NOTES

RWANDA AND THE KIGALI INTERNATIONAL ARBITRATION CENTRE: THE FUTURE FACES OF EAST AFRICAN ARBITRATION AND GROWTH

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I. Introduction

It is said that "if judicial rules can change at any time . . . or if court decisions are slow or irrelevant, then [foreign direct investment] ("FDI") will not be attracted to a country." Nevertheless, property rights are a major factor that can affect FDI. Thus, "enhancing the efficiency of the judicial system can improve the business climate, foster innovation, attract foreign direct investment and secure tax revenues." While a healthy judicial system in Af-

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1 Foreign Direct Investment-FDI, INVESTOPEDIA, http://www.investopedia.com/terms/f/fdi.asp (last visited Mar. 5, 2017) ("Foreign direct investment (FDI) is an investment made by a company or individual in one country in business interests in another country, in the form of either establishing business operations or acquiring business assets in the other country, such as ownership or controlling interest in a foreign company.").


3 Tejvan Pettinger, Factors That Affect Foreign Direct Investment (FDI), ECON. HELP (Sept. 26, 2016), http://www.economicshelp.org/blog/15736/economics/factors-that-affect-foreign-direct-investment-fdi/ (The author lists political stability and property rights as two of the factors that can affect FDI. Furthermore, "related to political stability is the level of corruption and trust in institutions, especially judiciary and the extent of law and order.").

4 Enforcing Contracts, DOING BUS., http://www.doingbusiness.org/data/exploretopics/enforcing-contracts/why-matters (last visited Sep. 12, 2016); see also John S. Ahlquist & Aseem Prakash, FDI and the Costs of Contract Enforcement in Developing Countries, 43 J. SOC'Y POL'Y Sci. 181 (2010). The authors found, in part, that increased FDI was associated with lower contract enforcement costs; see also Matthias Busse & Carsten Hefeker, Political Risk, Institutions and Foreign Direct Investment, 23 EUR. J. POL. ECON. 397, 399 (2007). In examining other studies, the authors found that, generally, lower levels of corruption and higher levels of contract enforcement have a positive effect on FDI.
rica as a whole is important in bringing business to the continent, this Note focuses on the East African Community ("EAC"). As will be described hereinafter, Rwanda has one of the strongest economies, lowest corruption levels, and most stable governments in the EAC. The Proposal argues that efforts should be focused on the Kigali International Arbitration Centre ("KIAC") as the institutional face of the EAC arbitration, and why Kigali, Rwanda’s capital, should be its arbital seat.

Part I is a brief introduction to the Note. Part II is a brief background of Rwandan history and the country’s push for economic growth. Furthermore, Part II elaborates on the history, the current status of Rwanda’s judicial system, and on the KIAC. Part III explains why arbitration is fitting for Africa as a whole and why it is more fitting for East Africa specifically. In particular, the Note explains why Kigali is the proper choice of seat and KIAC the proper institution, and analyzes certain problems preventing the growth of African arbitration. Lastly, Part IV proposes how to effectuate Kigali becoming the go-to seat for arbitration in the region, with KIAC as its face.

II. BACKGROUND

Rwanda certainly has a long and storied past, marred by its prior colonization by other countries and the Civil War of 1994. Rwanda is inhabited by three groups: the Twa, Hutus, and Tutsis. Germany gained control of Rwanda from 1885 until 1923 when it

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5 Overview, E. Afr. Cmy., http://www.eac.int/about/overview (last visited Sept. 12, 2016) (The EAC is made up by Burundi, Kenya, Rwanda, South Sudan, Tanzania, and Uganda. Its members are pushing for a “powerful and sustainable East African economic and political bloc.”).

6 Laura Warren, The Seat of Arbitration—Why is it so Important?, CLYDE & CO. (Sept. 18, 2011), http://www.clydeco.com/insight/article/the-seat-of-arbitration-why-is-it-so-important (The seat of arbitration “will normally determine the law of the procedure which the arbitration adopts as well as the involvement/intervention, as appropriate, which the courts exercising jurisdiction over the seat, will have.”).

7 Institutional vs. ‘Ad Hoc’ Arbitration, Out-Law, https://www.out-law.com/en/topics/projects—construction/international-arbitration/institutional-vs-ad-hoc-arbitration/ (last visited Mar. 5, 2017) (“An institutional arbitration is one in which a specialized institution intervenes and takes on the role of administering the arbitration process. Each institution has its own set of rules which provide a framework for the arbitration, and its own form of administration to assist in the process.”).


9 Id.
was put under Belgian supervision by a League of Nations mandate. In 1962, the country gained its independence. After many years, conflict broke out in 1994 between the Hutus and the Tutsis, resulting in a vicious genocide and serious damage to Rwanda’s economy, which impeded its growth.

Paul Kagame has served as President of Rwanda since his election in 2000. One of his main goals since being elected became the growth of Rwanda’s economy, and one way he sought to achieve that goal was through the inception of Vision2020. Created in 2000, Vision2020’s goal is to turn Rwanda into a middle-income country by 2020. It plans to achieve this by methods including increasing per capita income, lowering the poverty rate, and increasing the life expectancy rate of the country. Vision2020 has a further purpose of transforming Rwanda into a “knowledge-based, service-oriented economy” while also increasing FDI in

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10 Id.
11 Id.
12 Id.

13 Rwanda: How the Genocide Happened, BBC (May 17, 2011), http://www.bbc.com/news/world-africa-13431486. Some claim the tension between the Hutus and the Tutsis can be traced back to Belgian colonization, when the Belgians created identity cards that classified Rwandans by their ethnicity. Tutsis were considered superior, and this created a power struggle, eventually leading to a divide between the two ethnicities. However, the straw that broke the camel’s back occurred on April 6, 1994, when then president Juvenal Habyaramina, a Hutu, had his plane shot down. This led to mass killings of Tutsis on behalf of the Hutus. The conflict “ended” a few months later when the Tutsi army, the RPF, captured Kigali, the capital of Rwanda. Id.


17 Id.

18 Id.; see also UNDP, ASSESSMENT OF DEVELOPMENT RESULTS, EVALUATION OF UNDP CONTRIBUTION: RWANDA U.N. DEV. PROGRAMME (May 2010), http://www.oecd.org/countries/rwanda/41105593.pdf (Other goals of Vision2020 include the “development and promotion of the private sector” and “regional and international economic integration.”).

the country. Nonetheless, Rwanda needs to create a stable and trustworthy business environment to strengthen this growth.

A. A Brief History of the Rwandan Judicial System

During its colonial rule, Belgian civil and criminal law dictated much of the Rwandan judicial system. Once Rwanda became independent, it favored a civil law system based on German and Belgian law. However, after the 1994 genocide, Rwanda started transitioning to a common law system, in part to “boost foreign direct investment.” Rwanda subsequently created a complex court system, divided into “ordinary” and “specialized” courts. The ordinary courts include the Supreme Court, districts courts, and others, while the specialized courts include the Gacaca Courts and the military courts. Since 2003, the Constitution of

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20 Rwanda Vision 2020: Revised 2012, supra note 16 (To further economic integration, one of the goals of Vision2020, Rwanda will implement “policies to encourage foreign direct investment.”).


22 Id.

23 Sofia Lind, A&O Helps Rwanda to Transition From Civil to Common Law System, LegalWeek (May 26, 2010), http://www.legalweek.com/sites/legalweek/2010/05/26/ao-helps-rwanda-to-transition-from-civil-to-common-law-system/?slreturn=20170021154400; see also Hoon Lee et al., Legal System Pathways to Foreign Direct Investment in the Developing World, 10 Foreign Pol’y Analysis 393, 393 (2014) (Common law leads to greater foreign direct investment “because common law systems are more inclined to promote the rule of law and protect property rights and can be understood to provide more efficiency in the law, better contract enforcement, more judicial autonomy, and more market-oriented regulations.”); see also Steven Globerman & Daniel Shapiro, Governance Infrastructure and US Foreign Direct Investment, 34 J. Int’l. Bus. Stud. 19, 21 (2003) (The authors argue that because common law systems “protect shareholders and creditors better, preserve property rights better, and are associated with less regulation of markets . . . [they] expect countries whose legal systems originate in English common law will attract more FDI.”).


27 The Gacaca Courts are community justice courts, and were created in the aftermath of the genocide. For more on Gacaca Courts, see Erin Daly, Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda, 34 N.Y.U. J. Int’l. L. & Pol. 355 (2002).

28 Judiciary in Rwanda, supra note 26.
Rwanda has given substantial independence to the judiciary, and the government has made efforts to stem judicial corruption.

Rwanda created commercial courts in 2008 in an effort to stem the backlog of cases and increase business activity. The original law formed four commercial courts, which dealt with issues such as bankruptcy, tax disputes, and consumer protection cases. The commercial courts soon became backlogged and pursuing claims in Rwandan courts became more expensive.

