

Joint Ventures.

Mr. Giuseppe De Marinis

**Studio Associato
Tupponi, De Marinis
& Partners**

Via Maceri n.25 - 47121 Forlì
Tel +39 0543 33006 - Fax +39 0543 21999



CONSULTING FIRM FOR INTERNATIONAL TRADE

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Joint-Venture: Definition and interest

- ✓ **A joint-venture is a commonly owned company where a small number of partners (more than two) share the capital of the firm.**
- ✓ **It belongs to the family of alliances – strategic and non strategic. Strategic alliances being characterized by the fact that they gather competitor companies.**
- ✓ **The main reasons why managers claim to be interested in Joint-Ventures are the access to new markets and to new resources.**

(Janger, 1980)

Building an international strategy

**Understand the nature of competition
at international scale**

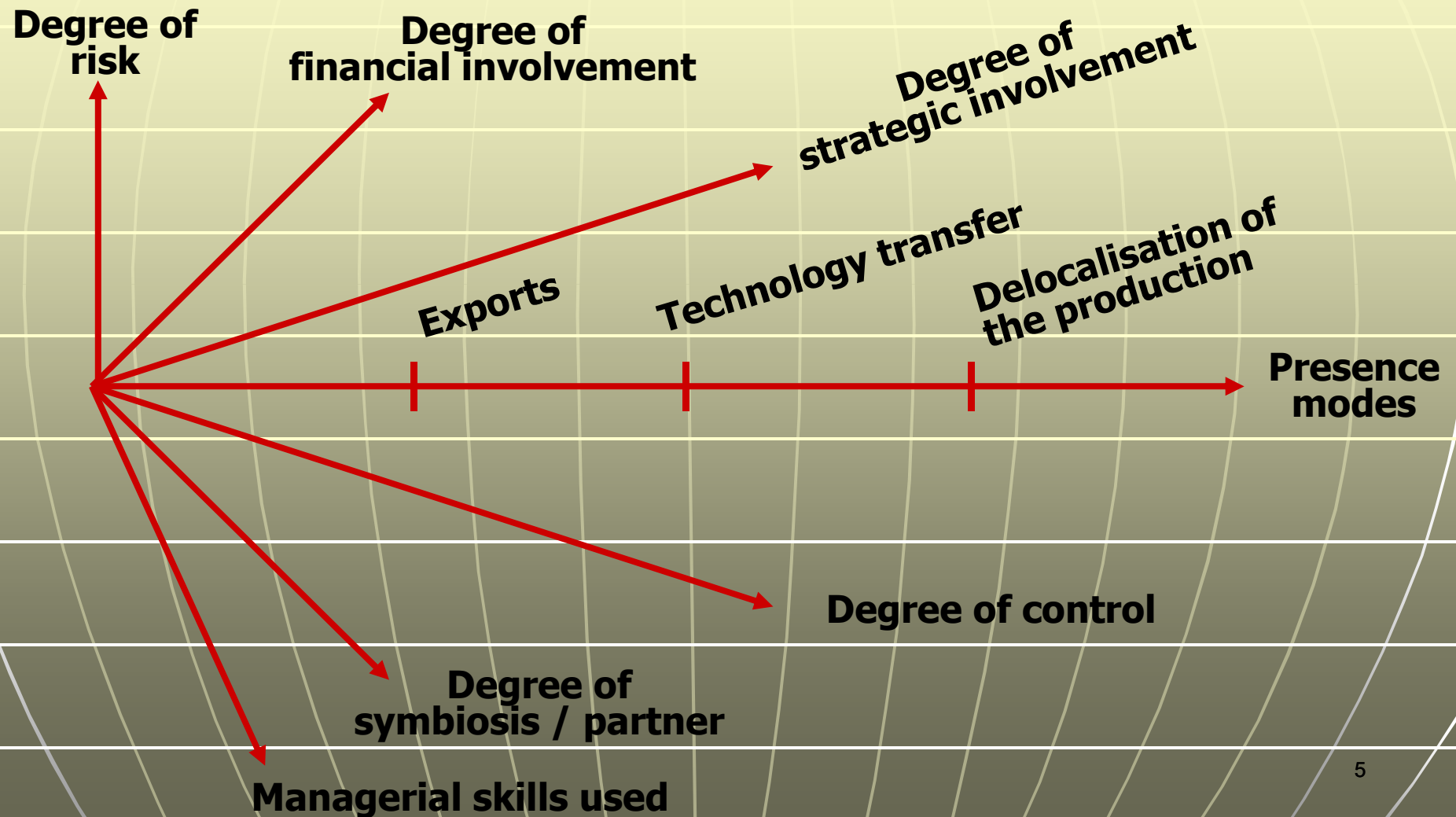
Select target countries

**Choose the place where
value chain components
will be set up**

**Choose the appropriate
entry modes for each
country**

Adapt the organization

Presence modes and complexity of the solutions



Technology: a set of knowledge

“ A set of systematic knowledge used for the making of a *product*, the setting up of a *process* or the delivery of *services*, be it for an *invention*, an industrial *drawing*, a functional *model*, or a new kind of factory, or technical information or knowledge, or services and assistance provided by experts for the *design, setting up, exploitation* or maintenance of a commercial or industrial factory. ”

Source: OMPI,
Organisation Mondiale
de la Propriété Industrielle

Transferring « Core Competences »

Technology transfer is not only a transfer of techniques, it also implies a transfer of ***core competences*** and of tacit and organisational knowledge.

Transferring a technology consists in enabling the acquiring partner to reproduce a production process and to be able to formalise and explain it.

