

2016

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Recommended Citation

Cashman, Michael S. and Lynch, J. Conlan (2016) "INTERNATIONAL INVESTMENT AND ARBITRATION IN SOUTH CAROLINA," *South Carolina Journal of International Law and Business*: Vol. 13 : Iss. 1 , Article 6. Available at: <https://scholarcommons.sc.edu/scjilb/vol13/iss1/6>

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INTERNATIONAL INVESTMENT AND ARBITRATION IN SOUTH CAROLINA

Michael S. Cashman and J. Conlan Lynch***

INTRODUCTION

South Carolina is, and has been for the past several years, one of the most desired destinations for international investment in the United States. Such investment stimulates business and generates substantial jobs in the state. While foreign investment is largely beneficial, it can expose domestic companies to significant risks. As is the case with any business transaction, disputes may arise. Furthermore, many businesses new to this type of commerce lack familiarity with the laws and procedural rules of foreign courts. Navigating them can be perilous. Lack of experience with and knowledge of international legal systems dramatically increases the chances of domestic business' receiving unfavorable results in disputes with a foreign entity. To this inherent problem, this article proposes a solution of international arbitration: a dispute resolution process very familiar to foreign and larger domestic companies, and gaining greater acceptance within the United States.

The first section of this article describes South Carolina's international investment environment and discusses South Carolina's predominant foreign partners and products manufactured in the state, including South Carolina's primary export partners. The second section then illustrates some of the differences in those main trading partners' dispute resolution systems, as well as problems that arise when forced to operate within them. The third section then proposes international arbitration as a solution to these problems and discusses the benefits of using it as a dispute resolution mechanism. The fourth section identifies key considerations when drafting an arbitration agreement. Lastly, the final section discusses some of the major arbitration forums and their default rules to illustrate available options and important considerations for choosing a forum.

I. INTERNATIONAL INVESTMENT AND EXPORT PARTNERS

Globalization is the tendency of businesses to spread beyond domestic markets to markets throughout the world as countries form a more interconnected marketplace.¹ As with any trend, it presents both opportunities and challenges; South Carolina is embracing these opportunities and meeting these challenges. As a result, it has experienced substantial foreign investment and parallel job growth. In order to put South Carolina's development into context, this section first will broadly look at foreign investment in North America and the United States, and then turn its focus specifically to South Carolina.

To better understand the statistics presented in this article, it is necessary first to identify the indicators used to gauge the presence and significance of foreign investment. This article uses Foreign Direct Investment (FDI), and the corresponding jobs created directly as a result of FDI, as indicators of foreign investment. FDI data is based on data announced by a company's press release and measures capital flow through measuring various forms of FDI, including mergers and acquisitions.² FDI is commonly used to measure the success of a geographic region, however, this measure can be misleading.³ Flows such as mergers and acquisitions are driven more by the desirability of the target than by the desirability of the geographic location and, consequently, can misstate the investment in a region that results from attractiveness of the location.⁴ Despite this risk, however, FDI often serves as a good, general indicator of foreign investment. Our second indicator, job creation, will be used

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¹ See *Globalization*, INVESTOPEDIA, <http://www.investopedia.com/terms/g/globalization.asp> (last visited Aug. 4, 2016).

² IBM GLOBAL BUSINESS SERVICES, GLOBAL LOCATION TRENDS 2015 REPORT: FACTS AND FIGURES 10 (Sep. 2015).

³ *Id.*

⁴ *Id.*

to supplement the general indication provided by FDI. Jobs created by FDI is a great measure of foreign investment because job creation indicates whether a “clear decision on the investment location has been made.”⁵ Accordingly, using these indicators together should provide a clear picture of foreign investment. With regard to South Carolina, this article will include a look at the state’s exports; the state’s top investing countries; the countries’ major companies operating in the state and their respective products; and the number of foreign companies operating in the state. These indices are designed to give a more complete picture of the current status of foreign investment in South Carolina.

Before examining these specific indicators, it is important to provide context by framing a current snapshot of global foreign investment: in 2014 the top five countries experiencing foreign-created growth were, in order, Asia, Europe, Latin America & Caribbean, North America, and Africa.⁶ Since 2005, North America in particular has seen steady growth in foreign investment projects and foreign jobs created.⁷ As a top foreign-investment destination in 2014, North America is responsible for 13% of foreign-created jobs, or approximately 133,500.⁸ These statistics show an increase, from 2013 to 2014, of over 30,000 foreign-created jobs and an increase of over 500 foreign-investment projects.⁹ In light of the global labor market average of 144 new jobs per one million inhabitants, North America’s growth is staggering: in 2015, the average was more than doubled, with 377 jobs per one million inhabitants.¹⁰

Although North America is ranked fourth in terms of foreign-created jobs, within North America the United States is, and has been for years, the top recipient of foreign-created jobs.¹¹ The United States hosts 11.6% of the world’s foreign-created jobs, totaling 120,500.¹² The U.S.’ closest rival, China, created only 107,000;

⁵ *Id.* (It is worth noting that the IBM Global Location Trends 2015 Report, which determines and analyzes trends and recent developments in corporate location selection, focuses on job creation as an indicator of foreign investment).

