

# INTERNATIONAL CONTRACTS AND DISPUTE RESOLUTION

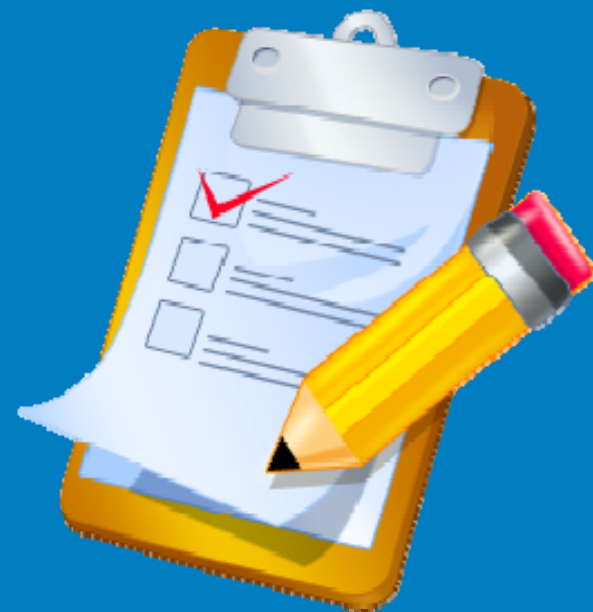
David Dubberly

36th Annual SC International Trade Conference

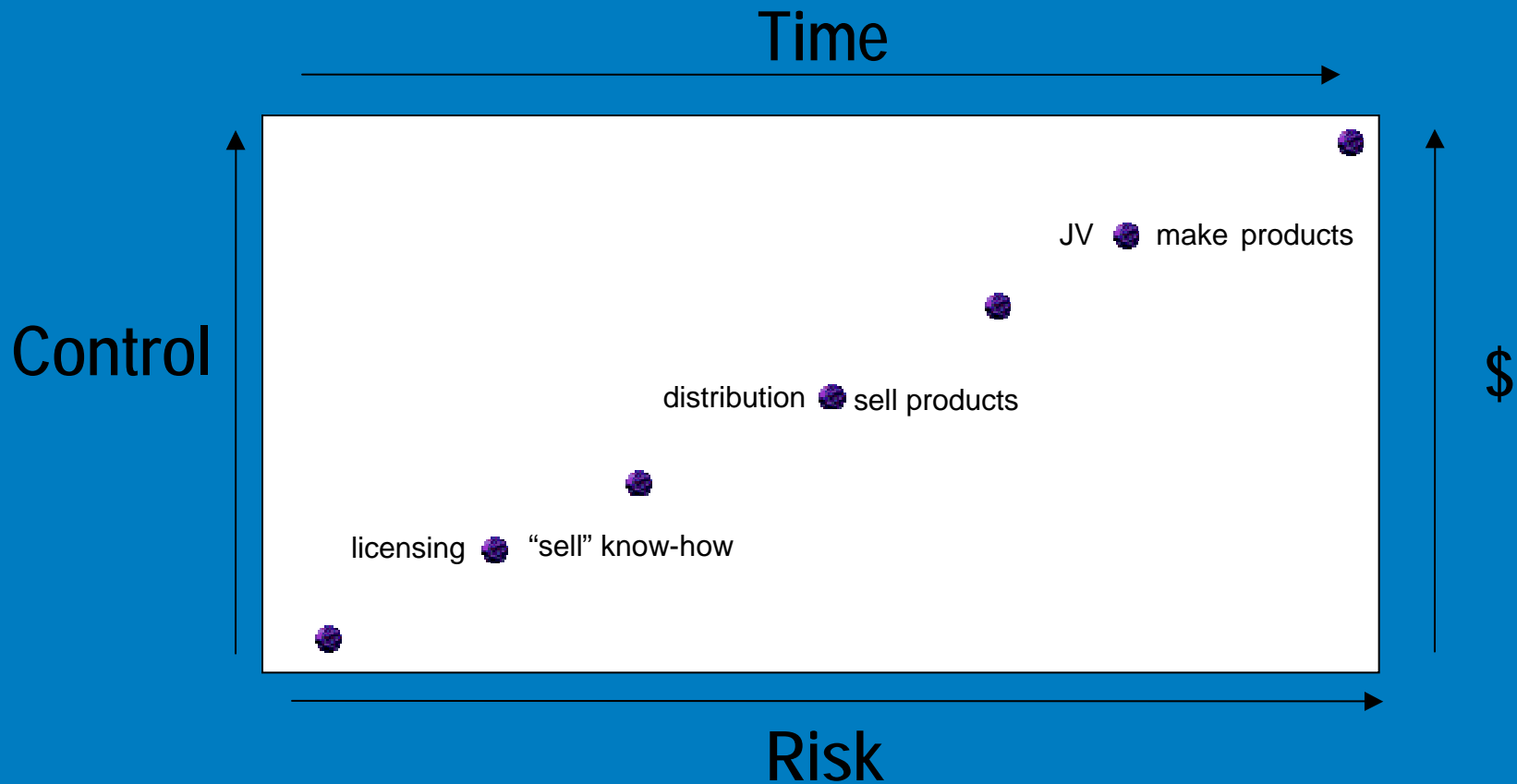
May 26, 2009

# Overview

- Types of int'l commercial arrangements
- Basic contract goals
- Legal questions for target markets
- Contract terms
- FCPA/ITAR
- Litigation and arbitration pros and cons
- Arbitration provisions
- ICC arbitration fees/procedures



# Some Export Contract Options



# Other Types of International Contracts



- Franchising
- Outsource design or manufacture of products
- Architectural, engineering, construction services
- Contractor/employment/separation
- Lease industrial space
- M&A

# Limit Liability

- Start slowly
  - Less complicated alliances
  - Short term
  - Limited territory
  - Close to home
- Insurance
  - Products insured until payment
  - Other coverages
- Due diligence
  - Business
  - Legal



# Limit Liability

- Written agreement
  - Clear, unambiguous language
  - Rights/responsibilities of each party
  - What if happens if unexpected events occur?