The deepness of the technology transfer

A company which wishes to transfer its knowledge and expertise must decide what will be the *deepness* of its transfer.

This will determine the level of control the company will have to implement as regards to the usage of its technology and on the management of the project; it will also determine the financial involvement which is necessary for the transfer and for the project planning.

How to measure the success of a Joint-Venture? (1/2)

1

Determining the degree of success of a Joint-Venture is difficult, as each partner has its own perception of performance criteria.

2

The performance of a Joint-Venture can only be measured by the simultaneous satisfaction of each partner, whatever its expectations might be.

How to measure the success of a Joint-Venture? (2/2)

3

Because it is the easier to measure, the most recognized criteria is the duration of the Joint-Venture. It represents a good sign of its stability.

Herbert and Morris, 1988

4

Measuring the perceived satisfaction, flexibility, learning level, and the parental control can also be used to evaluate the performance of a Joint-Venture.

Lyles and Baird, 1994

Why to make a Joint-Venture

According to Contractor and Lorange - 1987

- ✓ **Reduction of risk for each partner;**
- ✓ **Realize Economies of scale;**
- ✓ **Technology exchanges;**
- ✓ **Competitive advantage;**
- ✓ **Avoiding heavy governmental regulations;**
- ✓ **Facilitating initial start up phase.**

Failure Joint-Ventures

Reasons for failures of Joint-Ventures as presented by Kathryn Harrigan are as follows:

- ✓ **Partners do not manage to get on well with each other,**
- ✓ **Partners' market are disappearing,**
- ✓ **Managers from each partner company do not manage to work with one another in the Joint-Venture,**
- ✓ **Managers of the Joint-Venture do not manage to work with those of parent companies.**

Are the Joint-Ventures the best mode for technology transfer?

What is important in technology transfer is the simultaneous transfer of intangibles - to learn how and to learn why -, which is mainly made through organisational learning.

The company which transfers its technology must:

- ✓ **Keep a control of its transferred technology in order not to awake the competitors on its own market.**

Are the Joint-Ventures the best mode for technology transfer?

What is important in technology transfer is the simultaneous transfer of intangibles - to learn how and why -, which is mainly made through organisational learning.

The company which transfers its technology must:

- ✓ **Keep a control of its transferred technology in order not to awake the competitors on its own market.**
Hentze and Wiechers, 1991
- ✓ **Access the market where the technology is transferred.**
- ✓ **Access to the capital of the acquiring company, enabling some level of control.**

Bieszki and Rath, 1989

Joint-Ventures: Expansion and Development

Strategic assets

- ✓ **Access the market where the technology is transferred.**
- ✓ **Access to the capital of the acquiring company, enabling some level of control.**

The joint-venture has multiple advantages

- ✓ **A will to build commercial strategies: setting up of distributions networks.**
- ✓ **A will to develop one's capacities. Technological reasons: know-how acquisition.**
- ✓ **Possibility to reach economies of scale: reduction of costs**
- ✓ **Desire to diversify one's product/service range**
- ✓ **Researching an acceleration effect from international development**
- ✓ **Statutory reasons imposed by the host country**

What are the respective contributions in the Joint-Ventures

- ✓ **Financial contributions**
- ✓ **Knowledge of local market and local business practices**
- ✓ **Commercial contacts and networks**
- ✓ **Know-how and technologies**
- ✓ **Qualified and/or cheap workforce**
- ✓ **facilitated access to Raw materials**
- ✓ **Contribution of trademarks**

The joint-venture enables to share means and competences

Which partner(s) for the Joint-Venture(s)

How is the partner selected?

- ✓ **Technical competences**
- ✓ **Previous relationships**
- ✓ **Reputation**
- ✓ **Negotiation skills**
- ✓ **Financial situation**
- ✓ **Management quality and capacity**

The Joint-Venture: a marriage of interest

The end of the Joint-Venture

- ✓ **The joint-venture has a life cycle**
- ✓ **The joint-venture might be transformed into subsidiary**
- ✓ **Merger & Acquisition**
- ✓ **Purchase of the joint-venture by the local partner**
- ✓ **Dissolution of the joint-venture**
- ✓ **Duration limited since the creation of the joint-venture**
 - **R&D joint-venture**
 - **"Project" joint-venture**

