African Legal Developments in the United States and Sub-Saharan Africa

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Legal developments in Africa are often difficult to ascertain because of limited access to information. Therefore, we cover two areas of the law in this article: intellectual property rights and the harmonization of business law in Africa. In addition, we provide information about the African Growth and Opportunity Act, enacted by the U.S. Congress in 2000. The act is the first substantive trade law passed in the United States that deals specifically with sub-Saharan Africa.

I. U.S. Congress Passes the African Growth and Opportunity Act of 2000

A. BACKGROUND

On May 18, 2000, the African Growth and Opportunity Act (AGOA)[1] was signed into law as part of the Trade and Development Act of 2000. The AGOA, introduced in the 106th Congress by Rep. Philip Crane (R-IL), is a milestone in trade relations between the United States and Africa, authorizing a new trade and investment policy toward the countries of sub-Saharan Africa. Similar African free-trade bills were introduced in the 104th Congress and 105th Congress but did not pass both the House and Senate.

The AGOA provides greater access to the U.S. market by extending trade benefits such as duty-free imports to eligible sub-Saharan African countries. It also promotes sustainable economic growth and development in sub-Saharan Africa while encouraging trade and investment between the United States and the forty-eight countries of sub-Saharan Africa.

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1. Title I – Extension of Certain Trade Benefits to Sub-Saharan Africa, Trade and Development Act of 2000, 19 U.S.C. §§ 3701–3741 (West Supp. 2000).

B. Country Eligibility

The AGOA authorizes the U.S. president to designate a sub-Saharan African country as eligible for AGOA trade benefits if the country meets certain criteria, including having established or progressing toward establishing a market-based economy, the rule of law, political pluralism, due process, and equal protection under law.[2] Other criteria include making progress toward eliminating barriers to U.S. trade, adopting economic policies to reduce poverty and expand private enterprise, protecting human rights, and not engaging in activities that undermine U.S. national security.[3] In October 2000, President Clinton designated thirty-four countries as eligible under the AGOA.[4] In January 2001, Swaziland became the thirty-fifth designated beneficiary.

C. Promotion of U.S. and Sub-Saharan Africa Trade

The AGOA requires the president to establish within a year of enactment a U.S.-Sub-Saharan Africa Trade and Economic Cooperation Forum in consultation with Congress and the governments concerned.[5] The forum will meet annually and serve as a venue for regular dialogue to foster closer economic ties between the United States and sub-Saharan African nations.

The act also contains provisions that encourage the negotiation of free trade agreements with interested countries "to serve as the catalyst for increasing trade between the United States and sub-Saharan Africa and increasing private sector investment in sub-Saharan Africa."[6] In this regard, the president is required to develop a plan for entering into trade agreements with interested eligible countries and to submit the plan to Congress within a year.[7]

D. Duty-Free Treatment of Certain Products from Africa

The AGOA extends duty-free treatment under the Generalized System of Preferences (GSP) for eligible sub-Saharan African nations until September 30, 2008—seven years longer than all other countries.[8] Designated eligible countries are also exempt from the cap on GSP benefits under competitive need limitations.

The AGOA also authorizes the president to grant duty-free treatment to items grown, produced, or manufactured in eligible sub-Saharan African countries that are currently excluded from the GSP program if he receives advice from the U.S. trade representative and the U.S. International Trade Commission that imports of such products are not import sensitive when imported from sub-Saharan Africa.[9] In December 2000, more than 1,800

2. 19 U.S.C. § 3703.

3. *Id.*

4. Benin, Botswana, Cape Verde, Cameroon, Central African Republic, Chad, Republic of Congo, Djibouti, Eritrea, Ethiopia, Gabon, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Tanzania, Uganda, and Zambia.

5. *See* 19 U.S.C. § 3704.

6. *Id.* § 3723(a).

7. *See id.* § 3723(b), (c).

8. *See* 19 U.S.C. § 2466b (Trade Act of 1974 as amended in 2000 by AGOA).

