

Managing the litigation process
with the support of your
Danish attorney

Copenhagen, 7 February 2012

Martin Sick Nielsen

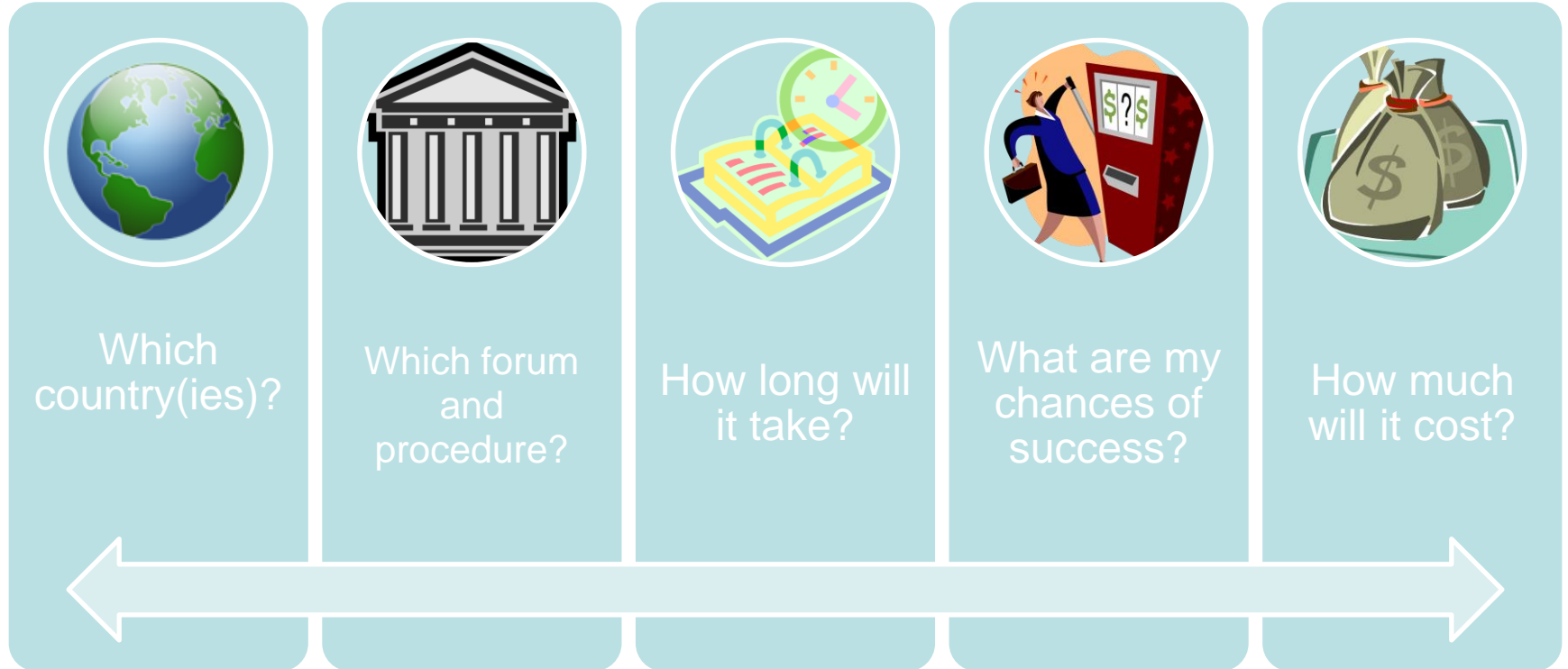
Aarhus, 8 February 2012

Mogens Yde Knudsen

Global patent disputes have come to stay



A successful global litigation strategy



Global patent litigations

1997-09 (13 years)			2007-09 (3 years)		
Rank	Country	total	Rank	Country	total
1	USA	34,214	1	China	9584
2	China	26,631	2	USA	8625
3	Germany	9400	3	Germany	2200
4	France	3252	4	France	645
5	Japan	2789	5	Japan	600
6	Italy	1400	6	Taiwan	500
7	Canada	1020	7	Italy	450
8	England	866	8	S. Korea	450
9	Netherlands	780	9	India	300
10	Australia	516	10	Canada	254

Two substantially different situations

- Claimant
 - You decide to start the process
- Defendant
 - The process and the associated risks are imposed on you

When do you become a defendant?

- Pre-trial communication
 - Notice of prior rights
 - Threat of litigation
 - Draft writ of summons
- Notice of proceedings

Notice of proceedings

- Place of business in the US
 - Wholly owned subsidiary
 - Representation office
- Co-defendants with place of business in the US
 - Licensee
 - Distributor
- None of the above
 - Official channels

The immediate questions

- How do we escape this?
- What is the potential risk to our business and how can we limit this risk?
- Which US attorney do we choose?