  - Payment terms
  - No implied warranties/limitation of liability
  - Term/termination/consequences of termination
  - Avoiding undesired default provisions of local law
  - Corrupt practices/language/arbitration



# Get Paid



- Become familiar with LC's
- Become familiar with INCOTERMS
- Look into Ex-Im, SBA, OPIC financing
- Consider credit and political risk insurance
- Retain security interest in goods until buyer pays
- Specify payments are net of taxes and other local government charges

# Protect IP



- Register trademarks in target markets in your name
  - Patents, copyrights
  - No local partner registration
- Use copyright and confidentiality notices on proprietary information
- Include ND, NC, and IP ownership clauses in contracts
  - Notify of infringement

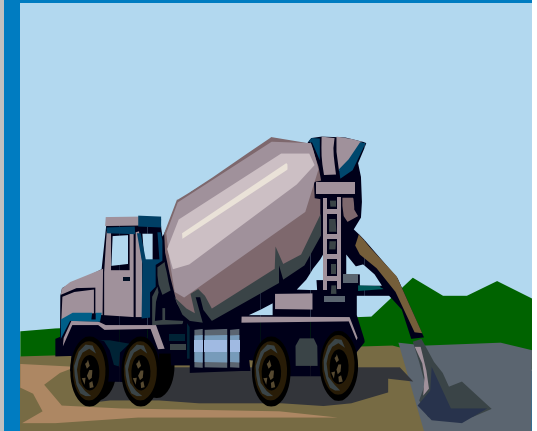
# Local Law Questions



- Registration/approval requirements
- Restrictions on contract terms
- Restrictions on terminating licensing or distribution agreements
- Procedure for registering IP
- Tax rate on royalties/licensing fees
- NC's enforced?
- Arbitration awards enforced?