⁶ *Id.* at 13.

⁷ *Id.* at 64.

⁸ *Id.* at 13-14.

⁹ *Id.*

¹⁰ *Id.* at 64.

¹¹ *Id.* at 16.

¹² *Id.* at 16-17.

India comes in next but represents a significant drop with a mere 86,700 foreign-created jobs.¹³ Additionally, the U.S. creates 378 jobs per 1 million inhabitants, which is well above the global average.¹⁴

As this data demonstrates, the United States is one of the top locations globally for foreign investment. Leading the U.S., as well as all of North America, as a destination for foreign investment is South Carolina. South Carolina has 1,653 jobs created per one million inhabitants, well exceeding the next closest states, Tennessee, by almost 400 additional jobs and Kentucky, by over 600 jobs per million.¹⁵ Significantly, South Carolina more than doubled its foreign-created jobs between 2013 and 2014.¹⁶ As of 2015, South Carolina has ranked first in job creation as a result of foreign investment for three of the previous four years.¹⁷ Further, in 2015, South Carolina was deemed the winner of the inaugural FDI championship.¹⁸ This championship evaluates which states attract the most FDI projects and “interstate investment on a per-capita basis.”¹⁹

Shifting from the examination of how South Carolina compares to other FDI players, this next section breaks down the international activity of South Carolina independent of those other players. As noted above, FDI is the investment of a company based in one country into a company based in another country.²⁰ FDI can be accomplished in many ways, including through an associate company, a subsidiary, a merger, or a stock acquisition.²¹ Over the last five years, South Carolina has had a total of \$11.8 billion of FDI,

¹³ *Id.* at 16.

¹⁴ *Id.* at 68.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Cathy Mullan, *US National Championship: The Winner*, FDI MAGAZINE, (Feb. 15, 2016, 9:00 AM), <http://www.fdiintelligence.com/Locations/Americas/USA/fDi-National-Championship-the-winner?ct=true>.

¹⁹ *Id.*

²⁰ See *Foreign Direct Investment*, INVESTOPEDIA, <http://www.investopedia.com/terms/f/fdi.asp> (last visited Aug. 4, 2016).

²¹ See *id.*

with \$2.2 billion of that coming in 2015.²² The FDI of 2015 represents an incredible 2,000% increase in FDI since 2010.²³ Supporting the data that demonstrates a strong foreign presence in South Carolina is the growth in FDI-created jobs; to reiterate the point made above, job creation is a strong indicator of foreign commitment to a region. In 2015, there were 7,308 FDI-created jobs.²⁴ This is almost a 40% increase from the previous year and more than a 200% increase from 2013.²⁵

South Carolina has steadily attracted interest from a variety of countries and companies. Since 2011, South Carolina has had 31 different countries and 186 different businesses invest in the state.²⁶ In 2015 alone, South Carolina had seventeen different countries and forty-one different foreign businesses actively investing in the state.²⁷ These statistics represent over 50% growth since 2005 and over a 20% increase from 2010.²⁸ Of these different investing countries, Germany is the leading investor followed by Japan, France, Canada, and Sweden.²⁹

Germany, as the leading investor, invested over \$4.1 billion in South Carolina in 2015 and is responsible for 35% of the foreign-created jobs in the state.³⁰ Its largest corporations in the state are Daimler, an automobile manufacturer, and the Schaffler Group, a roller bearing and ball bearing manufacturer.³¹

Japan invested over \$2.8 billion in South Carolina in 2015 and is responsible for 24% of South Carolina's foreign-created jobs.³² Japan has several large companies operating in South Carolina, including Mitsubishi Polyester Film, a plastic manufacturing company; Honda, in its ATV manufacturer capacity; Kobelco

²² See E-mail from S.C. Dep't of Commerce to co-author Conlan Lynch, jmslynch13@gmail.com (Apr. 4, 2016, 4:34 PM) (on file with author).