9. *See id.* § 2466a.

tariff line items were extended zero-tariff treatment if exported to the United States from AGOA-eligible countries. These items are in addition to the approximately 4,600 products already on the standard GSP list. The previously excluded products include a variety of items, such as certain cheeses, organic chemicals, luggage, watches, clock parts, and flatware.

Additionally, the act provides preferential treatment of certain textiles and apparel.[10] In particular, apparel assembled in eligible beneficiary sub-Saharan African countries from U.S. fabric or yarn may be exported quota-free and duty-free to the United States. Apparel assembled from African regional fabric or yarn in eligible countries is subject to a cap of 1.5 percent in the first year to 3.5 percent in seven years. However, there is a special rule for beneficiary countries designated as lesser developed countries (LDCs). LDCs will enjoy duty-free and quota-free access of apparel articles assembled in their countries until 2004 regardless of the country of origin of the fabric used to make such articles. Of the thirty-five eligible beneficiary countries, twenty-eight are considered to be LDCs.[11] To guard against transshipment, the AGOA contains provisions for import-monitoring and enforcement measures, including country-of-origin documentation.[12]

II. International Intellectual Property Rights in Africa

A. Introduction

Intellectual property rights have become increasingly more important in the global marketplace as rapid technological advances continue to emerge. Adequate mechanisms of protecting industrial, literary, and artistic property rights, whether national or foreign, are essential to encouraging innovation and creativity. In Africa, a strong and stable intellectual property infrastructure will undoubtedly help promote social, economic, and cultural development. In addition, the adoption of internationally accepted standards of protection and enforcement will bring new and improved products to African consumers and also facilitate foreign investment and the transfer of valuable technology.

Many African nations are aware of the advantages of regional and global cooperation in the field of intellectual property, such as the coordination of legislative and regulatory development. Therefore, a majority of African countries belong to the World Intellectual Property Organization (WIPO) and, as members of the World Trade Organization (WTO), have ratified the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).[13]

In addition to the WIPO and the WTO, regional African organizations are also becoming more influential. Fifteen anglophone states belong to the African Regional Industrial

10. *See* 19 U.S.C. § 3721.

11. LDCs designated as eligible for AGOA trade benefits are Benin, Cape Verde, Cameroon, Central African Republic, Chad, Republic of Congo, Djibouti, Eritrea, Ethiopia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Tanzania, Uganda, and Zambia.

12. *See* 19 U.S.C. § 3722.

13. Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, *opened for signature* Apr. 15, 1994, 33 I.L.M 81 [hereinafter TRIPS]; implemented in the United States by the Uruguay Round Agreements Act, Pub. L. No. 103–465, §§ 514(a), 108 Stat. 4809, 4976–81 (1994). (The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco, on April 15, 1994.)

Property Organization (ARIPO), based in Zimbabwe, and sixteen francophone, lusophone, or Spanish-speaking countries belong to the Organisation Africaine de la Propriété Intellectuelle (OAPI), based in Cameroon.

While most countries have enacted their own intellectual property legislation with enforcement on a national level, membership in international intellectual property organizations provides guidance and, to a certain extent, legitimacy. Moreover, administrative and procedural burdens are lightened as international intellectual property organizations administer programs that allow multinational, simultaneous filings of international patent or copyright applications.

B. The WTO's Council for Trade-Related Aspects of Intellectual Property Rights

The Council for Trade-Related Aspects of Intellectual Property Rights seeks common international rules of intellectual property rights enforcement and opens the WTO dispute settlement process to its members. The council administers the TRIPS Agreement, an outcome of the Uruguay Round of trade negotiations, which requires equal protection at a national level of both local and foreign intellectual property rights. Although the TRIPS Agreement became effective in 1995, countries designated by the United Nations and the WTO as LDCs—many of which are African—may delay implementation of most of the TRIPS Agreement's provisions until at least 2006.[14]

South Africa is thus far the only African nation that has both modified its legislation and had it reviewed by the TRIPS council. The following WTO African member states are LDCs and are therefore not yet required to fully comply with TRIPS: Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Democratic Republic of Congo, Djibouti, Gambia, Guinea, Guinea Bissau, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sierra Leone, and Tanzania.