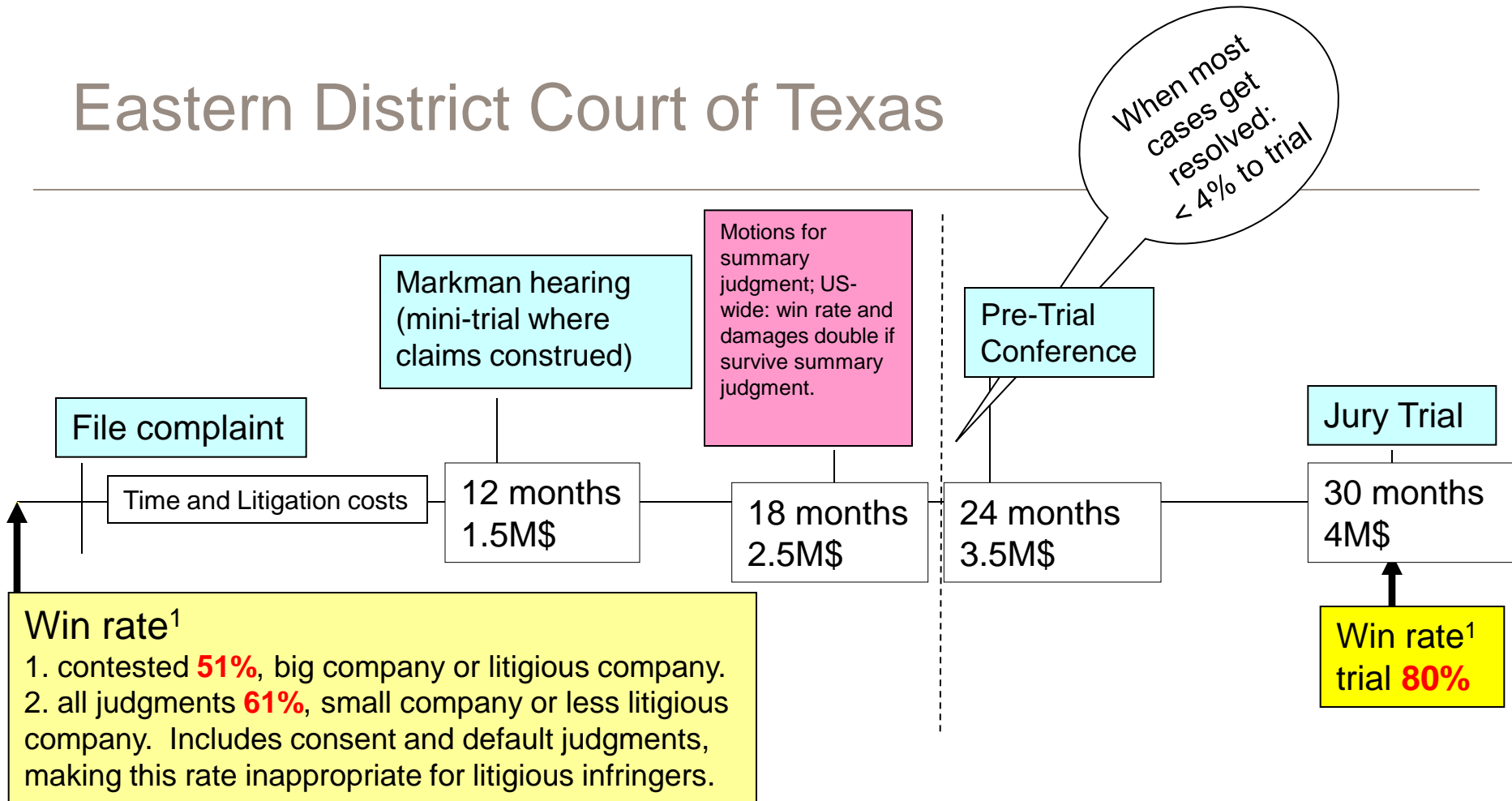
Can you afford to litigate?

- How much will it cost?
- How long will it take?
- What will we get if we win?

Substantially different risk exposure

- Forum shopping
 - Average patentee win rates vary considerably from court to court
- Discovery
- Jury trials
- 2-3 years
- 3-4 M\$ for first instance decision

Eastern District Court of Texas



¹Data Source: LegalMetric District Report, 1990-2007.

Choice of US attorney

- Current US attorney
- Recommendation
 - Industry network, e.g. DABF
 - Danish patent attorney
- Directories
 - martindale.com®

At the outset, from a commercial perspective

- What is the overall purpose of defending yourself?
- What are the commercial alternatives to achieving this position (fall-back position)?
- When should settlement be considered, if at all, and on which terms?
- Is ADR an alternative to litigation?

At the outset, from a legal perspective

- Does the court have jurisdiction?
- Should jurisdiction be disputed?
 - Proceedings dismissed
 - Proceedings move to another forum
- Do you have counterclaims?
 - Same proceedings
 - Independent proceedings

Management of the process

- Take the advice and follow the instructions of your US attorney
- Establish a project organisation
 - Project management
 - Allocation of resources
 - In- vs. outsourcing

Allocation of resources

- The litigation team manager should be released from other responsibilities
- Litigation team must include people from
 - Business
 - Finance
 - R&D
 - IT

Your Danish patent attorney

- General knowledge of the technology and your business
- Specific knowledge of
 - Relevant prior art
 - Own patent portfolio
 - Disputes in other countries re same product or technologies

Your Danish patent attorney (cont.)

- Geographical promiximity to the other members of your litigation team
 - Identify documents, expert witnesses and other evidence
 - "Translate" how the U.S. litigation process works
 - Develop arguments
- Transfer knowledge from/to litigation in other countries

Discovery

- Interrogatories
- Request for documents
- Depositions
 - In the US
 - Abroad

Depositions in Denmark

- Limits travel time and costs
- Could take place at your patent attorney's office
- US attorneys of either party present
- Testimony recorded by video or similar AV-facility

Close of proceedings

- Settlement
 - Statistics
 - ADR
- Judgment
 - Enforcement

Prejudicial effect outside of the US

- In principle limited to the territory of the USA
- May be referred to and attached weight also by courts outside of the USA

Should you be prepared for patent litigation?

- Depends on industry
 - General level of risk
 - Possibilities to limit the level of risk
- Take into consideration
 - Exposure to other risks
 - Resources available

Questions?