²³ *See id.*

²⁴ *Id.*

²⁵ *See id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

Construction Machinery, a manufacturer of construction and construction transportation machinery; and Akebono, a brake corporation.³³

France invested over \$1.2 billion in 2015 and is responsible for 11% of South Carolina's foreign-created jobs.³⁴ The major French companies operating in South Carolina are Michelin, a tire manufacturer, and Scheider Electric, which manufactures switchgears and breakers.³⁵

Next largest is Canada, which invested nearly \$700 million in South Carolina and is responsible for 6% of the state's foreign-created jobs.³⁶ The largest Canadian companies are Magna International, Gildan, and Domtar.³⁷ Magna manufactures exterior automobile parts, Gildan makes activewear, and Domtar makes paper products.³⁸

Rounding out the top five is Sweden, with investment of nearly \$600 million and the creation of 5% of South Carolina's foreign-created jobs.³⁹ Sweden's largest companies in South Carolina are Volvo, a car manufacturer; Husqvarna, a lawn and garden equipment supplier; and Electrolux, a refrigerator and freezer supplier.⁴⁰

Commensurate with the rise of foreign investment into the state of South Carolina has been a significant rise in exports out of the state.⁴¹ For example, between 2014 and 2015 South Carolina exports increased by \$1.2 billion.⁴² South Carolina's largest export partners, in order, are China, Germany, Canada, the United Kingdom, and Mexico;⁴³ and its top exports, in descending order, are transportation equipment, machinery (excluding electrical), chemicals, and plastics and rubber products.⁴⁴ Transportation equipment is an enormous industry in the state: in 2015, transportation equipment was a \$15.5

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See id.*

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *Id.*

billion export industry, comprising about 50% of the state's exports.⁴⁵ Machinery and chemicals each totaled about \$2.7 billion in 2015, making up about 9% of South Carolina's exports.⁴⁶ Finally, plastics are comparable to machinery and chemicals combined, encompassing a \$2.4 billion industry in 2015, making up almost 8% of South Carolina's exports.

China is South Carolina's leading export partner; in 2015, an overall value of \$4.4 billion was exported to China.⁴⁷ The leading export to China is transportation equipment, which constitutes 68.4% of the state's exports to China and is valued at \$3 billion.⁴⁸ The state's next largest exports to China are, in order, chemicals, computer and electronic products, and waste and scrap.⁴⁹

Close behind China is Germany, to which South Carolina exported goods with a total value of \$3.9 billion in 2015.⁵⁰ Similar to China, South Carolina's main export to Germany is transportation equipment, which totaled \$3.6 billion dollars and 86% of the State's exports to Germany in 2015.⁵¹ Other products exported to Germany are computer and electronic products, machinery, and paper.⁵²

Next in order of South Carolina's exports is Canada, to which South Carolina exported \$3.7 billion in products in 2015.⁵³ Of those exports, 30% was transportation equipment, 16.1% was plastics and rubber products, 10.9% was machinery, and 8.8% was electrical equipment, appliances and components.⁵⁴

Next, South Carolina exported \$2.8 billion to the United Kingdom in 2015.⁵⁵ The majority of exports to the U.K. was transportation equipment, totaling 86.4% and \$2.6 billion, followed by chemicals, machinery (except electrical), and paper.⁵⁶

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

Finally, in 2015, South Carolina exported \$2.4 billion in products to Mexico.⁵⁷ The make up of exports to Mexico are slightly different than South Carolina's exports to other countries: 32% of the exports were chemicals, 23.7% were plastics and rubber products, 23.6% were transportation equipment, and 10.5% were machinery.⁵⁸

Overall, South Carolina has become a major player in international business with a diverse and growing portfolio. As detailed above, the state is involved in a variety of markets, the result of which demonstrated job creation and growing FDI.

II. COUNTRY COMPARISON: BUSINESS DISPUTES AND RESOLUTION

With South Carolina's substantial growth and exposure in international business there naturally comes an increased amount of international disputes. It is an ordinary and predictable consequence in any transaction that, despite the parties' best intentions, conflicts arise. Furthermore, cultural differences can and often do exacerbate potential disputes, and foreign legal systems frequently diverge significantly from the United States' system in both procedural and substantive law—inexperience with such systems can lead to expensive and unfavorable results. These differences combined with the uncertainty of dispute resolution processes in foreign courts creates increased risk. Obviously, this situation is problematic since businesses prefer to minimize their risk. To illustrate some of these legal and cultural differences and to point to potential conflict resolution problems that may arise, this section will highlight the legal systems of several countries that have been previously discussed in this article as either foreign investors or as export partners with South Carolina.

