

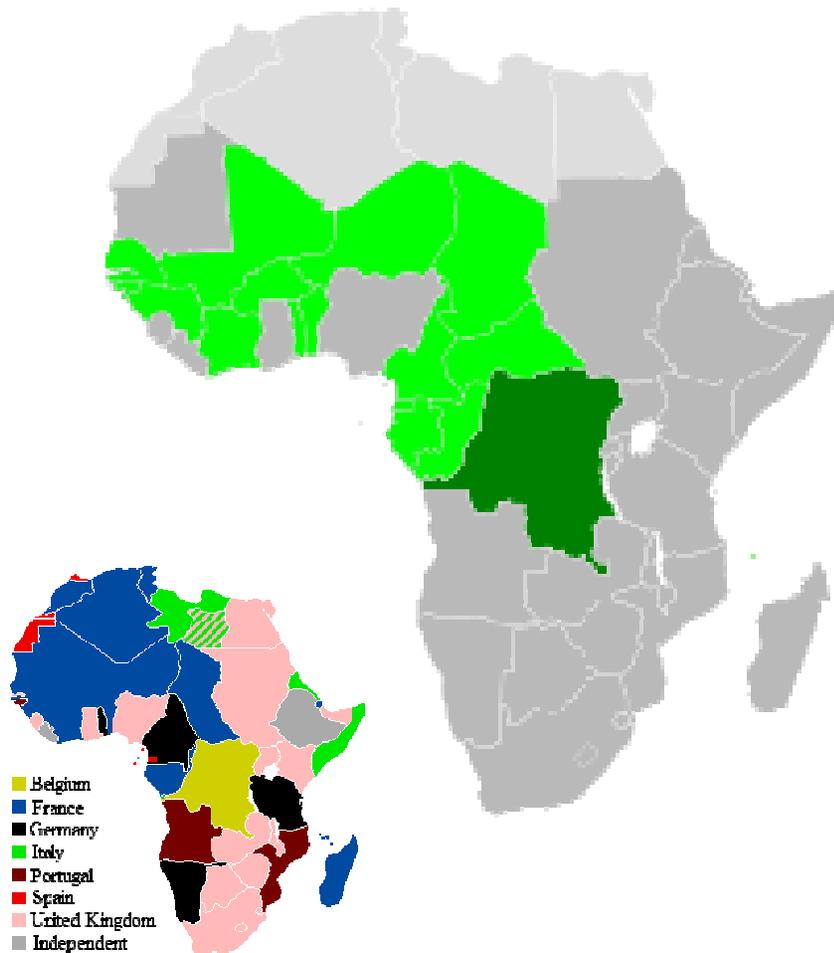
# The Elephant Never Forgets



# African Colonial Heritage



# The Organisation For The Harmonisation Of Business Law In Africa (Ohada)



- Common Court Of Justice
- Uniform Business & Commercial Laws
- Enforcement Of Arbitral Awards

(Useful against non-NYC signatories and non-model law parties but bilingual Mauritius not a member)

# Dallah Real Estate & Pakistan [2010] 1 All ER 485

“It is true that successful resistance by the Government to enforcement in England would not have the effect of setting aside the award in France. But that says nothing about whether there was actually any agreement by the Government to arbitrate in France or about whether the French award would actually prove binding in France if and when that question were to be examined there. Whether it is binding in France could only be decided in French court proceedings to recognise or enforce, such as those which Dallah has now begun. I note, however, that an English judgment holding that the award is not valid could prove significant in relation to such proceedings, if French courts recognise any principle similar to the English principle of issue estoppel (as to which see *The Sennar (No. 2)* [1985] 1 WLR 490).”

**Lord Mance [29]**

# Issue Estoppel – Legal Principles

1. that the judgment must be given by a foreign court of competent jurisdiction;
2. that the judgment must be final and conclusive and on the merits;
3. that there must be identity of parties; and
4. that there must be identity of subject matter, which means that the issue decided by the foreign court must be the same as that arising in the English Proceedings

# Sub-issues under 2 (above)

- i) It is irrelevant that the English court may form the view that the decision of the foreign court was wrong either on the facts or as a matter of English law.
- ii) The courts must be cautious before concluding that the foreign court made a clear decision on the relevant issue because the procedures of the court may be different and it may not be easy to determine the precise identity of the issues being determined.
- iii) The decision of the court must be necessary for its decision.
- iv) The application of the principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice.



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# Model law article 8(1)

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

# New York Convention Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

# Ecobank Transnational Incorporated v Tanoh [2015] EWCA 1309

Managing Director accused of improper conduct in the course of his employment amounting to incompetence and dishonesty in breach of Executive Employment Agreement (“EEA”) which allegations were published in the *Financial Times* and on *Bloomberg*.

# Arbitration Agreement

*“Any and all disputes, controversies or claims arising under or in connection with this Agreement, including without limitation, fraud in inducement of this Agreement, or the **general validity or enforceability of this Agreement shall be submitted to binding arbitration ... The arbitration shall be conducted in London, England under the UNCITRAL Rules. ...”**. (EEA Article 26)*

# Governing Law and Jurisdiction

*“This Agreement shall be **governed by the laws of England** and subject to clause 26 above, the parties hereby submit to the exclusive jurisdiction of the English Courts.”*

(EEA Article 28)

# Ecobank Transnational Incorporated v Tanoh

## **Cote D'Ivoire 4 April 2014**

- Defamation proceedings against Bank and Director and Shareholder (non-signatory third parties).
- Bank required by Court to plead to merits
- tribunal without jurisdiction over third parties.
- 3 February 2015 judgment for the claimant for 7.5 billion CFA francs or US\$15,000,000.00

## **Labour Court in Lome Togo 12 May 2014**

- Breach of contract proceedings against Bank.
- Bank required by Court to plead to merits; intended to but then changed its mind.
- Court rules arbitration agreement unenforceable against weaker party and therefore void.
- 15 January 2015 judgment for claimant for 5,773,786,000 CFA or US\$11,547,572.00

# The Elephant in the Room



# Section 32 Civil Jurisdiction and Judgments Act 1982

(1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings **shall not be recognised or enforced** in the United Kingdom if—

(a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and

(b) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and

(c) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court.

(2) Subsection (1) does not apply where the agreement referred to in paragraph (a) of that subsection was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given.

**(3) In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2).**

# Issue on Appeal

Were the claims in Togo and Côte d'Ivoire within the scope of the arbitration clause?

Held: English Law was applicable to construction of the Togolese Ordinance, the Articles of Association and the Executive Employment Agreement establishing Ecobank's headquarters which gave it primacy over Labour Law and thereby was not in conflict.

# Kenya, Uganda & Tanzania Civil Procedure Acts

“A foreign judgment shall be conclusive as to any matter [*thereby*] directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title, except -

- (a) where it has not been pronounced by a court of competent jurisdiction;
- (b) where it has not been given on the merits of the case;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of [**STATE**] in cases in which such law is applicable;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
- (e) where it has been obtained by fraud;
- (f) where it sustains a claim founded on a breach of any law in force in [**STATE**].



**KEEP  
CALM  
AND  
ARGUE  
ESTOPPPEL**

# Walk Away



# Phillip Bliss Aiker

**TANFIELD CHAMBERS  
2-5 WARWICK COURT  
LONDON WC1R 5DJ  
ENGLAND  
UNITED KINGDOM**

**ARBITRATION  
CHAMBERS  
ESBC  
EDEN SQUARE  
7<sup>TH</sup> FLOOR  
BLOCK 1  
CHIROMO ROAD  
NAIROBI  
KENYA**