# Licensing Contract Issues

- What rights granted?
- Your proprietary rights
- Independent contractor
- Term/termination
- Territory
- Exclusivity
- Payment
- Reports
- Insurance, indemnity, warranty



# Distribution Contract Issues



- What products covered?
- Your proprietary rights
- Independent contractor
- Term/termination
- Territory
- Exclusivity
- Payment/retention of title
- Compliance with local law requirements
- Reports
- Insurance, indemnity, warranty

# JV Contracting Issues

- Who will contribute what?
  - Cash? Services?
  - Equipment? Facilities?
  - IP? Technical expertise?
  - Distribution network?
  - Supplies and materials?
- Who will own what?
- Who will decide what?
- Term/termination
- Territory
- Compensation



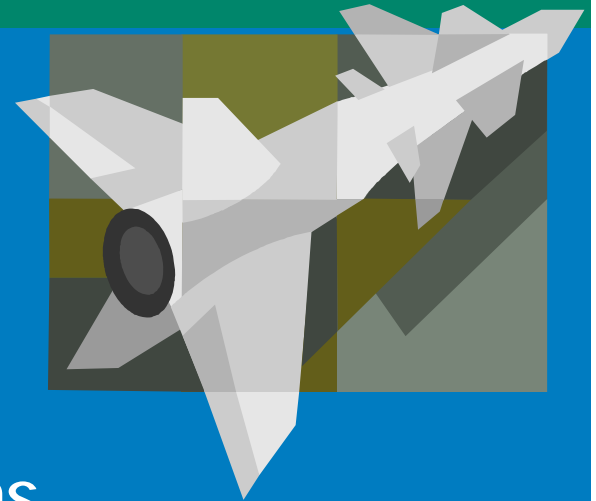
# Foreign Corrupt Practices Act

- Prohibits offering/giving “anything of value” to foreign official/public sector employee “corruptly” to obtain/retain business
- Not OK: large gifts and lavish entertainment
- OK: minor “facilitating payments” to expedite the performance of routine actions
- Usually OK: promotional samples of products
- Criminal and civil penalties for violations: fines, disqualification from receiving export licenses, disqualification from doing business with U.S. government
- Books and records rules applicable to public companies



# International Traffic in Arms Regulations

- Based on Arms Export Control Act
- Enforced by Directorate of Defense Trade Controls at U.S. Department of State
- Control export of some defense-related articles (listed on "United States Munitions List") to foreign countries
- Information relating to such articles may only be shared with "U.S. Persons" unless approved by State Department or special exemption is used



# Problems with Litigation

## Litigation in U.S.

- Does foreign defendant have enough contacts with U.S. jurisdiction to be subject to suit?
- Does foreign defendant have enough assets in U.S. to satisfy judgment?
- U.S. is not party to int'l convention requiring other countries to enforce U.S. judgments—and most countries won't

## Foreign litigation

- Costly, time-consuming, unpredictable



# Arbitration Pros and Cons

## Concerns

- Not necessarily faster or less expensive
- Possibility of “split the baby” decisions
- Limited discovery, interim remedies, appeal rights

## Advantages

- Awards usually easier to enforce
  - 130+ countries have signed NY Convention
- Shape procedures in contract
  - Administering organization or none and rules
  - ICC, Maritime Arbitration Assoc., etc.

# Crafting Arbitration Clause



- Arbitration is creature of contract
- Written agreement to arbitrate prerequisite under NY Convention
- ICC model clause: “All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

# Place of Arbitration

- Critical issue
  - Arbitration is within jurisdiction of local courts
  - Avoiding other side's home courts is priority
- Party to NY Convention?
- Established arbitration law?
  - Local courts encourage arbitration?
  - History of enforcement?



# Number of Arbitrators

- Benefits of one:
  - Cheaper
  - Faster
- Benefits of three:
  - Perhaps more reasoned decision
  - Perhaps carries more weight during enforcement proceedings
- Amount in dispute?



