

AIPPI Conference (Paris, Oct. 4th 2010)

Using ADR Hybrids to Resolve IP Disputes (Why, when and how?)

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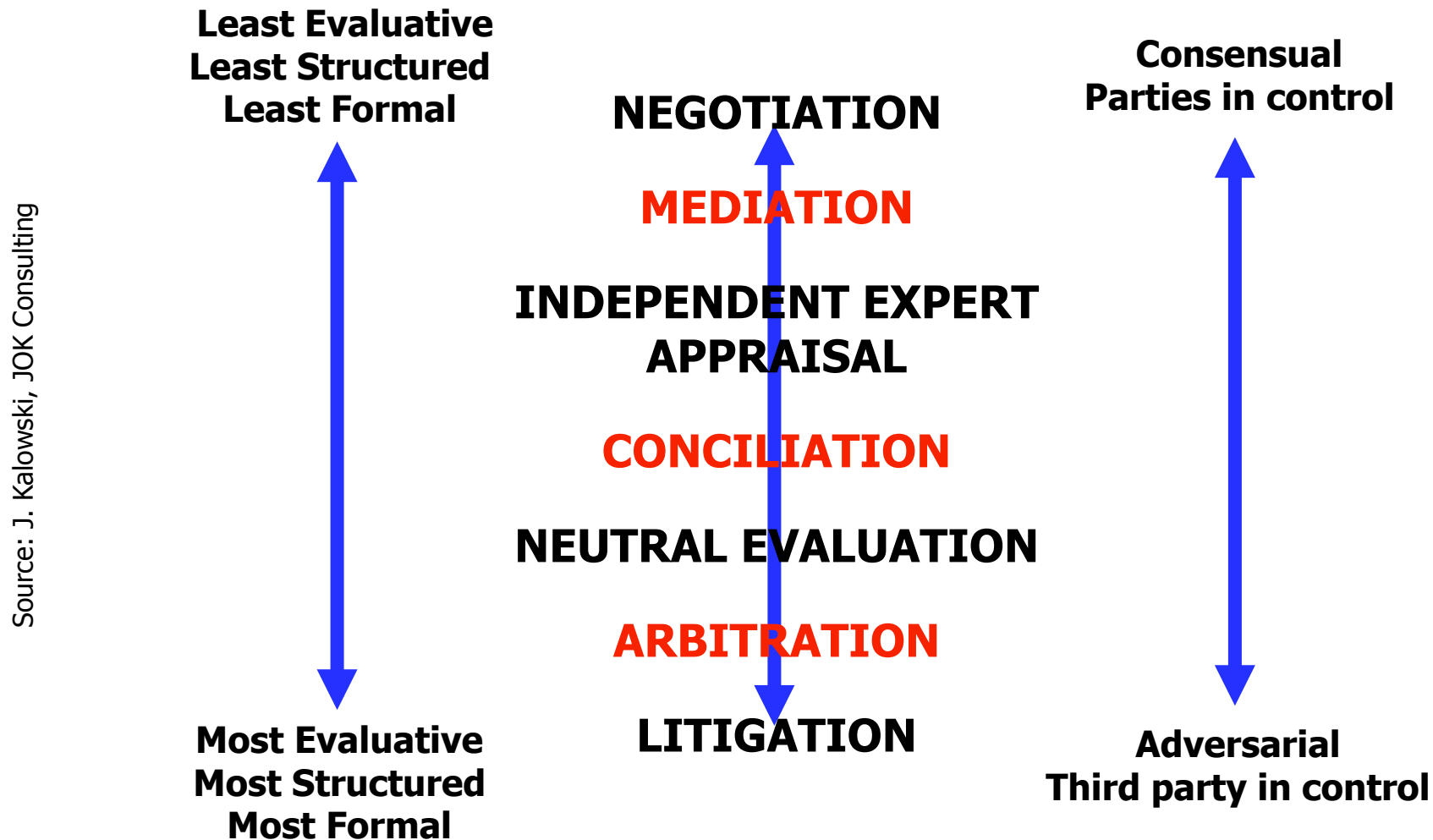