Rwanda also passed its first major arbitration law in 2008. In 2010, Rwanda passed the law establishing the KIAC, making it the sole arbitral institution in Rwanda. The KIAC was created on May 31, 2012, through a joint effort between the Rwandan govern-

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30 Id. at 418–20.
31 Commercial Courts Showing the Way, NEW TIMES (June 13, 2010), http://www.newtimes.co.rw/section/article/2010-01-13/15599/; see also Daudi K. Musoke & Tony Barigye, Kigali International Arbitration Centre in Advanced Stages, NEW TIMES (Feb. 21, 2010), http://www.newtimes.co.rw/section/article/2010-02-21/93871/ (“The new commercial courts eventually became operational in 2008 but had to deal with a backlog of over 3,000 commercial cases.”).
34 See U.S. Dep’t of State, Investment Climate Statements for 2016, https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&did=254233#wrapper (last visited Jan. 16, 2017) (“Rwanda’s Private Sector Federation has estimated that for investors pursuing claims via commercial courts, court fees can typically total up to 68 percent of the value of court awards.”).
37 Id. Article 5 of the law stipulated that KIAC is the only Rwandan center that can arbitrate in Rwanda, mainly in trade matters. See also Didas M. Kayihura, Rwanda, in ARBITRATION IN AFRICA: A PRACTITIONER S GUIDE 223-24 (Lise Bosman ed., 2013). Once the law was passed, KIAC became the sole Rwandan institution handling arbitrations, displacing others such as the Centre d'arbitrage et d'Expertise au Rwanda.
ment and the Private Sector Federation ("PSF")\(^{38}\) in order to create a more efficient Rwandan dispute resolution system and to foster growth and investment\(^{39}\) in the country.\(^{40}\) Another purpose was to "attract and create opportunities for arbitration, not solely in Rwanda, but also with neighboring countries in the East African Community . . . and from the Common Market of Eastern and Southern Africa [COMESA].\(^{41}\)

Located in Rwanda's capital, Kigali, the KIAC\(^{42}\) allows arbitrations to be administered under KIAC\(^{43}\) or U.N. Commission on International Trade Law ("UNCITRAL")\(^{44}\) arbitration rules, based on the set agreement between the contracting parties.\(^{45}\) Sim-


\(^{39}\) Katerina Drisi Knutson, Challenges of Promoting International Arbitration in Africa, 21 No. 1 IBA ARB. NEWS 86, WESTLAW (Feb. 2016). (Knutson notes that KIAC is one of many such institutions "created in response to a general political will to attract investments and keep international disputes local.").


\(^{42}\) Launch of the Kigali International Arbitration Centre, supra note 41.


ilarly, the KIAC arbitration rules were made to be on par with other international institutions’ rules.\textsuperscript{46} In addition to administering arbitrations under its rules, the KIAC assists with ad hoc arbitrations,\textsuperscript{47} gives legal advice for drafting international contracts, and runs arbitration and mediation training programs.\textsuperscript{48} In an effort to spread awareness of arbitration and the KIAC, it has taken on somewhat of an advisory role for parties interested in arbitration.\textsuperscript{49}

III. DISCUSSION

A. Arbitration is Preferred for Contracts with East African Businesses and States

There are many benefits in using arbitration over litigation, especially in regions where the judicial system is either under-developed or untrustworthy.\textsuperscript{50} It lowers the chances of corruption, potential bias towards their jurisdictional party,\textsuperscript{51} delays in the pro-

\textsuperscript{46} Id.; see also Kamal Shah & Matthew Harley, Kigali International Arbitration Centre Launched, PRACTICAL. L. (July 5, 2012), http://uk.practicallaw.com/5-520-2057 (“KIAC’s rules were drawn up by a panel of international experts, and are understood to combine the most effective aspects of the LCIA, ICC and SIAC rules.”).

\textsuperscript{47} Institutional vs. ‘Ad Hoc’ Arbitration, supra note 7 (“An ad hoc arbitration is one which is not administered by an institution . . . The parties will therefore have to determine all aspects of the arbitration themselves—for example, the number of arbitrators, appointing those arbitrators, the applicable law and the procedure for conducting the arbitration.”).


ceedings, and the risk of political instability. Arbitration is also preferred due to "...its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties' confidence of realizing justice in the best way achievable." Arbitration is the most efficient form of dispute resolution in international trade and is becoming the preferred method for resolving cross-border disputes. It is also becoming the preferred dispute resolution method in Africa, as it allays many of the fears listed previously, and tends to attract business.

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52 Cassidy, supra note 51 ("The average time to receive a judgment for a commercial dispute from Sub-Saharan courts is 653 days. By choosing arbitration in a contract, parties may avoid appearing before national courts entirely.").


54 Kariuki Muiga, Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration, Charterotted Inst. of Arb. Kenya (Apr. 2015), http://www.ciARBKeny.org/assets/building—legal-bridges—fostering-eastern-africa-integration-through-commercial-arbitration—april—2015.pdf [hereinafter Building Legal Bridges]; see also Cassidy, supra note 51. ("A party may mitigate the risk that the courts of a host state may not treat it fairly and impartially by seeking agreement that disputes be resolved by international arbitration.").


57 See Dutson, supra note 53; see also Gerhard Rudolph & Michelle Wright, Sub-Saharan Africa Overview, Baker & McKenzie LLP, http://www.bakermckenzie.com/-/media/files/insight/publications/2016/08/ia-sub-saharan-africa/bk_africa_i16ch43_aug16.pdf?la=EN (last visited Nov. 10, 2016); see also Michelle Bradfield et al., The International Arbitration Review 10-11 (2016) ("International arbitration is frequently the preferred dispute resolution method for international parties doing business in Africa, offering investors the benefit of having their disputes determined by independent and competent arbitrators according to rules that are both predictable and flexible, and with the comfort of enforceable awards.").

Growth on the African continent has been massive and multifaceted. The "continent’s transformation has led to boundless opportunities for foreign investors in diversified sectors such as mining, oil and gas and other commodities, power, banking, infrastructure, telecommunications and agriculture including, consumer and retail transactions." The EAC has consistently grown over the last decade or so, with an increase in its revenue, credit, and GDP. The EAC is becoming increasingly attractive to foreign businesses and investors, as well as nations. Rwanda, for example, has even caught the eye of China, necessitating more of a

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59 For an informative overview of mining in Africa, see Mining in Africa and the Middle East: A Legal Overview, DLA Piper, https://www.dlapiper.com/en/us/ (follow the search hyperlink, and input the title).

60 Clement N. Fondue & Sara Mansuri, Doing Deals in Africa—Reflections on What Is Different and What Is Not, 14 BUS. L. INT’L 163, 165 (2013); see also Cassidy, supra note 51. For consumer economies “the search for oil, gas, metals and minerals has shifted to emerging and developing countries with under-explored resources, such as Latin America and Africa.” Id.


reason for a strong and safe dispute resolution system. Nevertheless, more growth and globalization naturally leads to more conflict. For example, a study shows that between 2001 and 2010, international oil and gas arbitration cases increased tenfold from the previous decade, with mining cases increasing fourfold. Similarly, energy natural resource, and infrastructure disputes seemed to have made up the bulk of African arbitrations. Arbitration appears to be particularly suited to the types of disputes related to the industries growing in the EAC.

One of the EAC’s most developed industries is mining: the variety of mineral deposits attracts industries such as construction, agriculture, and pharmaceuticals. Indeed, arbitration appears to be the main form of dispute resolution in international mining dis-

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65 Mark Bezant et al., Trends in International Arbitration: A New World Order, LAW360 (June. 15, 2015), https://www.law360.com/articles/663022/trends-in-international-arbitration-a-new-world-order (The author holds that the “internationalization of the global economy” has led to the increase in international arbitration. This increase “has been driven primarily by the complexity that comes with economic activity occurring on a far greater scale.”); see also Robert Briner, Globalization and the Future of Courts of Arbitration, 2 EUR. J.L. REFORM 439, 442 (2000) (“The real growth of arbitration went hand in hand with the increasing globalization of international commerce.”).


70 Investment in Mining, supra note 69.
This is due, in part, to investors’ fears of local tribunals’ tendency to favor the government in a mining license dispute in comparison to a relatively unbiased arbitration panel.\(^{72}\)

Another growing industry in East Africa and Africa as a whole is the construction industry.\(^{73}\) This has been attributed to the growth of the energy, transport, tourism, and infrastructure industries.\(^{74}\) International arbitration is growing into the preferred method of dispute resolution for cross-border construction disputes.\(^{75}\) Reasons for this preference include the technical nature of construction disputes, as well as the ability to choose an arbitrator who has expertise in the matter and is neutral.\(^{76}\) The reasoning for this preference also applies to the energy field,\(^{77}\) a sector that has been growing in the EAC.\(^{78}\)

This increased discovery of natural gas in East Africa has increased energy investment prospects in the region,\(^{79}\) which is im-


\(^{72}\) Id.; see also Cassidy, supra note 51. In a study done by professional services firm Ernst & Young, protectionism by governments through resource nationalism was the primary risk for mining companies in 2013.