A. GERMANY

Within Germany, South Carolina's leading investor, traditional litigation in the court system remains the most common method of dispute resolution. While litigation is most commonly used, arbitration—one form of conflict resolution that is commonly referred to as "alternative dispute resolution"—is growing in

⁵⁷ *Id.*

⁵⁸ *Id.*

popularity,⁵⁹ particularly in instances of cross-border disputes.⁶⁰ Despite this growth, arbitration has yet to play a predominant role in dispute adjudication in Germany.⁶¹ Although Germany largely utilizes the litigation model in its court system, German courts contrast with the United States' civil system and other countries that follow the common law tradition because German judges play a more active role in litigation proceedings.⁶² Under the common law tradition, the parties present facts to the judge and the court does no independent investigation.⁶³ Germany's civil law system, on the other hand, is based on the Roman law tradition where the judges will question the witnesses, select and retain experts, and structure the proceedings.⁶⁴ Additionally, the standard of proof in Germany differs from the U.S., with the latter generally following more structured evidentiary procedures and a preponderance of the evidence standard.⁶⁵ In Germany, however, courts will review the entire content of the file and hearings, and, taking into account all of the evidence, must then reach a subjective conviction.⁶⁶

In addition to both the different standard of review and role played by the judges, time limitations on bringing a claim may also cause a problem for those unfamiliar with the German legal system. The limit to bring a claim in Germany, generally, is three years, subject to some variance.⁶⁷ The limitations period begins at the end of the year in which the claim arises, rather than the specific date the claim arises or the date of knowledge of the claim.⁶⁸ This time period can be suspended or paused for a number of reasons including the filing of a claim or the beginning of negotiations between the parties.⁶⁹

⁵⁹ Stefan Rützel, et al., *Litigation and Enforcement in Germany: Overview*, PRACTICAL LAW (Mar. 1, 2016), <http://global.practicallaw.com/1-502-0728>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

The structure of the German court system can have serious business implications, as well. “The local . . . and the regional civil courts [of Germany] have jurisdiction as courts of first instance,” and the value in dispute will determine which court has proper jurisdiction over the claim.⁷⁰ If the claim is worth more than €5,000, then the appropriate court would be the regional civil court.⁷¹ While the court structure alone does not appear to have an impact on foreigners navigating the German court system, the consequences of court placement does yield such an impact. If the case is brought before a regional court, then litigation parties can “only [be represented by] attorneys admitted to the German bar.”⁷² Significantly, there is no exception for foreign lawyers.⁷³ Accordingly, if a South Carolinian business were to find itself a party to litigation in a German regional court, it would have to put its fate in the hands of local legal counsel who may know little about its business.⁷⁴

Similar to the United States, the German system requires “each party to bear the burden of proof for the facts [it plans to assert].”⁷⁵ Dissimilar to the U.S. system, however, “[litigation] parties . . . are free [to choose what information] and documents” they produce in the case in order to meet this burden, and the German system places no obligation on either party to share specific documents, “even if [the documents] are relevant to the case.”⁷⁶ In other words, “[t]he German legal system does not provide for procedures such as pre-trial discovery or full-disclosure.”⁷⁷ Such a rule is in clear contrast with the U.S. legal system where the discovery process tends to be very open; obviously, in German litigation, this rule could make the availability of relevant documents difficult, if not impossible, to obtain. Additionally, because there is no obligation of production, the assertion of any discovery privileges is rare.⁷⁸

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

Another notable difference between U.S. and German courts are the rules regarding summary judgment: “There is no specific rule in German law providing for a summary judgment.”⁷⁹ Parties are allowed to move for summary judgment, but such a motion is limited to evidence already provided and “can be overturned at a later stage with additional evidence.”⁸⁰ Consequently, the German legal system can result in cases being adjudicated less efficiently and at additional costs to inexperienced litigants.⁸¹ Also in regard to efficiency, the German legal system does not allow class actions.⁸² Multiple parties are allowed to “join in one civil action . . . [but the] parties are still treated individually and each party’s claim [will be judged] on its own merits.”⁸³ Parties may only join together if their “asserted claims are legally or factually related.”⁸⁴ Furthermore, under the German legal system, each party bears its own litigation costs; the costs “are allocated between the parties on a *pro rata* basis according to the outcome of the case.”⁸⁵ This is unlike the U.S. system where, absent a statute or contractual agreement, each party bears its own litigation costs.

Choice of law decisions can also be complex.⁸⁶ While the general rule in Germany is that the parties to a contract may agree to use a certain set of laws, this rule is subject to some exceptions, including “certain mandatory provisions of German law.”⁸⁷ Additionally, choice of law clauses will also not apply if the contract violates the Recast Brussels Regulation, which relates to jurisdiction for insurance matters, consumer contracts, and employment contracts.⁸⁸ Service of legal documents may also present a challenge to a party that wishes to file suit.⁸⁹ For an action pending outside of Germany, a party must to adhere to Regulation (EC) 1393/2007 to serve a German company or individual.⁹⁰ Under this regulation,

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ *Id.*

⁸⁹ *See id.*

⁹⁰ *Id.*

“there are mainly two methods of service available: Service through designated agencies [and] [s]ervice by mail.”⁹¹ For actions pending in Germany, the designated service agency is the court.⁹² “Therefore, the transmitting agency in the state where the proceedings are pending must address the request for service directly to the . . . German court, which then effects service.”⁹³