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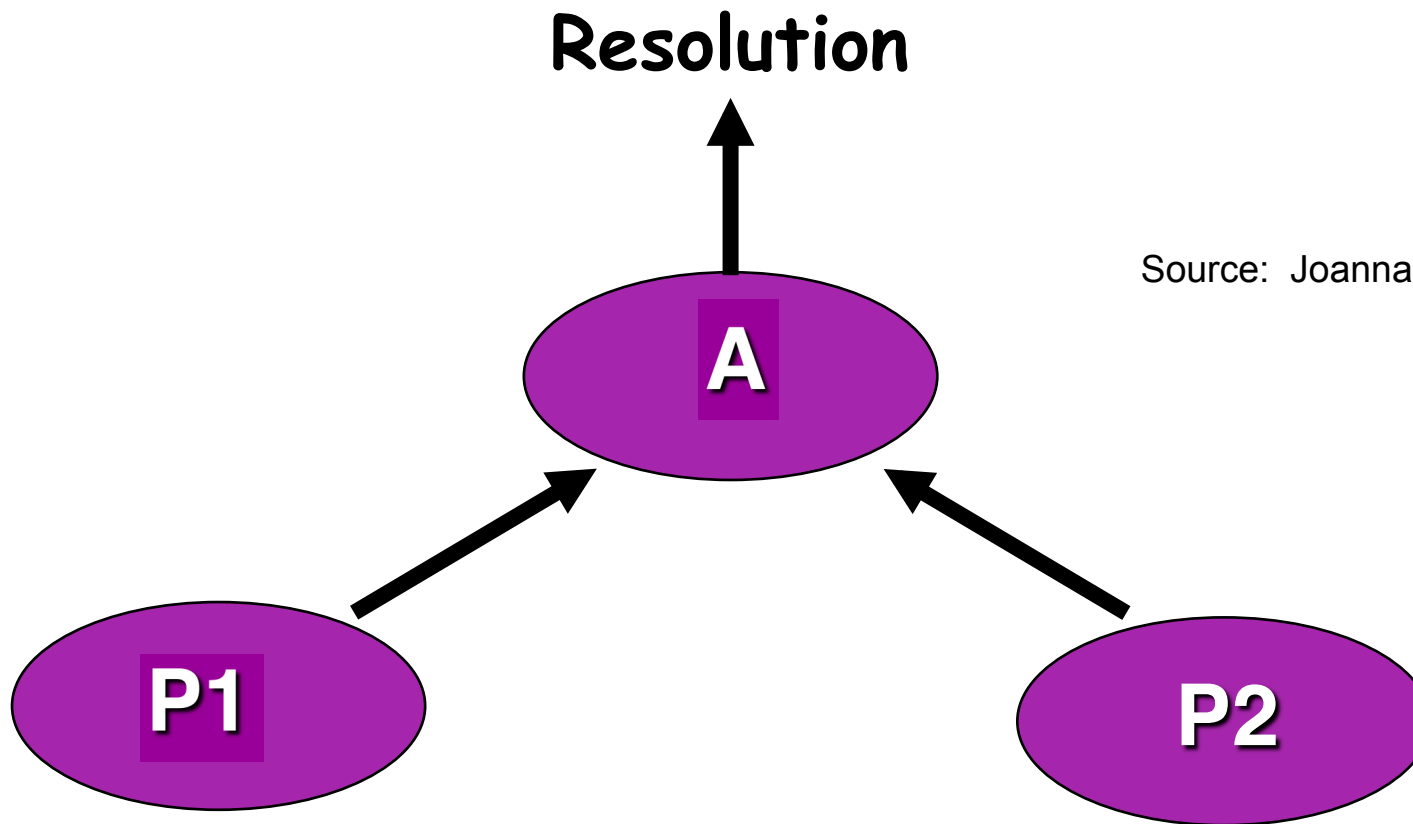
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ADR: Appropriate Dispute Resolution