The joint-venture: a medium term goal

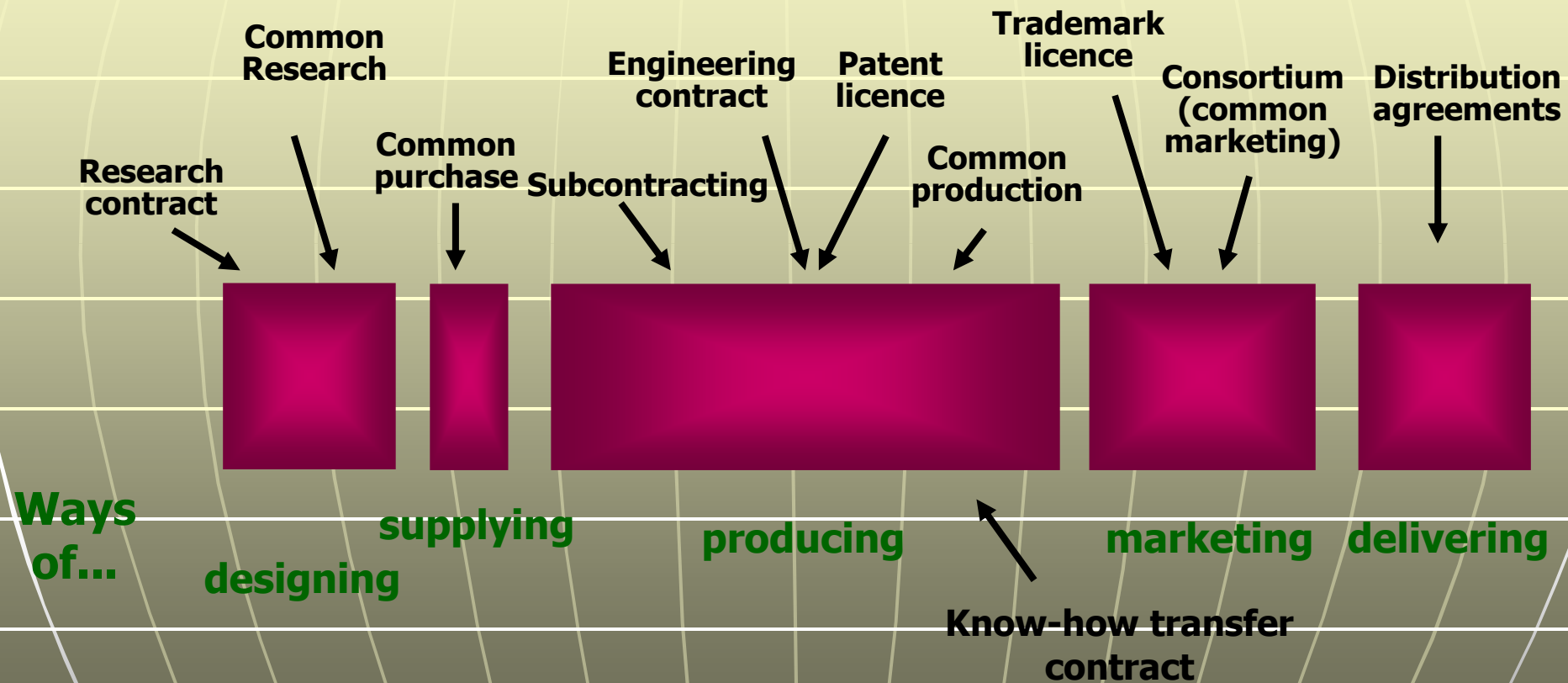
Negotiation of a Joint-Venture agreement

- ✓ **Preparatory talks and signature of a draft agreement / memorandum of understanding.**
- ✓ **Commitment for a negotiation exclusivity, for a specific amount of time and in a certain field.**
- ✓ **Signature of a confidentiality agreement (non disclosure and use of the received information “confidential agreement”)**

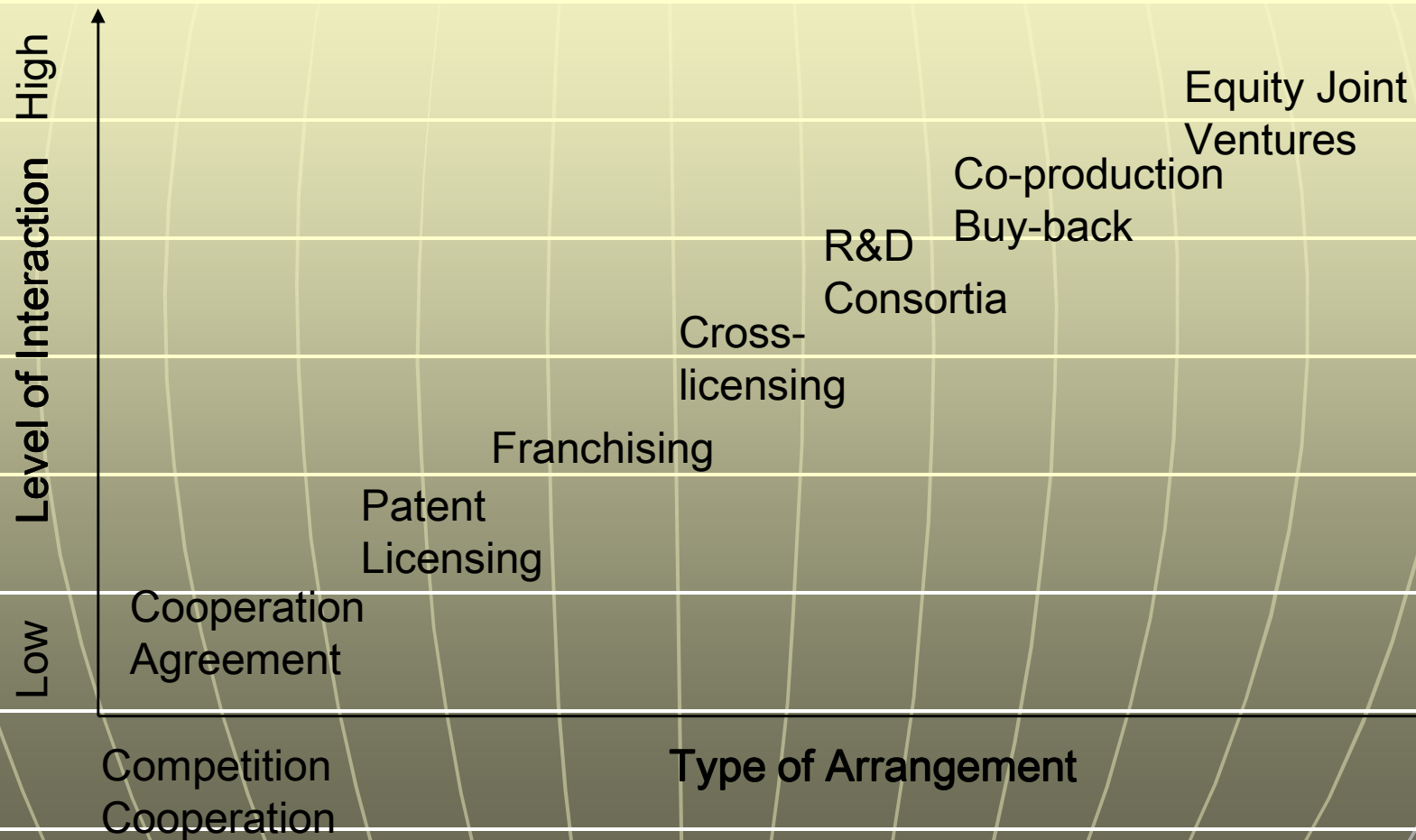
Negotiation of a Joint-Venture agreement