# Scope of Arbitration

- All issues?
- Should some be left for resolution in another way?
  - Technical issues resolved by expert evaluation?
  - Go to court for immediate relief on some issues?
- Either way, be clear



# Other Provisions to Consider

- Language
- Non-binding negotiation and mediation
- When arbitration will begin
- Arbitrator qualifications
- Discovery
- Exclude punitive damages
- Interim remedies
- Confidentiality
- Appeal



# Preserving Advantages of Arbitration

- Get expert advice
- Use unambiguous, tested language
- Don't bargain away place of arbitration without due care



# ICC Fees

- Non-refundable \$2,500 advance against admin. expenses
- “Provisional advance” of 25-35% of anticipated costs
- In \$2M case heard by single arbitrator, each party can expect to pay around \$50,000 for arbitrator’s fee, admin. expenses, and arbitrator’s transportation, hotel, and meal expenses

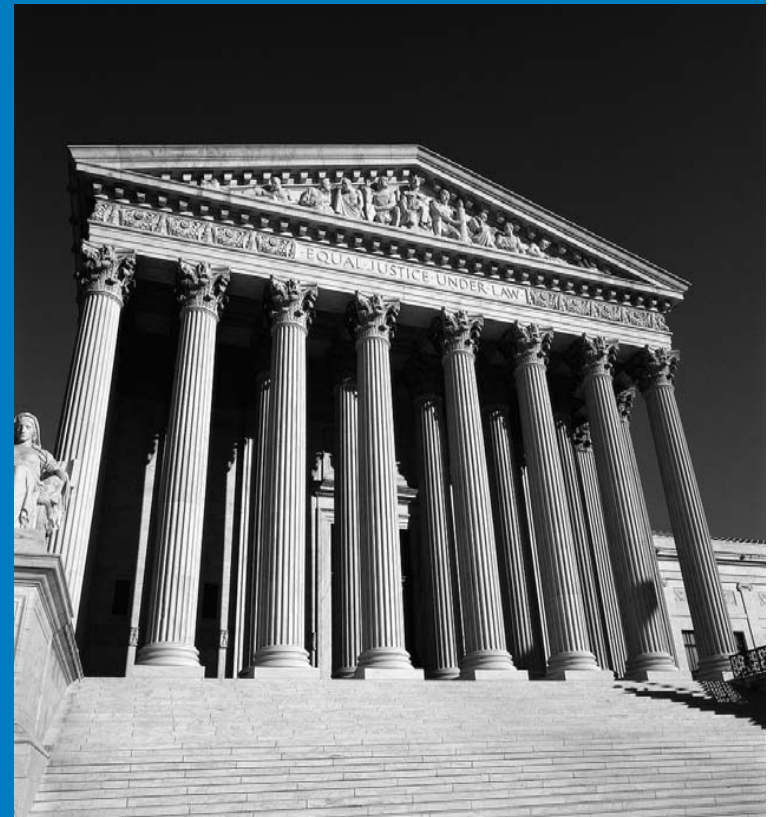


# Stages of ICC Arbitration

- Request for Arbitration
  - Like initial pleading in court case
- Answer and Counterclaims
- Appointment of Arbitrator
  - If parties can't agree, ICC will appoint
  - Generally arbitrator must be from different country than parties
- Terms of Reference; Procedural Timetable
  - Prepared by arbitrator, signed by parties
  - Summarizes positions and defines issues
  - Sets schedule for remaining stages

# Stages of ICC Arbitration

- Discovery
- Hearing
- Evidence
  - Documents, witnesses (live or by affidavit), expert testimony
- Post-Hearing Brief
- Arbitral Award
  - Final
  - Approved by ICC



# Questions?

David Dubberly

Phone: 800-825-6757 or 803-253-8281

E-mail: [ddubberly@nexsenpruet.com](mailto:ddubberly@nexsenpruet.com)