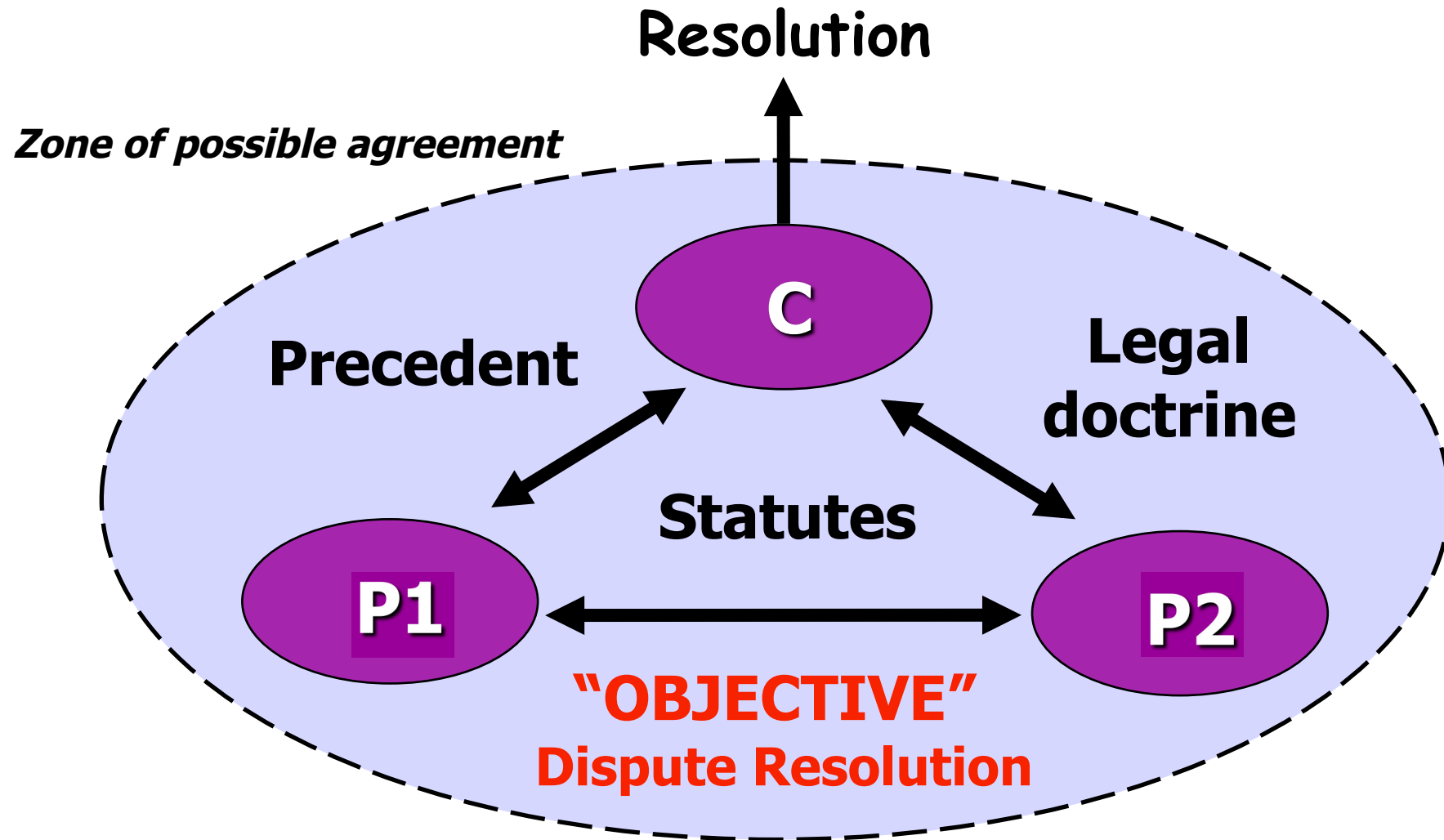
Arbitration



Source: Joanna Kalowski