\(^{74}\) See East Africa Construction, supra note 73.


\(^{76}\) See Corporate Choices, supra note 56.

\(^{77}\) Id.


\(^{79}\) Antonio Castellano et al., Brighter Africa: The Growth Potential of the Sub-Saharan Electricity Sector, MCKINSEY & CO. (Feb. 2015), http://www.mckinsey.com/~/media/mckinsey/dotcom/client_service/epng/pdfs/brighter_africa-the_growth_potential_of_the_sub-saharan_electricity_sector.ashx (“Monumental gas discoveries in East Africa between 2010 and 2012 have at-
portant for development of the EAC. However, the increase in foreign investment and consumption can potentially lead to African governments acting in a way that protects local interests at the expense of foreign companies. It has been further posited that oil and gas disputes can present a challenge due to a high likelihood of politicization. Yet, arbitration is utilized for its neutrality, and Rwanda takes a very pro-arbitration approach with limited judicial interference, thereby dissipation any potential fears. In any event, oil and gas companies seem to prefer arbitration in resolving international disputes, for reasons that include the ability to select arbitrators who have specialist knowledge in the industry (whereas courts generally do not), confidentiality of cases, and greater enforceability and finality of decisions. Arbitration is already often

extracted investment and increased fuel-supply options for power generation"; see also East Africa Becoming 'Investment Hot Spot for Oil and Gas,' Says Report, OUT-LAW (Aug. 25, 2015), https://www.out-law.com/en/articles/2015/august/east-africa-becoming-investment-hotspot-for-oil-and-gas-says-report/ ("Major international companies are becoming involved in the East African oil & gas market alongside smaller companies, thus indicating the industry's confidence in East Africa's immense potential.").

80 Victoria Ritah Nalule, Energy in the East African Community: The Role of the Energy Charter Treaty, ENERGY CHARTER SECRETARIAT KNOWLEDGE CTR., http://www.energycharter.org/fileadmin/DocumentsMedia/Occasional/Energy_in_the_East_African_Community.pdf ("The East African region is endowed with various energy resources that are spread throughout the region, and more investments are needed to develop these resources, which are expected to play a big role in ensuring economic development in the EAC.").


83 See infra Part III.B.

84 Damilola S. Olawuyi, Legal Strategies and Tools for Mitigating Legal Risks Associated with Oil and Gas Investments in Africa, 39 OPEC ENERGY REV. 247, 260 (2015) ("Generally, arbitration provisions provide neutral, competent and transparent options for insulating commercial disputes from the influence and whims of the host state and from difficult judgment enforcement problems that may arise under local laws.").

used for energy contracts in Africa, and companies that do not utilize arbitration provisions in their contracts should consider adding them.

Concurrently, parties appear to be more comfortable with arbitration in Africa. For example, in a survey conducted by international law firm Simmons & Simmons, 72% of respondents reported that they would consider using local or regional African arbitration institutions for dispute resolution. However, only 58% considered using an African seat.

B. What's the Issue?

As previously discussed, business in Africa is growing. This will cause an increase in cross-border disputes, which leads to more frequent usage of international arbitral forums. Despite this increase, the majority of international arbitrations involving an African party are still held outside of the continent, which is hindering the growth of African arbitration. Oftentimes, the venue or seat


88 Notaras & Bartle, supra note 68.

89 Id.


91 Maria Gritsenko & Emma Lindsay, Reflections on ‘AfriCCA’ in Mauritius, AFR. L. & BUS. (June. 24, 2016), https://www.africanlawbusiness.com/news/6491-reflections-on-africa-in-mauritius ("[M]ost Africa-related disputes are heard outside Africa by arbitrations from outside Africa."); see also Abdulqawi A. Yusuf, Vice President, Int’l Ct. of Just., Keynote Address at the ICCA, Mauritius: The Contribution of Arbitration to the Rule of Law, The Experience of Afri-
chosen has no connections to the conflict but for them being in the arbitration clause.\footnote{92} For example, energy disputes are generally not resolved at African arbitration institutions.\footnote{93} This leads to the logical conclusion that parties generally do not want to use an African seat or institution for arbitration. Many contracts choose seats outside the continent due to their reputation and experience,\footnote{94} “and this is likely to be the case until confidence and experience are built in local institutions.”\footnote{95} Unfortunately, as a result of this, African institutions are stuck in a Catch-22. Parties must choose African arbitration centers for them to gain experience and increase reputation; however, parties won’t choose the centers until

\footnotetext[92]{In regards to arbitrations involving an African party, “most of these arbitrations are seated in jurisdictions such as Paris, Geneva, London, and the UAE, even where neither the subject matter of the disputes nor the parties to the dispute have any connection with the venue, but for the agreement containing the arbitration clause that makes the seat of arbitration to be in those countries.” Funke Akoni, \textit{Challenges With International Arbitration in Africa: The Perceived and Real Problems}, \textsc{Arb. Hub} (Mar. 25, 2016), http://thearbitrationhub.com/challenges-arbitration-africa/}

\footnotetext[93]{Finizio, \textit{supra} note 86. Finizio states that “foreign investors almost always insist on arbitration under the rules of well-known international arbitral institutions.” He adds that “foreign parties also typically seek to provide that any arbitral proceedings will take place outside of the host state and outside of Africa, with London, Paris, and Switzerland being common seats for arbitrations relating to African energy projects.” \textit{Id.} at 86.}

\footnotetext[94]{Dipen Sabharwal & Mona Wright, \textit{What Do Users Want From Seats and Institutions?}, \textsc{Kluwer Arb. Blog} (Nov. 2, 2015), http://kluwerarbitrationblog.com/2015/11/02/what-do-users-want-from-seats-and-institutions/ (“‘traditional seats’ and arbitral institutions with long-established reputations continue to be favored by users”); \textit{see also} 2015 \textit{International Arbitration Survey: Improvements and Innovation in International Arbitration}, \textsc{White & Case LLP}, http://www.arbitration.qmul.ac.uk/docs/164761.pdf (last visited Jan. 31, 2017) [hereinafter 2015 \textit{International Arbitration Survey}.] In a survey of hundreds of stakeholders in regards to international arbitration, when asked why certain institutions were selected the most often, the two top considerations were “reputation and recognition” and “previous experience of the institution.” \textit{Id.}}

they have more experience and a better reputation. Kigali and the KIAC, however, are perfectly suitable for international arbitration.

C. Why Kigali as a Seat? Why the KIAC?

1. Factors of a Strong Seat

Although there are many factors to consider when determining a viable arbitral seat, this Note will only examine a few. To reiterate, the arbitral seat determines the procedural laws that govern the arbitration as well as the involvement of that seat’s courts. A fear that many foreign parties have of contracting with African parties is the likelihood that foreign arbitral awards will not be recognized and enforced by the African courts. This fear is related to choosing African arbitration seats. Appropriately, the

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96 Jayne Bentham & Basil Woodd-Walker, The Rise of Arbitration in Africa, SIMMONS & SIMMONS (Dec. 10, 2015), http://www.exelica.com/~/media/Files/Training/2015/12%20December/ The%20Rise%20of%20Arbitration%20in%20Africa.pdf; see also Kariuku Muigia, Effectiveness of Arbitration Institutions in East Africa, KMCO (Feb. 2016), http://www.kmc.co.ke/attachments/article/170/Effectiveness%20of%20Arbitration%20Institutions%20in%20East%20Africa%202016.pdf (“This has denied the local arbitrators the fora to put their skills and expertise in arbitration to use since disputants shun the local arbitral institutions, if any, for foreign institutions.”).

97 Judith Gill, International Arbitration: Choosing the Seat, ALLEN & OVERY LLP, http://www.aohub.com (type in on Google “AOHub International Arbitration: Choosing the Seat”) (last visited Sept. 30, 2016). The Guide suggests the following questions to consider when choosing a seat: (1) Is the seat a signatory to the NY Convention? (2) What are the seat’s main arbitral institutions? (3) What is the procedural legal framework? (4) What are the formal requirements for the arbitration agreement? (5) Does the doctrine of separability apply? (6) Can third parties be bound to an arbitration agreement? (7) Will the arbitration be confidential? (8) What are the powers of the arbitrator? (9) Can the arbitrator award interim measures? (10) What court remedies are available when proceedings are brought in breach of an arbitration agreement? (11) Will the court intervene in arbitration? (12) How are costs allocated in arbitration? (13) Can the arbitral award be appealed, and if so, on what grounds? and (14) To what extent are awards enforceable?

