Resolution ("ADR") in the Constitution has cemented this attitude. Article 159 (2) (c) requires Courts to promote the use of alternative dispute resolution. To my mind, this places a duty on the court to encourage parties to consider other mechanisms. The cumulative effect of this bold policy is a judicial culture endeared towards other forms of dispute resolution including arbitration.

The Arbitration Act is modelled on the UNCITRAL Model Law and the country is a signatory to both the New York Convention and the ICSID Convention. Its fidelity to the tenets of these legal frameworks has been repeatedly asserted by the judiciary. With a robust legal fraternity testing various aspects of the practice, the courts have defined the limits of judicial involvement within the confines of the Arbitration Act. The Supreme Court recently explored the landscape in the decision of *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR*. The case examined the question of finality and scope of appeal against the decision of the High Court (*court with jurisdiction to determine applications to set aside an award*) under Section 35 of the Arbitration Act (Kenya). The Court's approach in this Case was to emphasise minimal judicial intervention.

Like every other jurisdiction that is committed to the continual development of jurisprudence in this area the core of the Court's decision in this and other decisions mirrors the view that we have a bench and a bar that is increasingly aware of the framework of the UNCITRAL Model Law on Arbitration. This is good for any jurisdiction.

6. *I understand NCIA also administers mediation. Do you see an increase in mediation?*

Yes! We have the NCIA Mediation Rules, 2015. We have entered the space for commercial mediations with an impressive response from the industry. This has been mainly in the construction sector in mega projects with domestic disputes.

Admittedly, this is an area where much more needs to be done for mediation to have the same level of acceptance as arbitration does. We are excited about the Singapore Convention which could be the precursor of a brighter future for mediation.

7. *The COVID-19 health crisis has caused and is expected to keep causing unprecedented disruptions to several sectors of the economy and business relationships. How is NCIA facing the challenges brought by this new reality?*

Quite unexpectedly, the pandemic has not slowed the flow of disputes to NCIA. We have recorded more cases registered per quarter than in the same period last year. Since NCIA already had a functional virtual infrastructure before the start of the pandemic, we have been able to support the continuity of proceedings without any interruptions. That said we have adjusted our services to ensure the safety of the most important resource, our staff, and facilitated remote operations during the height of the pandemic.

We have also adopted the Africa Arbitration Academy Protocol on Virtual Hearings in Africa to guide parties on efficient use of remote hearings. We are committed to continual improvement and learning from our international network.

8. *Any parting words of wisdom you would like to share with African practitioners particularly the younger generation?*

The train has left the station and we on the continent are firmly in the carriage. The debate will no longer be about inclusivity but the excellence of your performance. Learn, learn, learn!

We are well positioned in history to participate fully in the new advent for international arbitration. Rather than focus on past decades of isolation we have the opportunity to actively pursue excellence and live a footprint and a legacy that will usher a new dawn for posterity. I personally see no reason why the future can't be anything but optimistic.

9. *Where do you see NCIA in ten years?*

On the global map of international arbitration innovating, creating, and offering end-user friendly arbitral and other ADR services fashioned to meet the demands of a fast-evolving online generation.

Thank you for your time and perspectives - we wish you and NCIA continued success!

This interview is part of Kluwer Arbitration Blog's "Interviews with Our Editors" series. Past interviews are available [here](#).