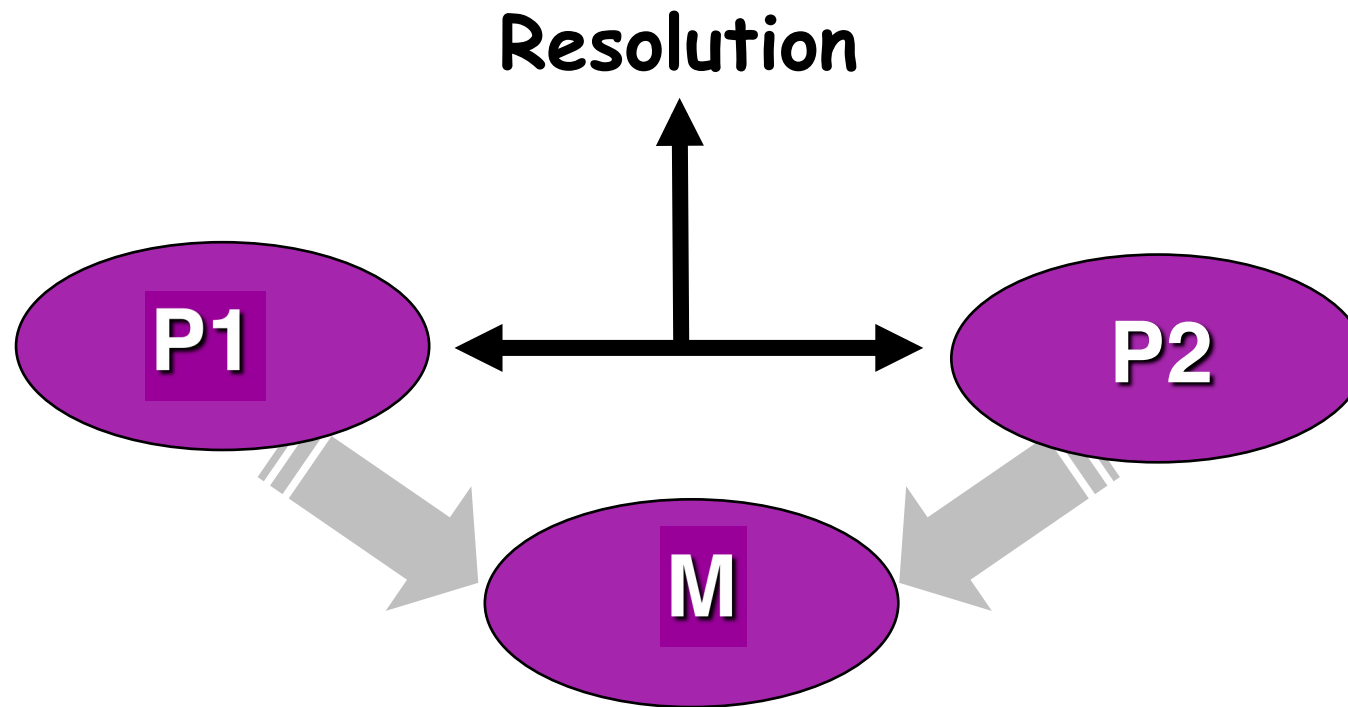
... Conciliation ...