98 Warren, supra note 6.

99 Arbitration Award, in Black’s Law Dictionary (10th ed. 2014). An arbitration award is “a final decision by an arbitrator or panel of arbitrators.” A foreign arbitral award is “an arbitration award that is made in a country other than the country in which enforcement of the award is sought.”


first factor one must consider is if the seat is a signatory to the New York Convention\textsuperscript{102} ("Convention"),\textsuperscript{103} which allows for recognition of foreign awards in any of the contracting seats.\textsuperscript{104}

The Convention is currently the most significant international arbitration treaty\textsuperscript{105} and "it is imperative that parties choose a New York Convention Seat."\textsuperscript{106} Likewise:

The key criteria to consider when selecting a seat is to ensure that the country in which the city is situated has both a supportive arbitration law and a supportive but non-interventionist judiciary and that the country has ratified the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the 'New York Convention.')\textsuperscript{107}

The Convention is widely used throughout the world,\textsuperscript{108} and "remains the preferred framework for providing an enforceable


\textsuperscript{103} Gill, supra note 97; see also Jennifer L. Price, Why Where Matters: The Seat of Arbitration in International Energy Contracts, KING & SPALDING LLP, http://www.kslaw.com/library/newsletters/EnergyNewsletter/2013/August/article1.html (last visited Mar. 4, 2017) (one of the main factors that parties should keep in mind when choosing an arbitral seat is if the seat is a party to the New York Convention).


\textsuperscript{106} Gill, supra note 97.


\textsuperscript{108} Convention on the Recognition and Enforcement of Foreign Arbitral Awards, supra note 102 ("The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal."); For a better understanding of the New York Convention, see Albert Jan van den Berg, The New York Convention of 1958: An Over-
outcome in the context of cross border commercial disputes." It is also especially important "for investors who may need to conduct arbitration and/or enforce an arbitral award in African countries and generally provides investors with an effective and predictable tool to seek recognition and enforcement of arbitral awards." Rwanda acceded to it on October 31, 2008, and it came into force on January 29, 2009, which eventually "enable[d] the KIAC arbitral awards to be enforceable in any other country signatory to the convention."

Two other significant factors to determine are where the major arbitration centers are and which procedural legislative framework the seat operates under. The major Rwandan arbitration center is the Kigali International Arbitration Centre (KIAC). Rwanda operates under its own arbitration law and KIAC operates under the laws that established the KIAC.

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112 KIAC Services, supra note 48.

113 Gill, supra note 97.

114 See Kigali International Arbitration Centre, supra note 40.

115 See Law on Arbitration, supra note 35.

116 See Law Establishing KIAC, supra note 36.
The next factor to consider is if the Doctrine of Separability applies. This doctrine allows the tribunal to rule on both the validity of the arbitration agreement and the validity of the contract separately. Justifications for the Doctrine include:

That it conforms to the parties’ intentions, that it furthers the integrity of the arbitral process, that there is a legal presumption of the existence of two agreements, and that courts usually review only the arbitral award, not the merits, of the dispute.

Although all four justifications are sound, two in particular are of utmost importance. As discussed previously, foreign businesses want to have confidence in the arbitration framework without fear of judicial interference. Prior to the creation of the Doctrine of Separability, an issue that constantly arose was that if a tribunal “set aside the contract containing the arbitral clause . . . it [would] retroactively [suppress] its own adjudicatory power.” If the Doctrine is in place, the arbitral jurisdiction will remain even if the contract is voided. This helps lead to stability and effectuating the intent of the parties. Having a doctrine in place that helps further the integrity of the process as well as decrease the chances of judicial intervention is certainly a step in the right direction. Article 31 of the KIAC rules provides that the Doctrine applies to its arbitrations.

117 See James Carter & Hannah Kennedy, English High Court Addresses Separability of Arbitration Clauses, DLA Piper LLP (June 26, 2013), https://www.dlapiper.com/en/us/insights/publications/2013/06/english-high-court-addresses-separability-of-arb ("Separability is a legal doctrine that allows an arbitration agreement to be considered entirely separately from the underlying contract in which it is contained."); see also Janet A. Rosen, Arbitration Under Private International Law: The Doctrines of Separability and Competence De La Competence, 17 Fordham Int’l L.J. 599, 607–08 (1993) ("The doctrine of separability, or autonomy, of the arbitration clause provides that an arbitration clause embedded in a contract is considered separate from the main contract. The arbitration clause and the main contract comprise two separate sets of contractual relations. Where a dispute arises concerning the initial validity or continued existence of the main contract, the arbitration clause, being independent, continues to be valid and binding on the parties even if the main contract is void.").

118 See Gill, supra note 97.

119 Rosen, supra note 117, at 607.


121 See id.


123 See David K. Schollenberger & Steven P. Finizio, Overview of Africa, 1 Transnat’l Bus. Transactions § 8:156, Westlaw (Aug. 2016) ("Any significant growth in arbitration in Africa will depend on legal reforms and, in particular, local courts demonstrating a willingness to support, and not interfere with, arbitration agreements, arbitral proceedings and awards.").

124 See KIAC Arbitration Rules, supra note 43.
Contracting parties must consider whether third parties can be bound to the agreement under KIAC rules.\textsuperscript{125} The notion of joinder in international arbitration\textsuperscript{126} is to bring in parties not originally part of the arbitration. Under Article 8 of the KIAC rules, current parties may make a request to the secretariat to join other parties, subject to certain requirements in this Article and other KIAC rules.\textsuperscript{127} Once an arbitrator is confirmed, additional parties cannot be joined unless the existing parties and the additional one consent.\textsuperscript{128} As such, KIAC’s rules are comparable to that of other renowned arbitration institutions.\textsuperscript{129} Nevertheless, as the economic climate in the EAC continues to grow stronger,\textsuperscript{130} it is likely that the influx of business and creation of contracts will too. In a world of international business, joinder can prove important. Without the possibility of joinder in multi-party contracts, the likelihood of jurisdictional conflicts and the commencement of parallel proceedings is higher.\textsuperscript{131} Thus, the allowance of joinder will increase the confidence of the businesses.

“Domestic court interference is the key obstacle to the success of international commercial arbitration of disputes involving African parties and projects.”\textsuperscript{132} And, “the extent of [judicial] interference depends upon the national attitude towards international

\textsuperscript{125} See Gill, supra note 97.
\textsuperscript{126} For an expansive article on joinder in international arbitration, see S.I. Strong, Third Party Intervention and Joinder as of Right in International Arbitration: An Infringement on Individual Contract Rights or a Proper Equitable Measure?, 31 Vand. J. Transnat’l L. 915 (1998).
\textsuperscript{127} See KIAC Arbitration Rules, supra note 43.
\textsuperscript{128} See id.
\textsuperscript{129} See Comparative Chart of International Arbitration Rules, BAKER & MCKENZIE LLP, http://www.bakermckenzie.com/-media/files/insight/publications/2016/04/comparative-chart-of-international-arbitration/mm_london_comparativechart_apr16_updated.pdf?la=en (last visited Mar. 5, 2017). The London Court of Arbitration rules allow joinder only by an application of a party, “and consent of applicant and new party [is] required.” The International Chamber of Commerce allows joinder on request by a party, and it is “only permitted prior to confirmation/appointment of any arbitrator, unless otherwise agreed.”
\textsuperscript{132} Beeley & Goins, supra note 86.
arbitration.”133 Accordingly, it should come as no surprise that a major factor in choosing a seat is whether the country gives the arbitrators independence from judicial interference.134 Rwanda is very pro-arbitration and, “Rwandan courts have also been supportive of arbitration during the conduct of arbitral proceedings and afterwards, at the enforcement stage; and, notably, most arbitral awards to date have been against the state.”135 In fact, the law that established KIAC explicitly grants its autonomy.136 Having political backing for arbitration and an institution that wants KIAC to succeed is crucial for its success on the global stage.137 However, parties must be wary of the possibility that certain public policy exemptions will cause courts to overturn awards.138 While this Note has only touched on a few of the factors relevant in choosing a seat and institution, Kigali and KIAC certainly fit the bill.


134 See Gill, supra note 97; see also GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 65 (2d ed. 2006) (“Second [factor in choosing a seat], and at least as important, the arbitral seat must have both national arbitration legislation and national courts that are hospitable to and supportive of international arbitration.”); see also SIMON GREENBERG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION 82 (2011) (“Realistically, the most important factor [in choosing a seat] is the presence of laws and courts that are favourable to international arbitration.”).

135 Andrew McDougall & Heather Clark, International Arbitration Supports A Country’s Competitiveness and the Rule of Law, 11 LA REVUE DROIT & AFFAIRES 45, 54 (2013); Natasha Mellersh, In the Land of a Thousand Hills, Afr. L. & Bus. (Feb. 9, 2016), https://www.africanlawbusiness.com/news/6147-in-the-land-of-a-thousand-hills (Rwanda has a pro-arbitration policy which “prioritizes” arbitration-related matters.”); see also Gakuba, supra note 91 (In 2012, Rwanda’s Supreme Court were given instructions and policies that were pro-arbitration regarding enforcement of awards.); Law on Arbitration, supra note 35 (Article 7 of the law dictates that “In all matters governed by this law, no court shall intervene except where so provided in this law.”); Worth a Closer Look: Middle East & Africa, GLOBAL ARB. REV. (Nov. 2, 2016), http://globalarbitrationreview.com/insight/guide-to-regional-arbitration-volume-5-2017/1070168/worth-a-closer-look-middle-east-africa. KIAC is a private institution, and the Rwandan government has lost cases in KIAC proceedings. Consequently, the government has complied with all awards against it.

