



L-R Edward Fashole of Luke & Associates in Botswana and Elikem Nutifafa Kuenyehia of Oxford & Beaumont in Ghana are part of a panel on Doing Deals in Africa: What is Different and What is Not. The panel is part of the 3rd Annual Conference of the Atlanta International Arbitration Society, held November 2nd thru the 4th in Atlanta Ga.

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At a conference Monday on African arbitration, participants from Africa said that several countries on the continent are developing the legal infrastructure and local capabilities for commercial arbitrations, and they encouraged U.S. investment in their countries.

The conference, held at the Buckhead Marriott, attracted about 100 people from seven sub-Saharan African countries—Botswana, Ghana, Nigeria, Cameroon, Kenya, South Africa and Rwanda—as well as Europe, China and India. It was organized by the Atlanta International Arbitration Society (AtlAS) as part of its continuing push to put Atlanta on the map as an arbitral venue, or seat.

As African economies heat up, they are attracting more foreign investment—which means more potential contract disputes and arbitrations. In Ghana, foreign direct investment has tripled in the last 10 years, international firms have opened offices and local firms have "scaled up," said Elikem Nutifafa Kuenyehia of Oxford & Beaufort in Accra.

"When you talk about Africa and business, the 'corruption' word always comes up," Kuenyehia said, but he downplayed concerns, saying that the courts operate properly in his country.

The perception of corruption can be worse than the reality, said Edward Fashole-Luke II from Luke & Associates in Botswana.

Botswana was listed as the least corrupt country in Africa in Transparency International's most recent Corruption Perceptions Index. Noting that Botswana has a credit rating on par with Japan, Fashole-Luke questioned why his country has not attracted more foreign investment.

Fashole-Luke cited a World Bank report that seven of the 10 fastest-growing economies in the world are in Africa, often stimulated by government infrastructure projects for transportation, electricity and agricultural

development.

"There are phenomenal returns to be made," he said. "The Chinese are in Africa in a very big way," he said, but U.S. investment has lagged. "The time has now come for our friends and partners in the United States to come do business in Africa."

"America has always been quite liked and admired in Africa, but America has ignored Africa, perhaps more than they should have," said Phillip Alier, an arbitrator with Tanfield Chambers in London who is from Kenya. "It is our preference to deal with people we know and like," he said.

He added that some high-profile Chinese road and stadium projects have run over budget, missed deadlines and in some instances been of questionable construction quality.

African disputes historically have been arbitrated in London and Paris, reflecting the continent's colonial history, but new options for seats, both in Africa and elsewhere, are proliferating.

Government contracts are starting to specify local arbitral seats, as countries develop arbitration capabilities, Alier said. There already are some well-established regional venues, he added, such as Mauritius, which in 2011 opened the Mauritius International Court of Arbitration in partnership with the London Court of International Arbitration.

An African government or state-owned company contracting with a U.S. company will not locate an arbitration in the U.S. because it's not neutral ground, said one attendee, James Lalumiere, the president of Project Development International in Dunedin, Fla. He has done infrastructure and public services deals with public entities in Africa.

Instead, African entities in anglophone countries generally choose London for arbitrations because it's neutral and there is history and familiarity, Lalumiere said. If his company is funding a deal, he said, it has more leverage in choosing the seat. "If it's my money, I'm going to be more assertive—and they're going to be more receptive," he said.

Lalumiere recently worked on a deal to supply 125 firetrucks to Ghana. The Ghanaian officials wanted to locate any potential arbitration in Ghana, but he persuaded them to compromise on the London Court of International Arbitration with UNCITRAL rules (model rules that are widely used internationally).

"If I've got to compromise, I trust London, too," he said.

On the other hand, Atlanta potentially could be a seat for a Chinese company in a dispute with an African entity, said Glenn Hendrix of Arnall Golden Gregory, who is AtlAS's president.

African arbitration business is one of many options that AtlAS is exploring, said Whit Engle, an independent arbitrator and AtlAS board member who helped organize the conference. Asia also presents possibilities. Engle said Korean is the third-most commonly spoken language in Georgia after English and Spanish, noting the plethora of Korean car and car-parts makers in the Southeast.

AtlAS hopes to attract commercial arbitrations from all over the world, he said. "We want to make Atlanta the best place to resolve disputes, regardless of where they originated."

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Roy E. Hadley Jr.

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Phillip Alier of Tanfield Chambers, London

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L-R Shelby Grubbs director of GSU's International Arbitration Center and Glenn Hendrix of Arnall Golden Gregory

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