- ✓ **Elaboration of a business plan with the partner.**
- ✓ **Adjustment of the joint-venture, licensing or Industrial franchising project after the business plan results.**
- ✓ **Negotiation and elaboration of a joint-venture agreement (or of a shareholder agreement) and prospective annexes.**
- ✓ **Joint-venture agreement: cooperation charter respecting the interests of each partner.**

The eleven modes of cooperation agreements: illustration of their anchor points

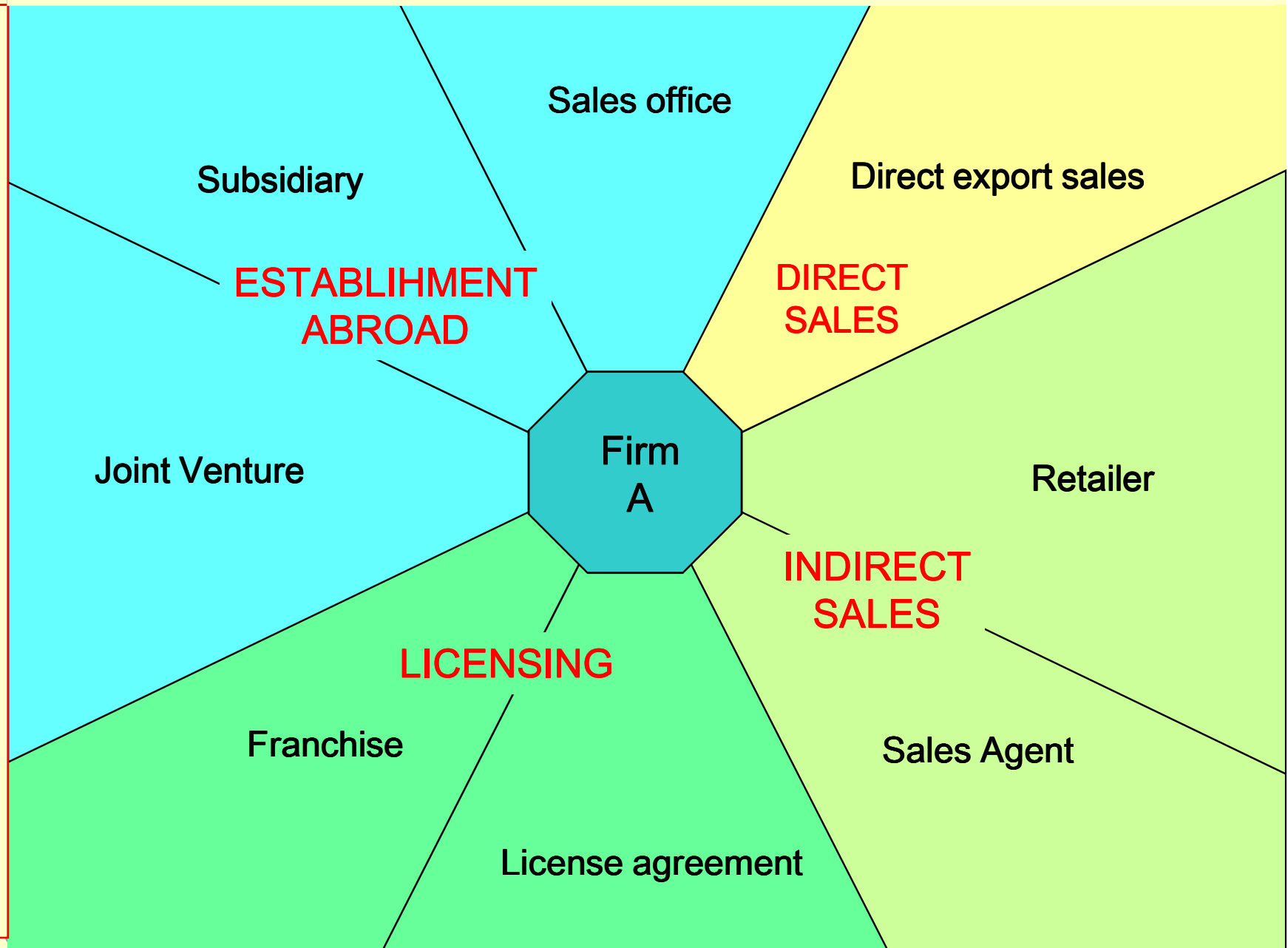


Range of Strategic Alliances

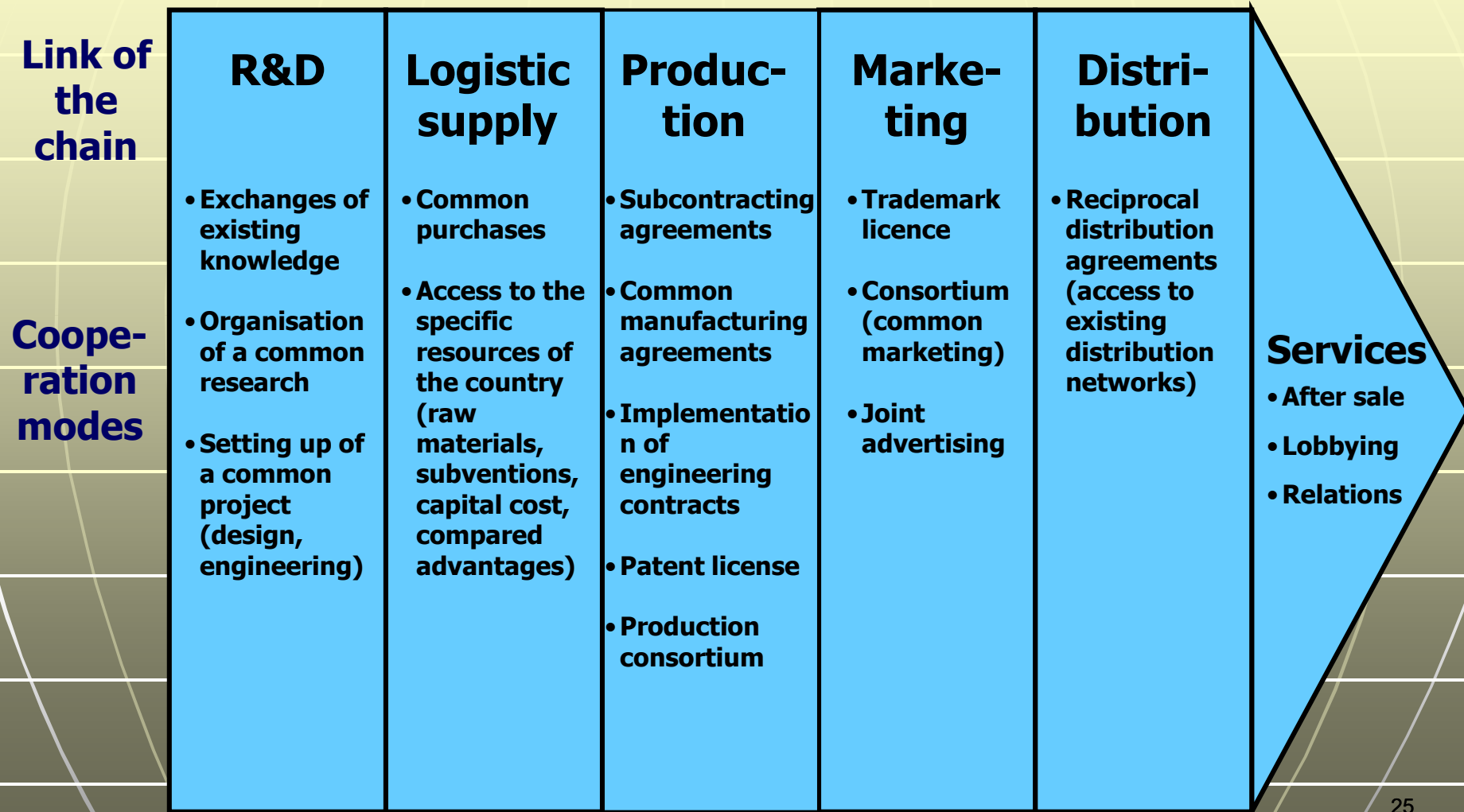


TRANSNATIONAL BUSINESS :

STRATEGIES



Cooperations modes and value chain



Know-How

Transmission of
results and formulae

Adaptation and use
of the materials

Know-How

Complete technical assistance
with scientific assistance

Know-Why

**Transmission of
research work**

**Transmission
of product
conception**

Know-Why

Explication of formulae

Know-Everything

Transmission of
SECRETS,
know-how and
« technological
heart » (calculation
programmes)

**Common and integrated
Research &
Development**

Know-Everything

Typology of technology transfer with developing countries

Transfers with vocation of infrastructure

Main transfer objectives

- ✓ Reorganise the country
- ✓ Prepare or accompany the development of the country

Typical examples

- ✓ Building of towns, ports, airports...
- ✓ Urban transport systems
- ✓ Rural development programmes
- ✓ Transmigration, education, etc.

Type of contract

- ✓ Programme contracts
- ✓ Supplies
- ✓ Technical assistance

Typology of technology transfer with developing countries

Transfers with vocation of production

Main transfer objectives

- ✓ Highlight the raw material
- ✓ Improve the production
- ✓ Develop employment

Typical examples

- ✓ Nuclear power stations
- ✓ Oil production, minerals extraction...
- ✓ Agricultural production
- ✓ Transformation factories: aluminium, automobile, textile...