Source: Joanna Kalowski



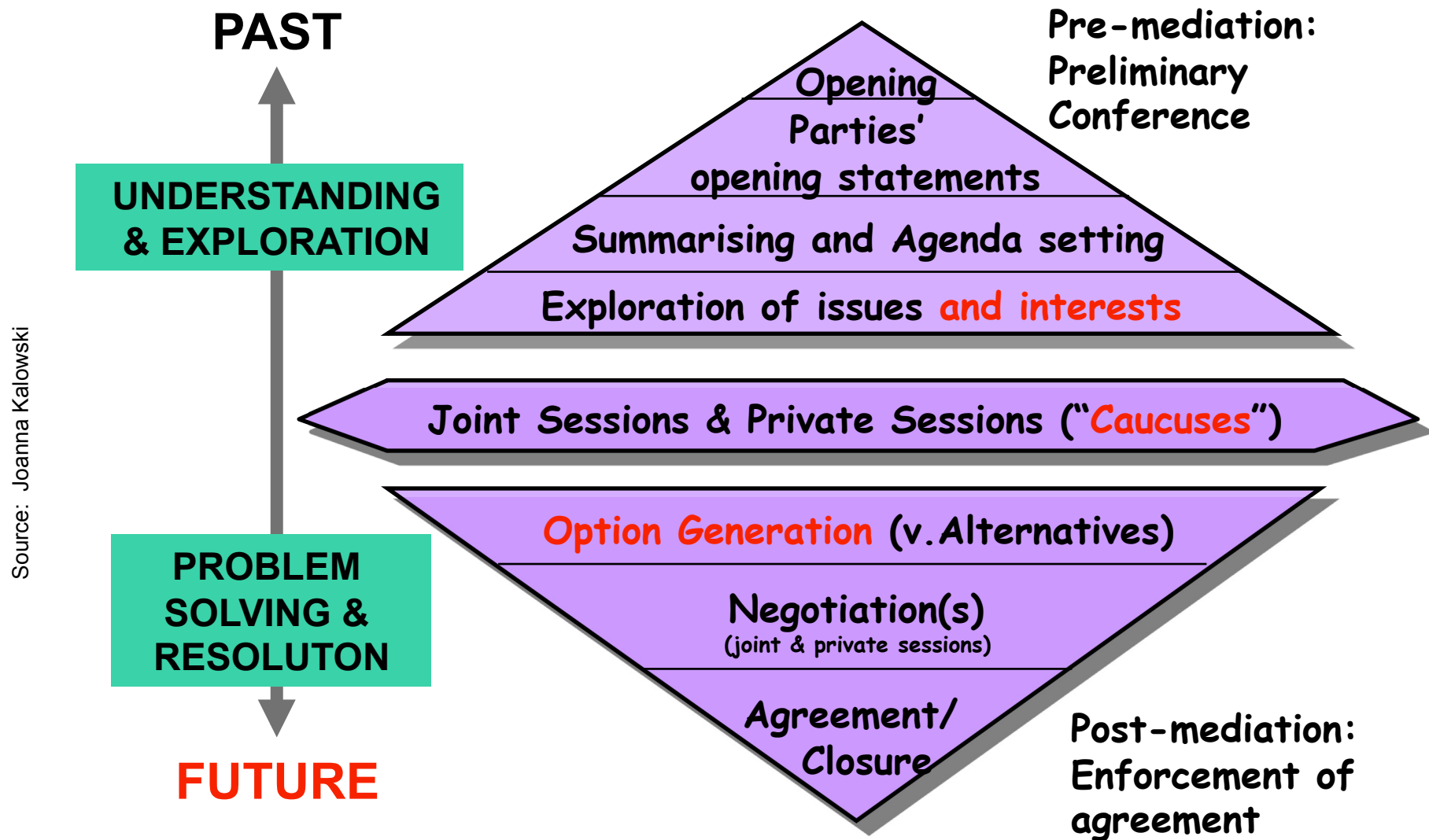
... Mediation

Source: Joanna Kalowski



"SUBJECTIVE"
Dispute Resolution

Why consider mediation? Four specific reasons.