136 See Law Establishing KIAC, supra note 36. Article 3 of the law states in part: “The Centre shall have legal personality, financial and administrative autonomy.”.

137 See Knutson, supra note 39, at 89; see also Elvira R. Gadelshina, What Plays the Key Role in the Success of an Arbitration Institution?, FINANCIER WORLDWIDE (Feb. 2013), https://www.financierworldwide.com/what-plays-the-key-role-in-the-success-of-an-arbitration-institution/#,WMRVKOKZnp8 (“In fact, there is not a single story of global success of arbitration institutions based in states with flawed legal systems.”).

2. Why Not Other EAC Seats?

KIAC is a great choice of institution for Africa, and East Africa specifically.\textsuperscript{139} Moreover, Rwanda is the EAC seat best suited for international arbitration.\textsuperscript{140} Rwanda leads the EAC in controlling corruption,\textsuperscript{141} and it has the lowest perceived corruption levels in the region.\textsuperscript{142} It the highest ranked in terms of rule of law,\textsuperscript{143} as

\textsuperscript{139} See Emilia Onyema, \textit{Arbitration Institutions in Africa}, in \textit{The Transformation of Arbitration in Africa: The Role of Arbitral Institutions} 35 (Emilia Onyema ed., 2016) [hereinafter \textit{The Transformation of Arbitration}]. In explaining that each region of Africa has at least one institution that attracts international arbitrations, the author gives KIAC as the example for East Africa.

\textsuperscript{140} See \textit{Arbitrating Commercial Disputes}, \textit{World Bank Grp.}, http://iab.worldbank.org/data/exploretopics/arbitrating-commercial-disputes (last visited Jan. 30, 2017). Analysis was done on the arbitration regimes in certain countries, ranking each metric from 0–100. The Strength of Laws ("SoL") metric compared the strength of arbitration regimes by examining the laws and regulations related to domestic and international arbitration, and the countries’ adherence to specific international conventions. The Ease of Process ("EoP") metric compared the easiness of parties to design arbitration proceedings as they wish and conduct fair and predictable arbitrations. Lastly, the Extent of Judicial Assistance ("EoJA") metric compared the extent of judicial assistance to the proceedings, including the extent to which the judiciary supported and facilitated arbitration in that country. The SoL, EoP, and EoJA, respectively, ranked by country: Rwanda (93.1), (80.1), (73.3); Kenya (94.9), (77.1), (56.3); Tanzania (82.4), (74.7), (39.1); Uganda (86.3), (62.9), (39.3). Burundi and South Sudan are not ranked. Furthermore, although Kenya surpasses Rwanda in terms of SoL by a mere 1.8 points, Rwanda is stronger in terms of EoP by 3 points, and EoJA by 17 points; see also Rahman & Weinberg, supra note 101 (The authors claim Rwanda is a safer seat than Tanzania or Kenya. They posit that enforcement in Kenya is cause for concern. Additionally, they state that Tanzania is not yet a fully safe seat, and must modernize its arbitration legislation as well as its ability to enforce awards. However, the authors believe that Rwanda is in the perfect position to become perceived as a safe seat.); see also Kariuki Muigia, \textit{Reawakening Arbitral Institutions for Development of Arbitration in Africa}, KMCO (May 2015), http://www.kmco.co.ke/attachments/article/158/Conference%20Paper-Reawakening%20Arbitral%20Institutions%20for%20Development%20of%20Arbitration%20in%20Africa.pdf (noting that the author mentions that Tanzanian courts have substantial power to interfere in court proceedings. This lack of autonomy has led to less confidence in Tanzanian arbitration. He also mentions that the formality and cumbersome nature of arbitration in Kenya have led to the dissatisfaction of many people, causing them to file in court instead.).

\textsuperscript{141} See \textit{Control of Corruption—Country Rankings}, \textit{Glob. Econ.}, http://www.ther gobaleconomy.com/rankings/wb_corruption/ (last visited Jan. 30, 2017). Based on data from 2015, Rwanda led the EAC in terms of the fight against corruption. Rwanda ranked 41st in the world, followed by Tanzania (146), Kenya (158), Uganda (167), and Burundi (172). South Sudan was not ranked.

\textsuperscript{142} See \textit{Corruption Perceptions Index 2016}, \textit{Transparency Int’l.} (Jan. 25, 2017), http://www.transparency.org/news/feature/corruption_perceptions_index_2016. In a global study of corruption, Rwanda had the lowest levels of corruption in the EAC. Rwanda ranked 50th in the world, followed by Tanzania (116), Kenya (145), Uganda (151), Burundi (159), and South Sudan (175); see also \textit{Investment Climate Statements for 2016}, supra note 34. Rwanda is a signatory to the UN Anticorruption Convention and the African Union Anticorruption Convention. Numerous, numerous Rwandan agencies enforce anticorruption laws, and bribery has been criminalized.
well as political stability, maintaining political stability since 1994. Throughout the years, Rwanda has increased its reputation internationally; for example, it was ranked second in Africa on the World Bank’s 2017 Doing Business Report and highest in the EAC. Additionally, Rwanda’s arbitration system has also received very high ratings and Rwanda has the highest “Quality of Judicial Processes” in the EAC. The World Economic Forum 2016–2017 Global Competitiveness Report also lists Rwanda as having the strongest institutions in Africa and the thirteenth

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144 See Political Stability—Country Rankings, GLOB. ECON., http://www.theglobaleconomy.com/rankings/wb_political_stability/ (last visited Jan. 30, 2017). Based on data from 2015, Rwanda ranked 108th in the world, followed by Uganda (113), Tanzania (114), Kenya (117), and Burundi (157). South Sudan was not listed. Id.

145 See Rwanda Profile, supra note 15.


147 See Doing Business 2017: Equal Opportunity for All, supra note 146 at 7. Rwanda ranked 56th in the world in terms of its ease of doing business, followed by Kenya (92), Uganda (115), Tanzania (132), Burundi (157), and South Sudan (186). Id.


strongest institutions in the world.\textsuperscript{151} While other metrics could be compared, these evidence why Rwanda is the logical choice of seat for EAC arbitration.\textsuperscript{152}

Furthermore, a local venue seems logical. It is likely closer to where the parties are doing business, to the witnesses, and to relevant documents, which contracting parties should consider.\textsuperscript{153} The convenience factor should be a major consideration when drafting an arbitration clause.\textsuperscript{154}

3. What is Preventing KIAC Arbitral Growth?

A major impetus to the growth of KIAC and arbitration in Africa is the increasing amount of arbitration centers on the continent.\textsuperscript{155} As of May 2016, there were seventy-two different seats on


\textsuperscript{152} See Gonzalo Vial & Francisco Blavi, New Ideas for the Old Expectation of Becoming an Attractive Arbitral Seat, 25 TRANSNAT'L L. & CONTEMP. PROBS. 279, 307–08 (2016). The authors stress the importance of a seat with a stable political and economic structure and state that “a supportive legal environment, a neutral attitude from national courts, favorable material conditions, experienced practitioners, and political and economic stability are key features of popular destinations for international arbitrations”; see also MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 48 (2d. ed. 2012).

\textsuperscript{153} See Dutson, supra note 53; see also John W. Hinchey & Troy L. Harris, Potentially-Applicable Local Law-Considerations in Selecting the “Place” or “Seat” of Arbitration, INT’L CONSTRUCTION ARB. HANDBOOK § 3.8 (2016); Maryanne Lavan et. al., THE ARBITRATION CLAUSE-Elements of the Arbitration Clause-Place of Arbitration, in 3 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 58:21 (2016); see also Bradfield, supra note 57 (“When negotiating arbitration clauses, investors are increasingly giving consideration to agreeing to an onshore arbitration with the logistical benefits this provides in obtaining the relevant documentation and securing the attendance of witnesses.”).

\textsuperscript{154} It is said that:

One venue will be more convenient than another due to a variety of factors: adequacy of hotel facilities and transportation links; nearness to witnesses, documents, and counsel; climate; and availability of local service resources such as stenographers, translators, photocopiers, and the like. Given relatively equal bargaining power and relatively equal attention to the drafting of the arbitration clause, the place of arbitration should be equally convenient, or inconvenient, for both parties.