African WTO members that are not considered to be LDCs are Botswana, Cameroon, Republic of Congo, Côte d'Ivoire, Gabon, Ghana, Kenya, Mauritius, Morocco, Namibia, Nigeria, Senegal, Swaziland, Togo, Tunisia, Uganda, Zambia, and Zimbabwe. Algeria, Cape Verde, Ethiopia, and Seychelles are WTO observers, and Sudan is currently negotiating membership.

C. World Intellectual Property Organization

The mandate of the WIPO is to promote the protection of intellectual property rights worldwide. The organization administers twenty-one treaties: fifteen on industrial property and six on copyrights. The WIPO's Patent Cooperation Treaty (PCT)[15] provides a uniform worldwide system for simplified, multiple filing of international patent applications. Filings can be made at the WIPO's headquarters in Geneva or at designated offices around the world.

African member states that have ratified the PCT include Algeria, Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Republic of Congo, Côte d'Ivoire, Democratic

14. TRIPS, *supra* note 13, pt. VI, art. 66 (Least Developed Country Members).

15. Patent Cooperation Treaty, Jan. 24, 1978, 28 U.S.T. 7645, 1160 U.N.T.S. 231, *available at* www.wipo.int/treaties/ip/plt/index.html.

Republic of Congo, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Morocco, Mozambique, Niger, Senegal, Sierra Leone, South Africa, Sudan, Swaziland, Tanzania, Togo, Uganda, and Zimbabwe.

The remaining African members of the WIPO that have not ratified the PCT are Angola, Botswana, Burundi, Cape Verde, Equatorial Guinea, Eritrea, Ethiopia, Libya, Mauritius, Namibia, Nigeria, Rwanda, Sao Tome and Principe, Seychelles, Somalia, Tunisia, and Zambia.

D. African Regional Industrial Property Organization

The African Regional Industrial Property Organization (ARIPO), based in Zimbabwe, was created by the 1976 Lusaka Agreement[16] and has fifteen anglophone member states. Because the Lusaka Agreement merely established the ARIPO without elaborating on its powers and functions as an industrial property office, two additional legal instruments—the Harare Protocol[17] and Banjul Protocol[18]—were created to specify the ARIPO's functions. The Harare Protocol allows the ARIPO to examine and grant patents and industrial designs, and the Banjul Protocol allows the organization to examine and register trademarks. The ARIPO also receives international patent applications under the PCT.

ARIPO member states as of December 2000 are Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe. Every ARIPO member state except Somalia is a party to the Harare Protocol. However, only five member states to date have ratified the Banjul Protocol: Lesotho, Malawi, Tanzania, Swaziland, and Zimbabwe.

E. Organisation Africaine de la Propriété Intellectuelle

The OAPI, based in Cameroon, was established by the 1977 Bangui Agreement[19] and has sixteen francophone, lusophone, or Spanish-speaking member states. Its goals include creating uniform and efficient administrative procedures concerning intellectual property

16. With the assistance of the United Nations Economic Commission for Africa (UNECA) and WIPO, a Diplomatic Conference, held in Lusaka, Zambia on December 9, 1976, adopted a draft Agreement on the Creation of the Industrial Property Organization for English-speaking Africa (ESARIPO) [hereinafter Lusaka Agreement]. The Lusaka Agreement became effective in 1978, and in 1985, ESARIPO changed its name to the ARIPO.

17. In December 1982 in Harare, Zimbabwe, the Administrative Council of ARIPO adopted the Protocol on Patent and Industrial Designs within the Framework of the African Regional Industrial Property Organization [hereinafter Harare Protocol]. The Harare Protocol became effective in 1984 and empowers the ARIPO Office to receive and process patent and industrial design applications on behalf of the fourteen states currently party to the protocol.