Conflict as an Iceberg

**A dispute
is never
about
what it is
about...**

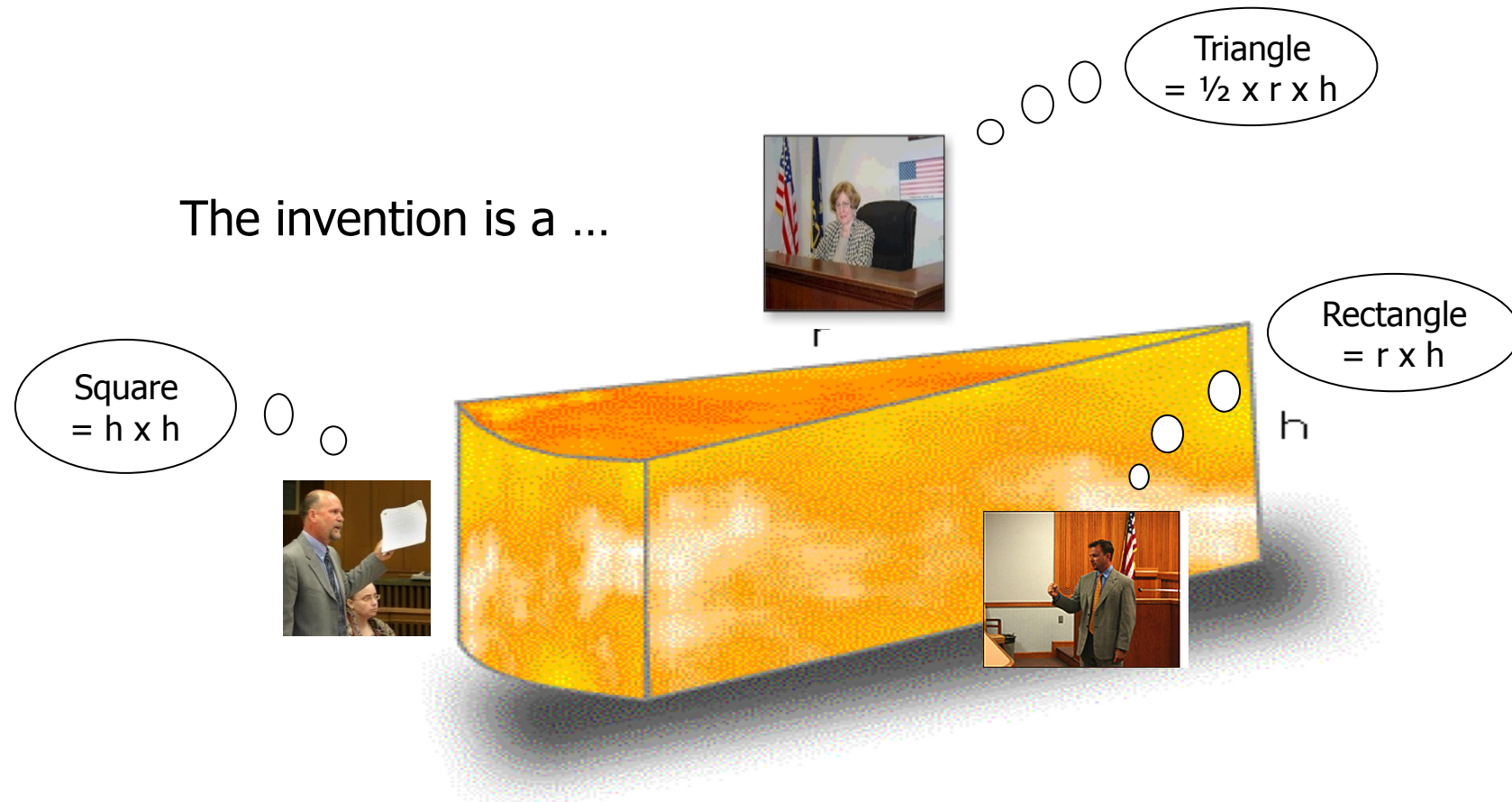


**Although the
“objective” aspects of
the dispute may be
apparent...**

**...the “subjective”
aspects remain to
be discovered.**

IP disputes are like a piece of cheese