PAUL D. FRIEDLAND, ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS 53 (2d ed. 2007); see also GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 125 (2d ed. 2015). Logistics, cost, and convenience are factors to be considered when picking a seat. Furthermore, hearings at an expensive seat can dissuade a party from pursuing a claim or presenting a defense; see also MICHAEL MCLWRATH & JOHN SAVAGE, INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICAL GUIDE 33 (2010) (“Often, convenience to the parties is a driving force behind the selection of the place of arbitration.”).

\textsuperscript{155} See Ngotho, supra note 82 (positing that a potential impetus to African arbitration growth is the proliferation of institutions).
the continent,\textsuperscript{156} with nine centers in the EAC.\textsuperscript{157} A pro-arbitration attitude is certainly a step in the right direction, but the increase in seats dilutes their efficacy in attracting international matters, for multiple reasons. The varied arbitration laws and centers inhibit uniformity, which inhibits arbitral growth.\textsuperscript{158} While the EAC has made efforts to unify through the East African Court of Justice,\textsuperscript{159} it was mainly designated to resolve disputes pertaining to the EAC Treaty through litigation.\textsuperscript{160} And while it can hear arbitration cases, it has not heard one in its more than ten years of existence.\textsuperscript{161} Thus, again, efforts should be focused on an experienced site that holds itself out as an arbitration center.\textsuperscript{162}

Parties are also hesitant to choose an African seat because there is still a perception that those seats are economically, socially, and politically unstable,\textsuperscript{163} as well as corrupt.\textsuperscript{164} An illusory perception problem should not be the reason it fails to take off as a


\textsuperscript{157} See id.

\textsuperscript{158} See Edward Torgbor, \textit{Arbitration in Africa—The Bigger Picture}, TRANSNAT'L DISP. MGMT. (Nov. 3, 2016), https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1638. Africa lacks uniformity in its “arbitration laws, procedures and practices.” This lack “is often seen as an obstacle to the development and promotion of the commonalities of the continent.” Id.


\textsuperscript{160} See The Treaty for the Establishment of the East African Community, art. 4, Nov. 30, 1999.


\textsuperscript{162} One author advocates this idea, but wants to direct efforts in growing the East African Court of Justice. However, I entirely disagree. As mentioned before, it has not heard an arbitration case yet. Furthermore, the author mentions that the Court is not yet equipped for international commercial arbitration, and “is more involved in handling non-economic disputes.” In fact, he actually advocates that while waiting for the Court to develop, “KIAC presents a viable option that would be easier to address interstate commercial disputes faster and efficiently . . .” Kariuki Muigua, \textit{Building Legal Bridges: Fostering Eastern Africa Integration Through Commercial Arbitration}, KMCO, http://www.kmco.co.ke/attachments/article/143/Building%20Legal%20Bridges%20FOSTERING%20EASTERN%20AFRICA%20INTEGRATION%20THROUGH%20COMMERCIAL%20ARBITRATION-20TH%20FEBRUARY%202015.pdf (last visited Feb. 5, 2017). Cut out the middleman. KIAC and Kigali are ready to be the face of East African arbitration, and they should not be used only as a placeholder.

\textsuperscript{163} See Leon E. Trakman, \textit{“Legal Traditions” and International Commercial Arbitration}, 17 AM. REV. INT’L ARB. 1, 37 (2006); see also Fondue & Mansuri, supra note 60, at 176 (“The perception of corruption and political intervention in the local courts and the administration of justice as a whole result in a lack of credibility in the legal system on the African continent.”); see also Akoni, supra note 92 (There is a perception that all African countries are politically and economically unstable.); see also Muigua, supra note 140 (“Potential users shy away from Africa
seat.\textsuperscript{165} It should also be noted that every EAC nation except for South Sudan is party to the New York Convention.\textsuperscript{166} Nonetheless, another threatening issue is the perception of the arbitrators themselves.

It has been posited that the lack of African arbitrators at African arbitration centers contributes to the cycle mentioned above. Pertaining to KIAC, "the fact that more than half of the international arbitrators in KIAC are non-African may portray Africa to the outside world as a place where there are no qualified arbitrators (real or perceived) to be appointed as international commercial arbitrators."\textsuperscript{167} Local parties using foreign arbitrators instead of local arbitrators does not help either.\textsuperscript{168} Similarly, it is hard for an international arbitrator to develop their reputation, much like the Catch-22 mentioned previously. To increase arbitration experience and build reputation, one must arbitrate more. However, previous experience arbitrating is a crucial criterion when appointing arbitrators, making it that much harder for new arbitrators to break into the international circuit.\textsuperscript{169} This contributes to the international arbitration circuit becoming somewhat of an elite club.\textsuperscript{170}
In fact, African arbitrators are often not recognized on the international stage at all.\textsuperscript{171} This should not be the case, as it is likely that increased investments in Africa have and should grow the demand for lawyers there.\textsuperscript{172}

Another issue facing arbitrators in Africa is language barriers.\textsuperscript{173} However, although the KIAC tribunal normally determines which language or languages proceedings are conducted in, parties can actually decide which languages govern the proceeding,\textsuperscript{174} much like other strong arbitration institutions.\textsuperscript{175} If documents are submitted in languages other than those mandated, the party can be ordered to submit a translation.\textsuperscript{176} Accordingly, language barriers are very unlikely to pose a problem during KIAC proceedings.

Foreign parties are clearly content having seats and institutions outside the African continent, and many African parties are as well. This leads to the question of why these parties should care about KIAC or Kigali. It boils down to mutual benefit. Arbitration appears to be the preferred method of dispute resolution for contracts with African parties and foreign entities are increasingly contracting with said parties. These clauses allow contracting parties to feel more comfortable doing business in developing nations,

\textsuperscript{171} See Martinez & Mason, supra note 91. ("The 2015 edition of Chambers and Partners "Most In Demand Arbitrators—Global-Wide" doesn't feature a single African arbitrator."); see also Akoni, supra note 92. In a 2014 ranking published by Who's Who Legal, none of the top 25 arbitrators were African. Additionally, in its 2013 ranking compiling 573 arbitrators from 74 countries, none were African.

\textsuperscript{172} See James Booth, Global Law Firms Turn to Africa, Am. Law. (Jan. 18, 2017), http://www.americanlawyer.com/id=1202776952403/Global-Law-Firms-Turn-to-Africa?mcode=1202615731542&curindex=8&curpage=ALL ("As the big emerging market that is Africa starts attracting more investment . . . you will see more and more professional services providers, lawyers included, come under pressure to render their services in Africa.").

\textsuperscript{173} See Ngothero, supra note 82. See also Fernando Dias Simões, The Language of International Arbitration, Conflict Resol. Q. (2017) ("The first barrier that needs to be overcome [in international disputes] is language.").

\textsuperscript{174} See KIAC Arbitration Rules, supra note 43; see also Francis Byaruhanga, Why Business Operators Should Embrace Arbitration, New Times (Aug. 23, 2016), http://www.newtimes.co.rw/section/article/2016-08-23/202862/ ("This is specifically beneficial to foreign litigants in Rwanda who may have difficulty following court proceedings in Kinyarwanda [one of the main languages in Rwanda].").


\textsuperscript{176} See KIAC Arbitration Rules, supra note 43.
and help diminish the fear of corruption and interference from local courts. And while these parties prefer foreign seats and institutions, KIAC and Kigali are great options for both. As will be described later in this Note, the growth of arbitration increases the rule of law in the region, and the more arbitrations are conducted, the more experienced arbitrators and institutions become. Adding KIAC and Kigali into arbitral clauses will strengthen the regional arbitral system, making it safer for foreign parties to contract there, and thus hopefully attracting more business and investment into the region. The EAC wants to attract more business and investment, but also wants to strengthen its arbitral system and rule of law.

IV. PROPOSAL

East Africa has accepted arbitration, and is slowly beginning to understand the importance of a unified system. It has already unified in its efforts to raise awareness of international arbitration in the region and Rwanda has been doing its part as well. Although more established centers and seats are often still utilized, the mere promotion of regional arbitration is a step in the right direction. Consequently, promoting and strengthening ar-


179 See Overview, E. Afr. Int’l. Arb. Conf. [EAIAC], http://www.eaarbitration.com/overview/?v=7516fd43adaa (last visited Feb. 2, 2017). East African countries are realizing the growth in their region, and the increase in disputes. Coupled with foreign companies’ mistrust of local courts and the applicability of arbitration to international trade, they are beginning to focus their efforts on strengthening arbitration in East Africa and raising its awareness.