Lastly, and perhaps most significantly, is how a foreign party, such as a U.S. company, may enforce a foreign judgment against a German entity that was granted by a court outside of Germany. “The enforcement of foreign judgments [in German courts] is governed by the European Union [EU], multilateral and bilateral treaties, and domestic procedural rules.”⁹⁴ According to Regulation (EC) 1215/2012, if a judgment is rendered within the EU, then it is “usually enforceable in Germany without any declaration of enforceability.”⁹⁵ On the other hand, enforcement of other foreign judgments outside of the EU, such as by the U.S., is more complicated. Recognition of the judgment is not automatic and “[t]he U.S. judgment must be final and unappealable.”⁹⁶ The party seeking to enforce the judgment in Germany must comply with The Hague Convention, but, even so, the German party will then have an opportunity to argue that the ruling should not be recognized.⁹⁷ This effectively adds a second layer of litigation to any suit against a German party when the other party is located outside of Germany, giving the German party a second chance to avoid or reduce an adverse ruling.

B. JAPAN

In Japan, South Carolina’s second leading foreign investment partner, “litigation is the most frequently used dispute resolution

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Dr. Klaus U. Eyber, *Recognition and Enforcement of US Rulings in Germany*, LEXOLOGY (Oct. 25, 2012), <http://www.lexology.com/library/detail.aspx?g=f41d3414-a8c9-4455-8e90-751170672efe>.

⁹⁷ *Id.*

method to settle large commercial disputes.”⁹⁸ Procedurally, the subject matter of the claim will determine both the statute of limitations (e.g., three years for product liability claims and ten years for contract claims) and the jurisdiction of the court.⁹⁹ Aside from litigation, arbitration is the most frequently used alternative dispute resolution method that Japan utilizes.¹⁰⁰ Japan’s arbitration law, “which is based on the [United Nations Commission on International Trade Law] Model Law on International Commercial Arbitration 1985, became effective in 2004.”¹⁰¹ Since then, “arbitration has become more popular, particularly in relation to large international commercial disputes.”¹⁰² Despite this growth, arbitration is still uncommon with litigation remaining the dominant dispute resolution method.¹⁰³ Also, similar to the German system, foreign attorneys cannot appear in Japanese courts.¹⁰⁴ This remains true even if the foreign attorney is licensed in Japan.¹⁰⁵

A departure from U.S. civil law is Japan’s unique summary judgment procedures. While summary judgment is wholly not an option, “the [Japanese] court can, at its discretion, give an interim judgment on a part of the dispute,” while the remainder of the case is still being adjudicated.¹⁰⁶ The availability of this interim judgment is contingent on whether “that part [of the judgment] is independent from the remaining parts” and whether a separate judgment is feasible.¹⁰⁷ While an interim judgment may be helpful in making proceedings in Japan more efficient, such judgments are quite rare and unlikely to carry the same significant benefit as complete disposal of the matter.¹⁰⁸

⁹⁸ Craig I. Celniker, et al., *Litigation and Enforcement in Japan: Overview*, PRACTICAL LAW (Nov. 1, 2016), <http://uk.practicallaw.com/9-502-0319>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (Noting this prohibition does not apply to foreign attorneys licensed in Japan who are conducting international arbitrations).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

Similar to Germany, discovery in Japan is very limited, especially when compared to discovery in the United States.¹⁰⁹ Specifically, broad requests for documents are not permitted.¹¹⁰ Japan requires great specificity when requesting a document; a discovery request must include: (1) the document title, (2) a summary of the document, (3) the name of the holder of the document, (4) the fact(s) to be proved, and (5) grounds for the document holder to submit the document.¹¹¹ If the requester cannot provide this specificity, “other information that is sufficient for the document holder to identify the requested document must be provided.”¹¹² Typically, Japanese courts request that the parties voluntarily produce documents, using the discovery request as a last resort.¹¹³

Regarding remedies given in Japanese courts, “remedies available in commercial disputes” typically fall into three different categories.¹¹⁴ First, a judgment will “order a defendant to do or not do a certain act . . . [and will typically] include payment of damages, specific performance, permanent injunction, eviction and restitution” as a remedy.¹¹⁵ Second, a declaratory judgment will declare a certain right or legal relationship, and will also declare which party has liability to the other.¹¹⁶ Third, a formative judgment creates a new right or legal relationship between the parties but is only available if the law specifically allows for it.¹¹⁷ One additional, significant difference from the U.S. civil system worth noting is that Japan does not grant punitive damages and will not enforce punitive damages granted elsewhere.¹¹⁸ This difference can lead to a substantially lower monetary judgment than if a judgment is rendered within the U.S.