Type of contract

- ✓ Patents
- ✓ Turnkey projects
- ✓ Products in hands
- ✓ Market in hand
- ✓ Profit in hand, including technical assistance, training

Typology of technology transfer with developing countries

Transfers with vocation of industrial and marketing development

Main transfer objectives

- ✓ **Develop the local or regional market**
- ✓ **Stimulate the development of economic agents (subcontracting, distribution)**

Typical examples

- ✓ **Company manufacturing consumer products or small industrial equipment**

Type of contract

- ✓ **Licence contract**
- ✓ **Know-how transfer**
- ✓ **Commercial and industrial franchising**
- ✓ **Joint-venture**
- ✓ **Industrial cooperation contracts**

Joint Ventures

Goals, Process, Basic
Requirements and Outcomes

Types of International Joint Ventures

PROCESS

- Traditional equity joint-venture
 - Two parents from two different countries
- Trinational
 - Two parents from two different countries, set up a venture in a third country
- Intrafirm
 - Two foreign subsidiaries of the same MNE
- Cross-national
 - Two parents of same nationality, venture located in a different country
- Greenfield (new) vs. merging existing operations

Joint Ventures as 'Mode of Choice'

PROCESS AND GOALS

- Access to resources that cannot be acquired through market transactions and the firm cannot or wishes not to develop internally, at least in the short-term
 - 35% of U.S. multinationals
 - 40-45% of Japanese multinationals
- Duration varies; tendency to last longer
- Performance varies (often measured as partners' satisfaction with how the venture meets their own objectives)
 - Considered successful in about 50% of the cases
 - Can outperform or refocus the mainstream business
- IJV were initially used to exploit North American MNE's existing competencies in new markets. While learning through joint-ventures has become an increasingly important objective in recent years, it often proves difficult.

Motives for IJV Formation

GOALS



Goals and Fit

- In most cases partners have a joint overall objective (motive) but different specific goals; some remain 'hidden'
 - compatible (congruous, i.e. can be attained simultaneously)
 - balanced (both partners need to receive proportional benefits for what they put into the venture)
 - consistent, well-understood and accepted internally within each firm
 - OK to view IJV as an instrument to achieve partners' strategies. Ensure consistency with each partners' short term and long term strategies.
 - Hidden agendas can be dangerous both among the partners (future conflicts) and internally (in-fighting within each parent, competing priorities).
 - To succeed, the goals of the joint venture should take precedence over the individual goals of the parents.

Partners' Contributions

BASIC requirements

- Complementary skills
 - Unique and continuing contributions
 - Once skills are redundant, IJV may be terminated
 - Different logics in different firms
 - Learning races (biotech firms)
 - Long-term relationships (buyer-supplier relationships)
- Cooperative cultures
 - Work together for joint benefit
 - Avoid decision-making stalemates
 - Avoid a confrontational stance
- Seek similarities among the partners when possible (size, industry, rural vs. urban location, functional background)

Outcomes

- Financial and Competitive Strategies
 - Short-term
 - Clarify expectations and discuss problems early on
 - Contingencies: market downturns, lower revenues, even losses
 - Long-term
 - May help create a strong competitor
 - Have partners planned for an exit strategy? Jointly? Independently?
 - Lock-in can damage economic performance
- Learning Strategies
 - Partners' desires vs. abilities; "trial-runs"; "warm-ups"
 - Exploitation vs. acquisition of useful knowledge
 - Effective knowledge management (may eliminate need for the JV)

Joint Ventures

How to negotiate a contract?

Joint Ventures

How to negotiate a contract?

Issues:

- Language
- Applicable Law
- Negotiations

Joint Ventures

How to negotiate a contract?

Language

Joint Venture Agreements (Verträge über Arbeitsgemeinschaften) with connections to foreign countries are mainly drafted in

English

Joint Ventures

How to negotiate a contract?

Language

We usually speak about

Joint Ventures

Joint Ventures

How to negotiate a contract?

Language

The English language is part of the English culture

Contracts drafted in English therefore a part of the English legal culture

Joint Ventures

How to negotiate a contract?

Language

In english spoken contracts

the english legal meaning

should be decisive.

[

Joint Ventures

How to negotiate a contract?

Language

Do you understand English law?

- English law is case law. The judge does not make the law he searches for it!
- Contracts „are legally binding“!
- Codified law, which is filling the gaps, is an exception (e.g. implied terms)
- Often use of synonyms
- therefore english contracts are often very detailed and long (e.g. definitions)
- Substantial completion
- Performance, discharge, and breach of contract

Joint Ventures

How to negotiate a contract?

Attention!

- English is not a unified language!
- English wording can have different meanings depending from the state of origin!
 - Example: Penalty and consequential damages
- Nowadays plain intelligible English becomes more and more usual,

Joint Ventures

How to negotiate a contract?

Interpretation of Contracts

- The interpretation criteria for the interpretation of contracts vary from country to country and they can be strongly different especially with regard to the formation and legal education of the concerned legal advisor.

Joint Ventures

How to negotiate a contract?

Interpretation of contracts

- English Courts tend to a literal interpretation
- The law excludes from the admissible background the previous negotiations of the parties
- Anyway the security of commercial transactions has to be respected
- Contracts have to be construed within their commercial purpose

Joint Ventures

How to negotiate a contract?

Interpretation of contracts

- In case of contracts drafted in several languages the following has to be taken in consideration:
- **Linguistic discrepancies**

When a contract is drawn up in two or more language versions none of which is stated to be authoritative, there is, in case of discrepancy between the versions, a preference for the interpretation according to the version in which the contract was originally drawn up.

Joint Ventures

How to negotiate a contract?

What you should not do!

- to agree to the contract language at the end of the negotiations only
- to agree to languages with an equal or alternative status
- to choose a neutral language

Joint Ventures

How to negotiate a contract?

Interpretation of contracts

- Translation risks
 - Translations are always interpretations
 - Faux amis and/or misunderstandings can not really be avoided

Example: Force Majeure, Penalty Clause and
so on

Joint Ventures

How to negotiate a contract?

- What is a Joint Venture?
 - Loose merger without legal personality(,, Contractual Joint Venture)
 - Merger with legal personality (Equity Joint Venture, integrated Joint Venture)

Joint Ventures

How to negotiate a contract?