181 See R. Rajesh Babu, International Commercial Arbitration and the Developing Countries, 4 AALCO Q. Bull. 386, 399 (2006). The author suggests, “every effort has to be made to setup and promote regional arbitration centers, whereby the dominance of the western arbitral institutions can be dealt with.” Furthermore, “[i]t is necessary that all efforts should be made for
Arbitrations locally are not only hugely beneficial for the region and its growth, but for its arbitrators and lawyers as well.\textsuperscript{182} For these reasons, the EAC should unify and choose KIAC as its arbitration institution and Rwanda as its seat. One of KIAC’s purposes was to promote Rwanda as a site for international commercial arbitration\textsuperscript{183} and to grow it into the “preeminent choice for international arbitration in the East Africa region.”\textsuperscript{184} As mentioned previously, Rwanda is the most suitable seat in the EAC and KIAC appears to be its strongest institution,\textsuperscript{185} currently having the largest caseload of all African arbitration institutions.\textsuperscript{186} It also seems to have achieved both of its goals, as all of KIAC’s arbitrations have had a Rwandan seat,\textsuperscript{187} administering fifty-four cases totaling over 100 million dollars.\textsuperscript{188} However, parties still elect for outside seats and institutions,\textsuperscript{189} despite Africa being ready to hold arbitrations.\textsuperscript{190}

promoting these Centre’s and such other institutions, if developing countries wish to make international commercial arbitration work for them.” \textit{Id.}

\textsuperscript{182} See Joshua Karton, \textit{The Culture of International Arbitration and the Evolution of Contract Law} 70 (2013) (“Attracting arbitrations to its jurisdiction will bring revenue to the state and will make it more likely that parties will hire advocates and arbitrators from that state.”). See also Hodges, supra note 58.

Accepting arbitration is not only important to encouraging wider investment into a state’s economy. A market in dispute resolution, particularly arbitration, is a source of economic activity; it can be a driver for growth and prosperity in its own right. If a state can be a “safe” place to arbitrate (as a seat of arbitration) or a suitable venue for holding hearings, there will be foreign companies and law firms spending significant money there. Conference centers, hotels, translators, transcribers and local lawyers can all benefit.

\textit{Id.} at 4.

\textsuperscript{183} See Law Establishing KIAC, supra note 36.


\textsuperscript{186} See Hodges, supra note 58.

\textsuperscript{187} See id.

\textsuperscript{188} See Kigali Arbitration Centre Handles Cases Worth $100m, \textit{New Times} (Mar. 11, 2017), http://www.newtimes.co.rw/section/article/2017-03-11/208774/.

\textsuperscript{189} See Martinez & Mason, supra note 91.

Although the end-goal of these changes is to convince foreign parties to agree to Rwanda as a seat and KIAC as an institution, the initial change must be internal.\textsuperscript{191} At the very least, “African parties will have to start appointing skilled African arbitrators. This is for the simple reason that Africa needs relevant skilled manpower to compete in the regional and global arbitration sector.”\textsuperscript{192} These skills can initially be developed on the domestic level.\textsuperscript{193} There must be a push for the “re-localization of arbitration to Africa by convincing our political leadership and private sector to push the necessary infrastructures.”\textsuperscript{194} Rwanda and its businesses are becoming increasingly pro-arbitration\textsuperscript{195} and progress is being made in utilizing African seats and centers. The Rwandan government has started pushing arbitration clauses to include Kigali as a seat and KIAC as an institution, and other EAC

\textsuperscript{191} It is suggested that:
The African countries and businessmen must also increase their utilization of these arbitration institutions in the resolution of their inter-state disputes as well as their disputes with foreigners. For the process to gain a meaningful hold in African countries, the impetus must be largely African, and the existing formulating agencies must be willing to make certain concessions and compromises.

Samson L. Sempasa, \textit{Obstacles to International Commercial Arbitration in African Countries}, 41 INT’L & COMP. L.Q. 387, 397–98 (1992); see also Knutson, supra note 39 (“Any effort to promote arbitration by international parties should reinforce existing local efforts and should be a response to gathering momentum on the ground”); but see Natasha Mellersh, \textit{Arbitration—An African Solution}, Afr. L. Bus. (May 11, 2015), https://www.africanlawbusiness.com/news/5552-arbitration-an-african-solution. In an interview with a partner at an international law firm, the partner suggests that African parties are starting to push for African seats. As an example, she mentions that Nigeria has been increasingly pushing for Lagos as the seat of arbitration in its contracts.


\textsuperscript{193} See Briner, supra note 65, at 442 (Local arbitration centers can act as a “training ground where arbitrators, parties and their counsel can gain first-hand experience of the arbitral process.”).

\textsuperscript{194} Gakuba, supra note 91.

\textsuperscript{195} See \textit{Making it Easier to Resolve Commercial Disputes in Rwanda}, KIAC, http://kiac.org.rw/spip.php?article98 (last visited Jan. 15, 2017) (“With greater awareness and an increasing pool of practitioners, more and more businesses in Rwanda, as well as Government entities, are including mediation and arbitration clauses in their contracts.”).
countries have utilized KIAC as well.  

Yet, despite this fact, there is still a distrust of non-African institutions by African parties. The sentiment goes both ways, however, as many foreign parties also tend to move for non-African institutions and seats. Coincidentally, although these arbitration clauses are meant to increase business, placing arbitration outside the continent can actually be antithetical for companies looking to gain a foothold in Africa. Nonetheless, “any hope for cooperation in the establishment of a viable arbitration process as a method of dispute settlement depends on a clear assessment by

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196 See Worth a Closer Look: Middle East & Africa, supra note 135. The most frequent case KIAC hears often involves a state entity, as Rwanda tries to include KIAC in its contracts. However, other EAC members have also utilized it. See also Standard Contract for the Supply of Goods for National Contracts, http://www.minjust.gov.rw/fileadmin/Documents/MoJ_Document/STANDARD_CONTRACT_FOR_THE_SUPPLY_OF_GOODS_FOR_NATIONAL_CONTRACTS_2.docx (last visited Feb. 4, 2017). A standard contract used by the Rwandan government includes arbitration under KIAC rules with Rwanda as the seat.

197 See 1st ICC Regional Conference Puts Future of Arbitration in Africa Centre Stage, INT’L CHAMBER OF COMM. (June 23, 2016), http://www.iccwbo.org/News/Articles/2016/1st-ICC-regional-conference-puts-future-of-arbitration-in-Africa-centre-stage/. A speaker at the conference mentioned that increased foreign interest in investing in Africa boosted the bargaining power of African businesses to have more say in arbitration clauses. See also Notaras & Bartle, supra note 68 (“Currently it is the African states that hold much of the bargaining power since the scramble for resources is highly competitive, many of those interviewed suggested that investors are prepared to compromise [for local arbitration seats].”).

198 International Arbitration and Developing Countries: What Are the Benefits and What is the Way Forward?, BRITISH INST. OF INT’L. & COMP. L. (Sept. 11, 2014), http://www.biicl.org/documents/394_event_report_-_international_arbitration_and_developing_countries_11_sept.pdf?showdocument=1. One of the speakers at the aforementioned seminar argued that African states are suspicious of arbitral institutions. He believes some of these suspicions are caused by “the systematic referral of arbitral matters outside Africa and exacerbated by the perceived preference for non-African arbitrators.”; see also Fali Nariman, East Meets West: Tradition, Globalization and the Future of Arbitration, 20 ARB. INT’L 123, 125 (2004). The author writes about a speaker at an international arbitration conference who says that African courts are hostile toward arbitrations by foreign tribunals, also quoted as saying “as everybody knows, arbitration is seldom freely agreed to by the developing countries. It is often included in contracts of adhesion the signature of which is essential to the survival of these countries.”

199 Many foreign contracts are entered into with African governments, and in the end, the governments govern who does business with them and in what capacity. Often times, these contracts contain arbitration clauses, which can sometimes lead to problems. One problem is Where a government, unsuccessful in arbitration with private parties, expresses its frustration through the abrogation or negation of references of future disputes to arbitration. Although this problem is not peculiar to African countries, the likelihood of a government of an African or of any developing country taking such a position is higher since most of the arbitrations contracted with these take place in a foreign country, and accusations of bias or unfairness are easy to conjure. S. Azadon Tiewul & Francis A. Tsegah, Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice, 24 INT’L. & COMP. L.Q. 393, 409–10 (1975).
both groups of their interests."\textsuperscript{200} Companies are slowly becoming more comfortable with utilizing African arbitration.