Similar to the U.S. system, litigated matters in Japan are not considered final and are appealable to both the High Court and the

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *See id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

Supreme Court of Japan.¹¹⁹ The grounds for an appeal to the High Court are broad and include error of fact or law, or both.¹²⁰ In contrast with the U.S. system, grounds for an appeal to the Japanese Supreme Court are limited to a list of particular reasons (e.g., reasons given for a judgment are inconsistent, contravention to the Japanese Constitution, etc.).¹²¹ If a party wishes to appeal to the Japanese Supreme Court based on a reason not specifically listed, it may file a petition for certiorari.¹²²

In further contrast to the U.S. common law system, Japan's system does not allow certain class action suits.¹²³ However, if multiple claimants have common rights or obligations, or have the same factual basis or cause of action, they may file a claim jointly.¹²⁴ Additionally, a party to litigation (party must be eligible to file jointly)¹²⁵ may authorize others, on the party's behalf, to proceed with the litigation and will be bound by the outcome, even without being substantially involved.¹²⁶ In 2007, a "consumer class action system" was introduced into the Japanese legal system and allows an accredited consumer entity to seek an injunction to prevent "certain acts harmful to consumers."¹²⁷ This consumer class action is limited to injunctions as a remedy and, consistent with the Japanese legal system generally, cannot receive damages.¹²⁸ The first injunction granted under this system occurred in 2009.¹²⁹

Generally, the Japanese system does not require the unsuccessful party to completely reimburse the successful party.¹³⁰ Each party is required to pay its own attorney's fees, unless those fees are claimed as damages in certain types of actions.¹³¹ Other litigation costs such as filing fees and witness travel expenses will be paid by the unsuccessful party, unless each party is considered partially at fault;

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *See id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

in these instances, the costs will be apportioned accordingly.¹³²

With regard to disputes with foreign entities, Japanese courts will typically honor express or implied choice of law provisions between two parties.¹³³ Thus, a parties' agreement to a jurisdiction, even if not in Japan, will typically be respected.¹³⁴ However, the choice of law provision will be found valid only if law specifically requires it.¹³⁵ The only time when the jurisdiction-selecting clause will not be honored is when the foreign court is prevented from hearing the case by law or if Japanese law requires a Japanese court to hear the case.¹³⁶ Obviously, conflict of law analysis in Japanese litigation would require specific knowledge of the Japanese legal system, which may not be readily ascertainable to a U.S. company.

Service on Japanese entities or individuals may also be problematic to U.S. companies involved in litigation in Japan. Japan is a party to The Hague Convention, so service of a party in Japan will be governed accordingly by the Convention's provisions.¹³⁷ The serving party must send the document to the Ministry of Foreign Affairs, who will review it and, if deemed acceptable, send it to the Supreme Court of Japan.¹³⁸ Once the Supreme Court has reviewed the document, it is sent to the District Court, which ultimately has jurisdiction over the addressee.¹³⁹

Lastly, Japan will enforce a foreign judgment if the "successful party [obtains] an enforcement judgment in the court in Japan which has jurisdiction over the unsuccessful party or its assets."¹⁴⁰ The judgment will be considered final if the following factors are satisfied: (1) The foreign court had jurisdiction over the case based on Japanese law or a treaty to which Japan is a party; (2) the process was duly served on the unsuccessful party, or the unsuccessful party voluntarily answered the complaint; (3) the foreign judgment and the foreign court proceedings are not incompatible with public policy in

¹³² *Id.* (citing MINJI SOSHŌHŌ [MINOSHŌ] [C. CIV. PRO.] 1996, arts. 61, 64 (Japan)).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

Japan; and (4) the foreign country recognizes a similar judgment rendered in Japan.¹⁴¹ Like Germany, this procedure creates an additional hurdle for a U.S. business to enforce a judgment and may prove difficult to enforce a foreign judgment against a Japanese company.

C. FRANCE

France, South Carolina's third leading foreign investment partner, also predominantly uses litigation and arbitration as its primary dispute resolution mechanisms in settling large commercial disputes.¹⁴² Mediation is not currently a major dispute resolution method in France, but it is growing.¹⁴³ The French litigation system is not characterized as either adversarial or inquisitorial but rather borrows aspects from both systems.¹⁴⁴ Which characteristic predominates is contingent on the stage of the litigation and the matter at hand.¹⁴⁵ The supervising judge typically begins in a managerial role because the parties before him or her are mainly inquisitorial.¹⁴⁶ However, during the trial, the judge's role transforms more into that of a "referee" because the parties have become more adversarial.¹⁴⁷