- What is a Joint Venture?
 - Neither in the common law jurisdictions nor on the European continent there is a reliable definition of the term of Joint Venture
 - The meaning of Joint Venture is defined by the content of the contract and the applicable law

Joint Ventures

How to negotiate a contract?

- Overview: Comparison Equity Joint Venture/Contractual Joint Venture
 - See script
 - Basic difference:
 - Apportion (suddivisione) of risk or complete risk
 - Individual character according to the applicable law, e.g. partnership, Gesellschaft bürgerlichen Rechts, Société Civile, raggruppamento temporaneo di imprese

Joint Ventures

How to negotiate a contract?

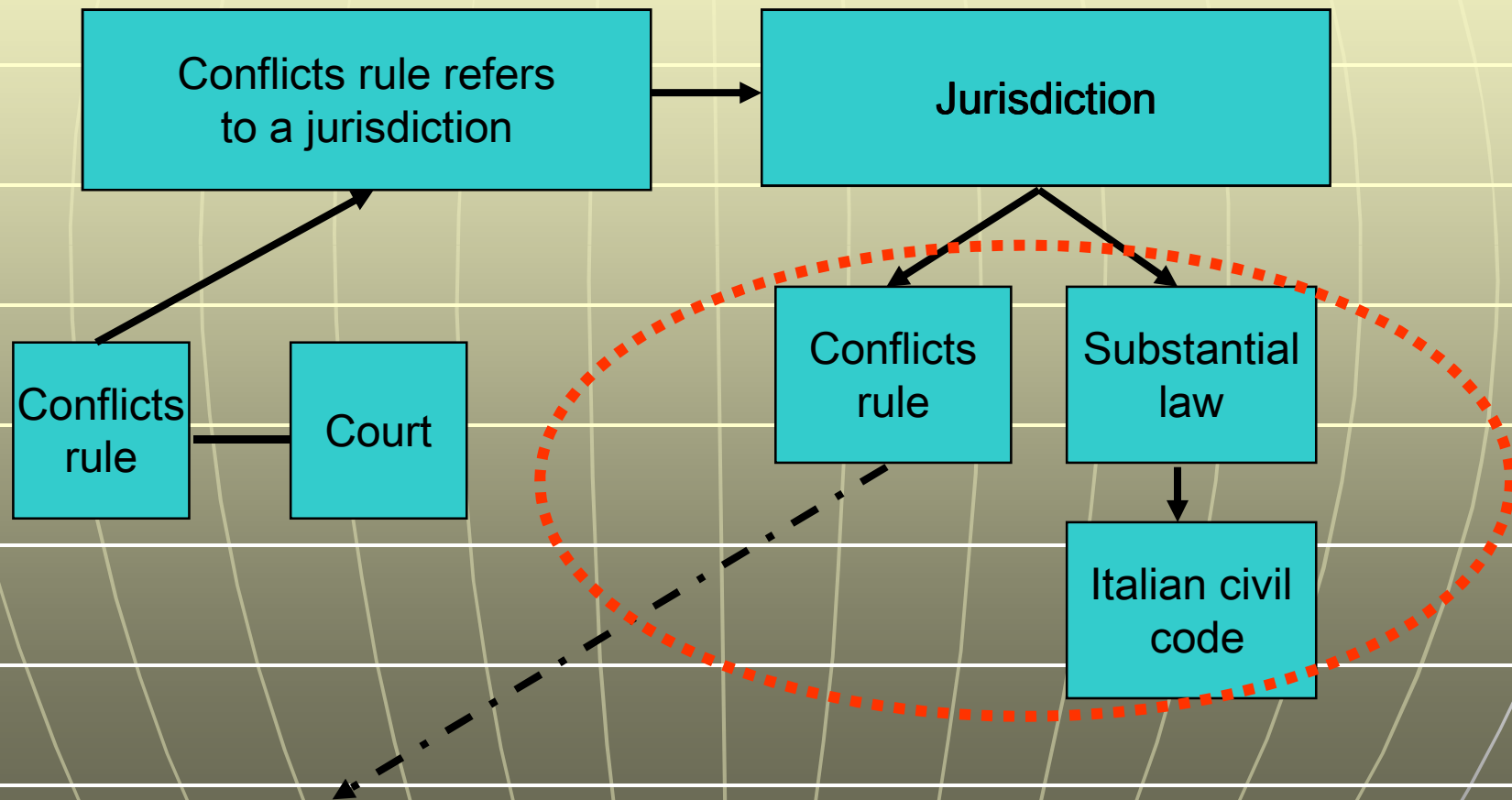
Applicable Law

- Which law is applicable to Joint Ventures?
- Comes into question:
 - The applicable contract law
 - Choice of law or incorporation law, law of the investment state
 - The applicable corporation law
 - Law of the headquarter or most closely connected law or incorporation law

Joint Ventures

How to negotiate a contract?