Another method is simply making parties\textsuperscript{201} aware of KIAC and Rwanda, and shattering the perception that the outside world has. The more comfortable the parties are with the seat, the more likely they will choose it. This can be done through greater use of "[a]wareness and knowledge sharing campaigns . . . [which] will help change the mind-sets and perception of the private sector in Rwanda and the rest of the region on the use of arbitration to resolve commercial disputes."\textsuperscript{202}

This can be done in part by showing the positives afforded by KIAC arbitration.\textsuperscript{203} In choosing an institution, parties want a likelihood of reaching a desired outcome, at a low cost.\textsuperscript{204} In fact, businesspeople believe that cost is the biggest deterrent to international arbitration.\textsuperscript{205} Fortunately, one of KIAC's goals was to be a lower-cost provider,\textsuperscript{206} especially compared to other international arbitration centers.\textsuperscript{207} Another plus is that KIAC offers parties the ability to add a mediation-arbitration clause to their contracts, in which a dispute can start at mediation and move to
arbitration if not settled within thirty days.\footnote{See Mediation Clause, KIAC, http://www.kiac.org.rw/spip.php?rubrique28 (last visited Jan. 15, 2017).} Furthermore, KIAC, with the consent of both parties, can use other forms of ADR, such as mediation or conciliation, before or during the arbitration to help encourage settlement of disputes.\footnote{See Law Establishing KIAC, supra note 36.}

These efforts have already started to occur in East Africa, as evidenced by events such as the East African International Arbitration Conference.\footnote{See Agnes Gitau & Wairimus Karanja, The Place of International Arbitration in Investment in East Africa, ADDLESHAW GODDARD LLP, https://www.addleshawgoddard.com/globalassets/insights/africa-2016/the-place-of-international-arbitration-in-investment-in-east-africa.pdf (last visited Nov. 5, 2016) [hereinafter The Place of International Arbitration] ("The East African International Arbitration Conference (EAIAC) was launched four years ago to promote the development of Arbitration practice in East Africa and bring together . . . regional and international arbitrators, [and] legal practitioners to share best [practices] and network."); About ICCA 2016 Mauritius: The First African ICCA Congress, http://www.iccamauritius2016.com/About.aspx (last visited Nov. 5, 2016). The International Council for Commercial Arbitration held its 2016 Congress in Mauritius in order to bring people together to "develop the involvement and influence of African governments, companies, practitioners and arbitrators in international arbitration."} Rwanda has made substantial efforts in doing this as well,\footnote{Annual Report July 2015–June 2016, KIAC, http://www.kiac.org.rw/IMG/pdf/annual_rept_2015_2016_web.pdf (last visited Feb. 2, 2017) From 2015–2016, KIAC conducts what it calls "Intensive Awareness Campaigns." One of the purposes of these campaigns was to portray Rwanda as a great venue for international arbitration. KIAC employees met with delegates from other nations and organizations in order to accomplish this. KIAC employees also met with businesspeople to explain the benefit of having arbitration occur under KIAC rules. KIAC advertised on African radio, television, and online. KIAC undertook numerous other actions in order to spread awareness of Rwanda as a venue and KIAC as an institution. See also Rwanda Promotes Arbitration at International Conference Organized by Kigali International Arbitration Center (KIAC), KIAC, http://www.kiac.org.rw/IMG/pdf/press_release-arbitration_conference_2014.pdf (last visited Nov. 5, 2016) ("The conference is part of KIAC's continuous efforts to institutionalize knowledge sharing, exchanging experiences and building partnership and cooperation on international Arbitration practice that will improve the profession in Rwanda as well as other African countries."); see also The Place of International Arbitration, supra note 210. The 2017 East African International Arbitration Conference is being held in Kigali.} and they certainly have seemed to succeed.\footnote{See Olive Monalisa Karekezi Kemirembe, Kigali Int'l Arb. Ctr., Communication and Perception Impact End Line Study on Arbitration and Other Alternative Dispute Resolution (ADR) Services in Rwanda (July 2015), http://www.kiac.org.rw/IMG/pdf/-28.pdf.} During an intensive marketing campaign directed at small and medium-sized enterprises ("SMEs") in the area, Rwanda made efforts to raise awareness of KIAC and arbitration.\footnote{Onyema, supra note 139.} In addition to raising awareness, the campaigns led to increased KIAC usage and parties even mentioned they would push more for KIAC arbitra-
tion in future contracts. These types of campaigns need to be employed by the other EAC nations to raise awareness, starting at the local level, which will likely have a snowball effect.

EAC parties must also help convince the other party to step out of their comfort zone with KIAC. It already has the groundwork established for becoming a great international arbitration institution, and is slowly increasing its caseload. In addition to the institution itself, the arbitrators are of extreme importance, and parties tend to nominate those with the most experience and reputation. Unfortunately, this may translate to parties appointing non-African arbitrators. While ultimately it would be optimal to push for the appointment of African arbitrators, it may be necessary for the EAC party to concede this for the time being, if only in order to help establish KIAC’s reputation. In enabling this, KIAC already allows parties to nominate arbitrators not on the KIAC panel as long as they qualify under KIAC criteria.

To aid this process, the EAC should create incentives for arbitrators as well as businesses for utilizing KIAC. For example, in a move to attract arbitrations, Singapore passed laws including tax-breaks on income of Singaporean practitioners related to Singapore-seated arbitrations and removed temporary work visa requirements for foreign arbitrators. Rwanda has already created serious tax incentives for foreign investment and has demonstrated its desire for KIAC to take off, so this seems fitting. Additionally, although Rwanda waives visas for citizens of certain countries, the citizens of the non-exempt countries still have to go

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214 Id. at 175.
215 Id. at 177. The EAC must make a strong push for arbitration, and raise the awareness of its strong institutions and the viability of KIAC as the go-to institution for the region to its SMEs. In turn, “once SMEs start participating in arbitration, this will influence other groups contracting with them at the local, regional and international level, and lead to an increase in the caseload of these arbitration institutions.”
216 As mentioned numerous times throughout the Note, parties tend to choose centers with an established reputation. These centers include LCIA, ICC, and SIAC.
217 See Panel of International Arbitrators, KIAC, http://www.kiac.org.rw/IMG/pdf/panel_of_international_arbitrators_2016.pdf (last visited Jan. 31, 2017). This should not lead readers to the conclusion that the arbitrators on KIAC’s international panels are not qualified. As mentioned throughout, panelists must meet certain criteria before being eligible. KIAC’s panel already has arbitrators well qualified for the disputes KIAC will likely hear. Of the panelists, 14 are experts in mining disputes, 39 are experts in construction disputes, and 15 are experts in the fields of energy and/or oil & gas.
218 See KIAC Arbitration Rules, supra note 43. Articles 12–15 of the Arbitration Rules allow parties to nominate.
219 See Karton, supra note 182, at 69–70.
220 See Investment Climate Statements for 2016, supra note 34.
through a visa application process.\textsuperscript{221} Thus, I also believe Rwanda and other EAC nations should pass laws exempting or easing the visa procedures for KIAC arbitrators and relevant parties to KIAC arbitration.\textsuperscript{222} That being said, the more that KIAC grows, the more it will attract famed arbitrators. In a call for international arbitrators for its panel, many joined KIAC for lower fees than at other large institutions, potentially as an opportunity to be on the forefront of the developing African arbitration market.\textsuperscript{223} For the reasons mentioned throughout, efforts should be made to unify the EAC in choosing an arbitration institution and seat, and those should be Rwanda and KIAC.

\section*{V. Conclusion}

Africa and the EAC are making a strong comeback, and growth through foreign business and investment has been continuous. The resources and attraction are there, yet one of the major roadblocks is that companies still have a skewed perception of the continent and a mistrust of the court systems. The clear answer is arbitration.\textsuperscript{224} However, the arbitration must now be on the EAC’s terms. Too long have contracts with African parties used foreign institutions and foreign seats, and the EAC must push in the other direction by taking pride in their sovereignty.\textsuperscript{225} This push must be unified, and they must have a say in international arbitration.\textsuperscript{226} The EAC must market Kigali and KIAC as its face: these are safe

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\textsuperscript{222} See \textit{Friedland}, supra note 154, at 52 ("It is evident that contract drafters should assure that they choose a venue where there is no risk that witnesses will be barred from entry."); see \textit{also Born}, supra note 154, at 125 ("Another consideration can be visa requirements, which may make attendance at arbitral hearings in some locations difficult for both arbitrators and counsel.").

\textsuperscript{223} See \textit{Uwicyeza}, supra note 213.

\textsuperscript{224} See \textit{Jason Fry, Arbitration and Promotion of Economic Growth and Investment}, 13 \textit{EUR. J.L. REFORM} 388, 395 (2011). This process is cyclical: "[I]nternational arbitration promotes economic growth as much as it is a product of economic growth and globalization.”

\textsuperscript{225} See \textit{Yusuf}, supra note 91 ("The absence of Africans from the process raises issues of legitimacy and affects ... the taking of ownership of arbitration by African countries as an ADR mechanism."); see \textit{also Julius Bizimunyu, Rwanda: Senior Lawyers Discuss Investment Arbitration, All Afr.} (Aug. 5, 2016), http://allafrica.com/stories/201608050485.html. At a conference in Rwanda, a renowned international arbitration lawyer was quoted as saying, "It is imperative that the trend changes to ensure African nations handle most of their cases.”

\textsuperscript{226} See \textit{Tiewul & Segah}, supra note 199, at 418. Participation by African states can be a crucial element in the development of international commercial arbitration law.
seats and will guarantee that property rights will be upheld. Consequently, East African parties must use entrance into their economies as a bargaining chip for greater say in arbitration contracts. “If the 21st Century is indeed to be ‘Africa’s century,’ the development of international arbitration in Africa must be a key part of this.”

227 See Dutson, supra note 53.