As with foreign legal systems previously discussed, one potentially major issue that may arise with a foreign party trying to litigate in France is attorney appointment. To litigate in France, parties must have a French qualified attorney registered with the French bar.¹⁴⁸ Foreign attorneys have no "rights of audience" in France unless there exists reciprocity with that foreign nation.¹⁴⁹ In that case, foreign lawyers are allowed to take a special examination

¹⁴¹ *Id.*

¹⁴² Elizabeth Oger-Gross, et al., *Litigation and Enforcement in France: Overview*, PRACTICAL LAW (Jan. 1, 2016), <http://us.practicallaw.com/9-502-0121>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

in order to qualify as lawyers in France.¹⁵⁰ Additionally, attorneys from an EU member state “who have [practiced] law on the basis of their EU qualification for more than three years can be deemed qualified lawyers in France.”¹⁵¹ Like the German rule, this rule forces foreign parties to find a foreign attorney that they are likely unfamiliar with, and who may have limited knowledge of their business. Another facet of the French system that may be problematic, and that is similar to the Japanese procedural rules, is that French procedural rules do not provide for any discovery or pre-trial disclosure procedures.¹⁵² Thus, unlike the U.S. legal system, neither party is required to produce documents that could be damaging to its case.¹⁵³ The only exception to this rule is if a party obtains a production order from a judge.¹⁵⁴ To do so, the party’s request must be specific or it will be denied.¹⁵⁵

Unlike other systems previously discussed, the French system allows for collective redress in “group actions.”¹⁵⁶ A French law passed on March 17, 2014, permits a national association “whose explicit purpose is the [defense] of consumers [to] bring an action before a court of first instance in major civil matters.”¹⁵⁷ This association is responsible for funding any case it brings, and the claim brought can only seek compensation for economic loss.¹⁵⁸ This system follows the opt-in model, meaning a consumer must explicitly choose to join and make a claim.¹⁵⁹ Furthermore, France will generally respect parties’ decisions as to the applicable choice of law in their transactions.¹⁶⁰ This decision needs to be express or demonstrated with reasonable certainty by the contract or the circumstances.¹⁶¹ If no choice has been made, then the law of the

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* (citing CODE DE PROCÉDURE CIVILE [C.P.C.][CIVIL PROCEDURE CODE] art. 24 (Fr.)).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

country that the contract is most closely connected to will apply.¹⁶² However, French rules do place some limitations on a party's choice of applicable law.¹⁶³ For example, if all other elements relevant to the situation are located in a country different than the one whose law was chosen, the court can apply that country's law.¹⁶⁴ Also, when a mandatory law applies, it can override a party's choice of law.¹⁶⁵

Service on a French party is determined by the serving party's country of origin.¹⁶⁶ If the serving party is from the EU, for example, then the party will serve an agency that has been designated as a receiving agency on behalf of the EU.¹⁶⁷ For non-EU members, the filing procedure will depend on whether or not the country has signed the Hague Conference Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.¹⁶⁸ Since the U.S., is a signatory to this Convention, a U.S. company wishing to sue in France would designate a central authority, which would send service to the French designated authority to affect service on the party in question.¹⁶⁹

In regards to recognition of judgments, if there is no specific treaty between nations to govern, then the Recast Brussels Regulation and the New Lugano Convention apply to enforce a foreign judgment in France.¹⁷⁰ The Recast Brussels Regulation "applies to judgments rendered in EU member states" and in foreign states.¹⁷¹ A judgment from a member-state must be recognized in another member-state without any special procedure.¹⁷² The only exception to this rule is if certain requirements are met (e.g., a judgment contrary to public policy).¹⁷³ If the country is a foreign state, like the U.S., a person who wishes to have his or her judgment recognized in France must submit an application which states "that the decision is a judgment in civil and commercial matters that is

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

enforceable in the country where it has been rendered without any further conditions, as well as a short description of the subject matter of the judgment.”¹⁷⁴ The New Lugano Convention, on the other hand, will not apply to the U.S. because it is meant to expand the applicability of the Brussels Regulation to the EU member states Norway, Iceland, and Switzerland.¹⁷⁵ Judgments in these countries will be enforced with limited exceptions.¹⁷⁶

D. CHINA

Dispute resolution with a Chinese party, South Carolina’s fourth leading foreign investment partner, creates different concerns than with any other country previously discussed. While China’s system involves similar differences as those aforementioned countries (e.g., service, rights of appearance, and enforcement issues), those differences are not the main concern when dealing with a Chinese party. Rather, Chinese dispute resolution mechanisms have many external influences that permeate each mechanism and affect the outcome.¹⁷⁷ Commercial disputes between Chinese parties will typically be resolved by either political or commercial pressure, and litigation and arbitration are used only as a bargaining tool, or not at all.¹⁷⁸ These external influences also complicate the analysis of dispute resolution in China and make it more difficult to study the prevalence of different resolution mechanisms. While collecting information on dispute resolutions in China is somewhat problematic because “[i]t is very hard to collect reliable statistics on the rates of litigation as the collection of such statistics and the flow of information in general is very strictly regulated[,]”¹⁷⁹ the information that is available suggests that litigation in China has increased over