PROCEDURES

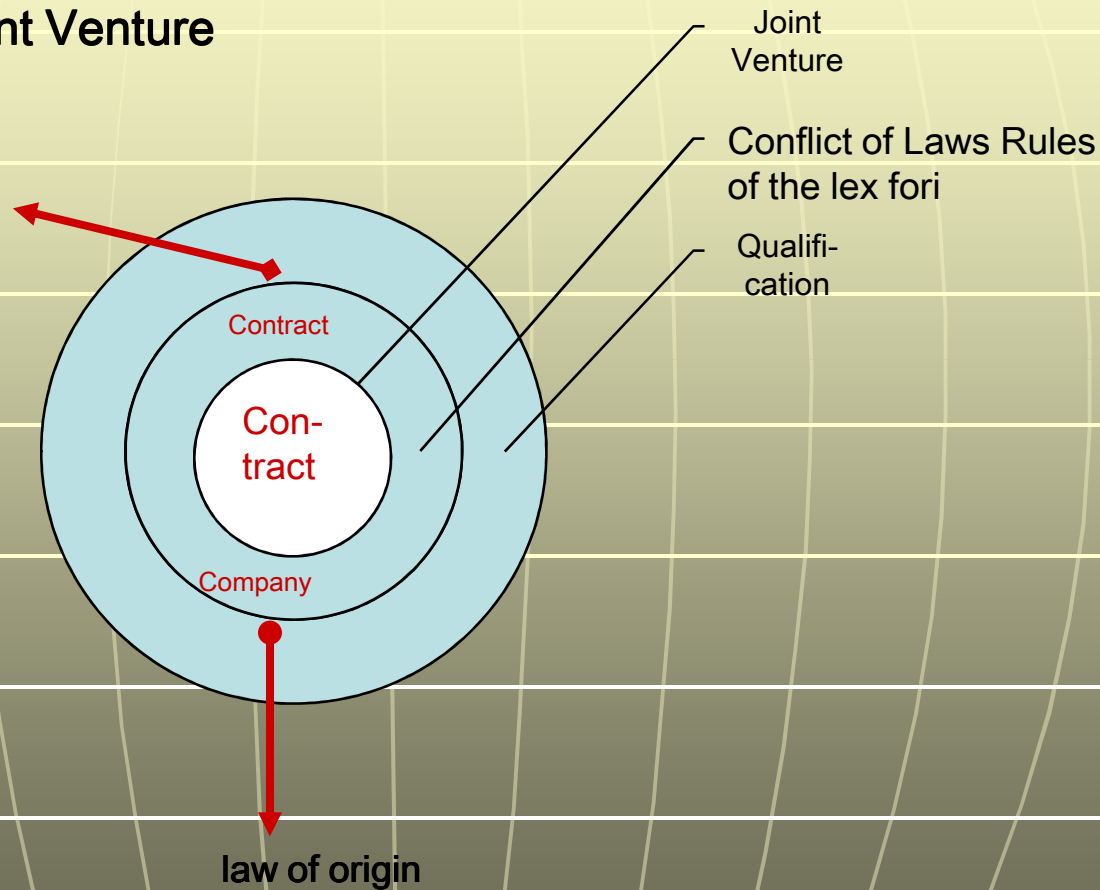


How to negotiate a contract?

Applicable Law

IV: IPR Joint Venture

Art. 4 Rome Convention
(most closely connection)



How to negotiate a contract?

Applicable Law

- V: Contractual Joint Venture without choice right

Presumption
Art. 4 sec. II
Rome
Convention (-)

Partner A
Country X

Partner B
Country Y

Most closely
connected
Art. 4 sec. V
Rome
Convention

Investment country
Building site
country
Country Z

goal
country
Z

Joint Ventures

How to negotiate a contract?

NEGOTIATION

- Clause 1.14 (Red Book, Silver Book, Yellow Book):
 - If the Contractor constitutes (under applicable Laws) a joint venture, consortium or other unincorporated grouping of two or more persons:
 - (a) these persons shall be deemed to be jointly and severally liable to the Employer for the performance of the Contract;
 - (b) these persons shall notify the Employer of their leader who shall have authority to bind the Contractor and each of these persons; and
 - (c) the Contractor shall not alter its composition or legal status without the prior consent of the Employer.

Agreement is composed of:

Agreement is composed of:

- Definitions and Interpretation
- Joint Venture
- Proposal Submission
- Performance of the Work
- Language and Law
- Exclusivity
- Executive Authority
- Documents
- Personnel
- Assignment and Third Parties
- Severability
- Member in default
- Duration of the Agreement
- Liability
- Insurance
- Promotional and project Costs, profits, Losses and Remuneration
- Financial Administration and Accounting
- Guarantees
- Arbitration
- Notices
- Sole Agreement and Variation

Joint Ventures

How to negotiate a contract?

- Clause (Joint Venture)
 - proposes an unincorporated company (association), which
 - is submitting the offer
 - provides information to the client and negotiates the contract
 - enters into a contract with the client
 - performs all services for the project
 - rules the nomination of a „leading member“

Joint Ventures

How to negotiate a contract?

- Clause contains broad provisions for the representation of the JV through its members
 - Main principle: No authorisation for representation for single members
 - Requirement of unanimous decisions concerning submission of offers, scope of the contract, prices and communication
 - Foundation of a Policy Committee

Joint Ventures

How to negotiate a contract?

■ Clause (Liability)

- rules that the members will indemnify and keep indemnifying the other members against all liabilities arising out of or in connection with the performance of the contract
- rules that in the event of it being alleged by one member that any legal liability is attributable to the other member or to the members, the members shall use reasonable endeavors to reach agreement,
- in the event of the members failing to so agree a proper apportionment shall be determined by arbitration

Joint Ventures

How to negotiate a contract?

■ Clause

- rules that the language should be stated in Schedule 1
- rules that the country or state, the law of which shall apply to the Agreement should be stated in Schedule 1
 - Annotation: In Schedule 1 the wording is: „The Law which is to apply to this Agreement shall be the Laws of (state Country)“
 - This clause is problematic because it gives the impression that the parties are free to choose their applicable law, which in fact is not true in so far as an equity joint venture is concerned

Thank you for your attention

demarinis@commercioestero.net