18. The Banjul Protocol on Marks [hereinafter Banjul Protocol], which was adopted by the administrative council in 1993, establishes a trademark filing system along the lines of the Harare Protocol. Under the Banjul Protocol an applicant may file a single application either at one of the contracting states or directly with the ARIPO office and designate states in the application where the applicant wishes the mark to be protected. The Banjul Protocol came into force on March 6, 1997 for Malawi, Swaziland, and Zimbabwe. Lesotho and Tanzania joined the protocol in 1999.

19. On March 2, 1977, more than a dozen francophone African countries adopted a convention known as the Bangui Agreement, which created the OAPI. The Bangui Agreement revised the Libreville Agreement, which was created on September 13, 1962, by twelve francophone African nations and established the now defunct African and Malagasy Patent Rights Authority.

rights. The OAPI grants and manages patents and titles that give rise to valid rights and protections in all member states.

In 1999, OAPI members revised the Bangui Agreement to bring it in conformity with the WTO's TRIPS standards. The revised agreement will not become effective until it is ratified by ten members. At present, there are only six signatories. Cameroon and Gabon ratified it in 1999 while Côte d'Ivoire, Equatorial Guinea, Mali, and Senegal signed in 2000.

Equatorial Guinea is the OAPI's newest member, acceding in September 2000. Other OAPI member states are Benin, Burkina Faso, Cameroon, Central African Republic, Democratic Republic of Congo, Côte d'Ivoire, Gabon, Guinea Bissau, Guinea, Mali, Mauritania, Niger, Senegal, Chad, and Togo.

F. Focus on South Africa: Pharmaceutical Patent Dispute

In 1997, the South African government amended its Medicines and Related Substances Control Act of 1965 (MRSCA),[20] which led to a legal battle initiated by the international pharmaceutical industry that began in 1998 and continued throughout 2000.[21] In the midst of an ongoing HIV/AIDS epidemic plagued by expensive drug treatments, South Africa introduced legal provisions intended to ensure the supply of more affordable medicines. The addition of section 15C to the MRSCA would allow the health minister to declare that existing patent rights no longer apply to specified medicines. It would also empower the minister to authorize parallel importation of patented or branded drugs from other international markets where the medicine is available at a price lower than it is in South Africa. These provisions as well as others (including section 22F, which would provide for greater use of generic substitutions) have raised the concerns of pharmaceutical manufacturers, particularly those in the United States.

At the onset, the thirty-eight drug firms involved in litigation declared that section 15C, if implemented, would be unconstitutional and in violation of the TRIPS Agreement, to which South Africa gave effect by promulgating the Intellectual Property Laws Amendment Act.[22] The pharmaceutical industry also claimed that section 15C was ambiguous and overly broad and could allow for compulsory licensing. Despite initial pressure from the U.S. government to repeal section 15C, South Africa has held steadfastly. The U.S. government has since taken a more balanced approach, given the gravity of South Africa's HIV/AIDS epidemic.

As of December 2000, section 15C was still not effective because of the pending litigation brought about by the Pharmaceutical Manufacturers' Association (PMA) of South Africa and more than thirty pharmaceutical companies. The South African government has argued that the amendments to the MRSCA are legitimate and will not undermine the country's WTO obligations particularly because the TRIPS Agreement allows for both compulsory licensing and parallel imports.

20. Medicines and Related Substances Control Amendment Act (Act No. 90 of 1997) to amend Medicines and Related Substances Act (Act No. 101 of 1965) (SA).

21. The pharmaceutical company lawsuit against the government of South Africa was filed by 42 applicants (38 drug companies) against 10 respondents (Case no. 4183/98, Notice of Motion, Feb. 18, 1998, High Court of South Africa, Transvaal Provincial Division).

22. Constitution of the Republic of South Africa (Act No. 108 of 1996); Intellectual Property Laws Amendment Act (Act No. 38 of 1997) (SA).

