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June 2011: Arbitration Update

France Unveils New International Arbitration Statute: In January, France adopted a statute governing arbitration that took effect May 1, 2011. The statute is intended to maintain France's role as a leading venue for international arbitration disputes.

Under the statute, the president of the Paris Court of First Instance is given the title of "support judge" and has the authority to support international arbitration proceedings in the event of procedural disputes. The support judge has jurisdiction when arbitration is in France or the parties have selected French procedural law. Remarkably, the support judge also has jurisdiction if one of the parties to the dispute is exposed to a risk of denial of justice, even if there is no link to France.

With respect to discovery, the new law allows parties to the arbitration to ask the support judge to order a third party to produce documents provided they first obtain permission from the tribunal. In addition, an arbitral tribunal can order the parties to produce documents subject to a penalty if they fail to comply. Another notable feature of the statute is that international arbitration clauses no longer need to be in writing, even if concluded before May 1.

The statute also changed the rule regarding suspension of the enforcement of international arbitration awards that are the subject of setting-aside proceedings in France. Under the statute, international arbitral awards are capable of enforcement in France while French proceedings to set aside the award are ongoing. An effort to set aside an award will stay enforcement only if the party seeking the stay demonstrates to the support judge that enforcement would be highly detrimental. The objective is to stop parties from initiating frivolous set-aside proceedings to delay enforcement of an arbitration award. Another provision allows the parties to waive their right to seek set aside. This provision does not, however, impact the parties' right to appeal a court's decision to enforce an award in France.

The law also addresses the availability of conservatory and provisional measures. It provides that once an arbitration tribunal is constituted, the tribunal has the ability to take conservatory or provisional measures. Before the tribunal is appointed, national courts have jurisdiction to order conservatory or provisional measures. These modifications to the law make France an even more attractive venue for parties engaging in international arbitration.

Motions to Vacate Arbitration Awards Are on the Uptick in U.S. Courts: *The National Law Journal* reports a sharp increase in the number of motions to vacate arbitration awards brought in state and federal courts. In 2010, state and federal courts issued 208 written decisions on motions to vacate arbitration awards. That was a 48% increase from 2005, when courts issued 141 decisions on motions to vacate arbitration awards. Although the increase is partially attributable to an increase in the number of arbitrations, the number of challenges are increasing at a faster rate than the number of additional arbitration proceedings.

Nevertheless, the success rate for motions to vacate remains low. The study concluded that only 13.9% of the motions decided in 2010 were successful. In 2005, 13.5% of the filed motions to vacate were successful and 16.8% of the motions to vacate filed in 2000 succeeded. This low rate of success is not surprising given the limited grounds for vacating arbitration awards under the Federal Arbitration Act and other applicable laws.