¹⁷⁴ *Id.* (citing Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters arts. 37 & 53, Sept. 27, 1968, 1262 U.N.T.S. 153).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Nicolas Groffman and Yu Simin, *Litigation and Enforcement in China: Overview*, formerly available at <http://us.practicallaw.com/8-502-1965?source=relatedcontent> (last visited August 20, 2016)(PDF on file with author).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

the last twenty years.¹⁸⁰ However, measuring the significance of this trend is limited by the external influences. In China, there are often court filings for appearances. A party will file with the court and settle the case, but the resulting settlement is likely due to commercial or political pressure rather than due process.¹⁸¹ Consequently, while statistics could indicate an increased use of litigation, the litigation used may merely be for show and take the form of the litigation while not actually representing an increased use of litigation to resolve the dispute. This process appears to skirt the court almost entirely and does not change when foreign parties are involved in the litigation.¹⁸² When foreign parties are involved, commercial and political forces still play a major role, but the foreign party is unlikely to be aware of these influences, which may make a favorable outcome for those foreign parties less likely.¹⁸³ Further, it is typically not possible to enforce any foreign award in China, including judgments obtained in U.S. or United Kingdom courts.¹⁸⁴ However, Hong Kong and certain Communist countries (like Bulgaria or Vietnam) that have a bilateral treaty with China are able to enforce judgments.¹⁸⁵

Therefore, foreign parties resolving issues with a Chinese party will often be referred to arbitration instead of litigation.¹⁸⁶ While arbitration may create the hope that the political and commercial influences of litigation can be avoided, the result may nevertheless be similar to that of litigation.¹⁸⁷ These commercial and political influences still play a role in the resolution of the issues; significantly, enforcement of the arbitral award, if favorable to the foreign party, is an issue because it is referred to the Chinese court and will likely be subject to similar problems.¹⁸⁸

Mediation is another dispute mechanism used in China.¹⁸⁹ It can be, but is not necessarily, administered by judges.¹⁹⁰ The Communist

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

Party has promoted mediation as being a “harmonious” dispute resolution method.¹⁹¹ However, in practice, mediation is a method for judges to prevent their superiors from reviewing their decisions.¹⁹² Additionally, mediation depends on the cooperation of each party and is not necessarily based on any law.

The Chinese system does provide an alternative from these three flawed systems (litigation, arbitration, and mediation), however: reconciliation.¹⁹³ The parties can voluntarily reach reconciliation without sponsored mediation.¹⁹⁴ Reconciliation is limited because both parties need to be willing to cooperate. Further, the result would be treated as a contract and, if breached, would likely circle back to one of the original three dispute resolution mechanisms discussed above.

Within the Chinese court system, “there is no equivalent [to] discovery or disclosure [in China].”¹⁹⁵ Parties to litigation are “prohibited” from withholding evidence; however, there is no sanction for doing so, which runs the risk of rendering this prohibition meaningless.¹⁹⁶ The court is permitted to conduct its own evidence collection, or a party may request the court to do so.¹⁹⁷ In practice, the court will rarely abide by this request and will have the parties do their own evidence collection.

Like many of the other countries previously discussed, class actions do not exist in the Chinese system.¹⁹⁸ The only thing comparable to a class action in China is “collective litigation.”¹⁹⁹ Similar to the Japanese system, in China’s collective litigation process, “persons can elect a representative to participate in the proceedings.”²⁰⁰

The Chinese system does not have rules dictating how the costs of the litigation will be paid.²⁰¹ Generally, the unsuccessful party will

191 *Id.*
 192 *Id.*
 193 *Id.*
 194 *Id.*
 195 *Id.*
 196 *Id.*
 197 *Id.*
 198 *Id.*
 199 *Id.*
 200 *Id.*
 201 *Id.*

pay the court fees, but those fees are insignificant in relation to the overall costs.²⁰²

As summarized above and depicted in the chart below, navigating the legal systems of foreign countries can be perilous. Not only does the substantive law that would govern a parties' claims and defense likely differ than what many domestic entities are accustomed to, but the procedural rules are diverse. U.S. companies and their agents are thus confronted with puzzling and complex questions, such as how do I serve a party to commence litigation? What documents and evidence would I be entitled to prove my claims or to defend my case? What restrictions apply to my choice of legal counsel? Even if I am successful in the litigation, will I be able to recover on the judgment? In response to these questions, many companies, both foreign and domestic, are turning to international arbitration.

²⁰² *Id.*