In addition to the PMA, firms suing the South African government include Glaxo-SmithKline, Bayer, Bristol-Myers Squibb, Eli Lilly, Merck, Novartis, Wyeth, and Warner-Lambert. The case will be heard in the Pretoria High Court in spring 2001, bringing the three-year dispute one step closer to resolution.[23]

III. The Treaty for the Harmonization of Business Law in Africa and the OHADA Court

A. Introduction

Inadequate legal frameworks in many African countries have caused serious harm to regional policies for trade and investment. As a result, some African countries are seeking to harmonize various legal instruments to facilitate regional economic cooperation. The Treaty on the Harmonization of Business Law in Africa[24] was signed on October 7, 1993, at the conclusion of the Francophone Summit held in Port Louis, Mauritius. The contracting states were Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Gabon, Equatorial Guinea, Mali, Niger, Senegal, and Togo. The treaty became effective in July 1995 after ratification by its seventh member. The objective of the treaty is to harmonize business laws in member states by elaborating and adopting simple, modern, and common rules; setting up appropriate judicial procedures; and encouraging arbitration for the settlement of contractual disputes. The main means of achieving the treaty's objective is the elaboration of legislative texts called *uniform acts*, which are directly applicable in member states to create a common legal framework in Africa.

The Organization for the Harmonization of Business Law in Africa (OHADA) administers the treaty. The OHADA consists of a council of ministers and a common court of justice and arbitration (OHADA court). The council of ministers is assisted by an OHADA permanent secretariat, based in Yaounde, Cameroon.

B. The OHADA Court

The OHADA court, a supranational body based in Abidjan, Côte d'Ivoire, consists of seven judges from contracting states who are elected for seven years by the council of ministers, whose terms are renewable once, and who are chosen from a list of individuals known for their technical competence and integrity. The OHADA court ensures the harmonized interpretation of the treaty, the uniform acts, and the adopted regulations. The court also administers the arbitration proceedings conducted under the OHADA Uniform Arbitration Act.[25]

The OHADA court may be consulted by any member state or by the council of ministers on any question relating to the interpretation or application of the treaty, its instruments, or its regulations. All matters may be referred to the court on appeal. The court rules on

23. 2001 Update: Hearings began in March 2001 in the Pretoria High Court and ended the following month when the pharmaceutical companies reached a settlement with the government of South Africa. In April 2001, the government indicated that it would take immediate steps to implement the Medicine and Related Substances Control Amendment of Act 1997 and draft relevant regulations.

24. Treaty on the Harmonization of Business Law in Africa, *available at* www.ohada.com.

25. OHADA Uniform Arbitration Act, *available at* www.ohada.com.

decisions rendered by the courts of appeal of the member states in all cases that raise questions related to the application of the uniform acts and regulations.

The OHADA court rules under the same conditions with regard to non-appealable decisions from member states concerning the same disputes. According to the treaty, in the event that any appeal is retained, the OHADA court may decide the case itself and rule on the merits. This power is one that national supreme courts do not always have, and the decision, which is enforceable in the territories of all member states, has *res judicata*. In any event, referral to the courts suspends any appeal procedure instituted before a national court against the decision in question except execution proceedings. The extensive power granted to the OHADA court is one of the innovative aspects of the OHADA treaty. This mechanism is very efficient.

The goal of the OHADA court is to promote the harmonization of commercial laws across boundaries. The OHADA treaty also grants to the court important prerogatives in matters of arbitration. This method of dispute settlement clearly constitutes one of the foundation stones of the OHADA system and an entire treaty chapter is devoted to it.

In theory, the subjects brought into line by the OHADA court are restrictively delineated by article 2 of the OHADA treaty. The court's competence to enforce areas that are not specified is one of the most significant challenges faced by the OHADA. It appears from recent opinions rendered by the court that the application of the various uniform acts is to be restrictively interpreted.

1. *Consultative Function and Procedure of the OHADA Court*

The OHADA court can be consulted by any state that is a party to the treaty or upon the request of the council of ministers. The court issues advisory opinions as provided in article 58 of the treaty. The procedure before the court is as follows: (1) a written request is filed, and the clerk of the court notifies the other member states; (2) the president of the court may decide to hold a hearing; and (3) a national jurisdiction can refer an issue to the court but only when it is already seized by a party.

2. *Jurisdiction of the OHADA Court*

Seized in appeal, the judgments referred to the OHADA court should be binding and only related to issues linked to the application of the uniform acts and the decree stating measures. In this case, the OHADA court's decision is substituted for the one issued by the national jurisdictions. The court can be seized either by one of the parties (articles 28 and 29 of the decree stating measures) or at the request of a national jurisdiction.

C. Recent Opinions Issued by the OHADA Court

1. *Advisory Opinion No 02/2000/EP*[26]

An advisory opinion rendered on April 26, 2000, responded to two questions with practical and theoretical interests. The Republic of Senegal, referring to its old legislation, wanted to clarify whether the provisions of article 449 of the Uniform Arbitration Act were applicable to banks and financial establishments. This article stipulates that guarantees subscribed by a company to commit itself toward third parties need a prior agreement from the board of administrators.

26. Advisory Opinion No 02/2000/EP, *available at* www.ohada.com.

The court responded that banks and financial establishments fell within the field of the article 449 (considered a provision of public order) inasmuch as the Uniform Arbitration Act measures apply to commercial companies having their registered office in a member state. Nevertheless, the Court noted that the Uniform Arbitration Act provided derogations, which referred them to national legislative provisions to which some companies falling within the framework of a particular legislation could be subjected. Article 916 of the Uniform Arbitration Act deals with this specific situation. In other words, one had to check in each case the particular legislation and its potential contradictions with the Uniform Arbitration Act by reference to both articles 916 and 449. The OHADA court decided not to make a too restrictive opinion, which might have contradicted with other national or regional legislation that had been enacted in the financial sector.

The other issue on which the Republic of Senegal requested the OHADA court to provide an opinion was whether the position of vice CEO in joint-stock companies was referenced in the OHADA legislation. In its answer, the court decided that the aim of article 909 of the Uniform Arbitration Act was the harmonization of the companies statutory provisions, which were in opposition with the mandatory provisions of the Uniform Arbitration Act. Therefore, it was not possible to institute a vice CEO position on the board.

The answer seems unclear and does not properly respond to the inquiry. The court remains extremely careful in its opinions that do not authorize the expansion of the harmonization process and in particular the objectives of legal security and simplicity.

2. *Advisory Opinion No. 001/99/JN*[27]

In response to a request filed by the Court of Libreville in Gabon, the OHADA court issued an opinion relating to the application of the simplified recovery procedure. Specifically, a plaintiff requested annulment of article 79 of the Uniform Arbitration Act, which concerns enforcement measures. The court decided to strictly interpret the provisions of the Uniform Arbitration Act, which stated that the violation of specific formalities was sanctioned by the annulment of the procedure whether or not it had caused a prejudice to the party (in some states, there is a discretionary power for a judge to consider the violation of the formality and only if it has caused a prejudice to the party).

3. *Advisory Opinion No. 002/99/EP*[28]

The Republic of Mali requested the OHADA court to provide an advisory opinion in relation to compatibility of the Uniform Arbitration Act's article 39, which concerns the simplified recovery procedure and measures of enforcement, with a draft project of a bill. Article 39 states, "The debtor cannot oblige the creditor to receive partially the payment of a debt, even divisible."[29] Article 16 of the draft bill, which dealt with the enforcement procedure in the area of financed housing, stated, "Concerning the execution procedure for financed housing, the debtor cannot ask for days of grace if he has not regularly respected the payment dates paying at least half of the whole debt."[30] The court decided that article 16 of the draft bill was contrary to article 39 of the Uniform Arbitration Act and based its decision on article 10 of the OHADA treaty, which stipulates the superiority of the treaty provisions.

27. Advisory Opinion No. 001/99/JN, *available at* www.ohada.com.
28. Advisory Opinion No. 002/99/EP, *available at* www.ohada.com.
29. OHADA Uniform Arbitration Act, *supra* note 25, art. 39.
30. OHADA Uniform Arbitration Act, *supra* note 25, art. 16.