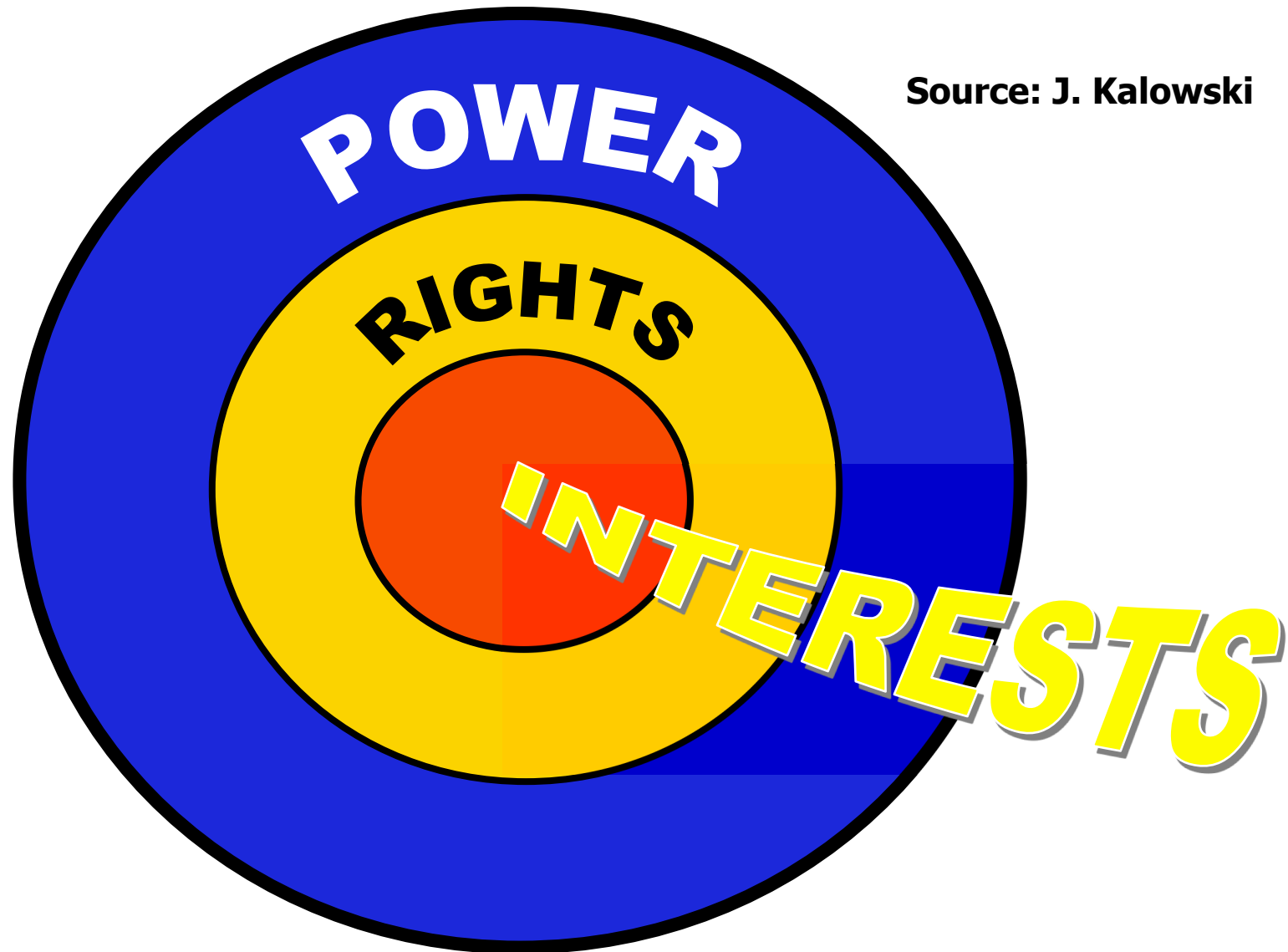
Perceptions = Value = 9/10 of all disputes



“It isn’t that they can’t see the solution, it is that they can’t see the problem”
Gilbert K. Chesterton

Possible Approaches to Conflict Resolution

Source: J. Kalowski

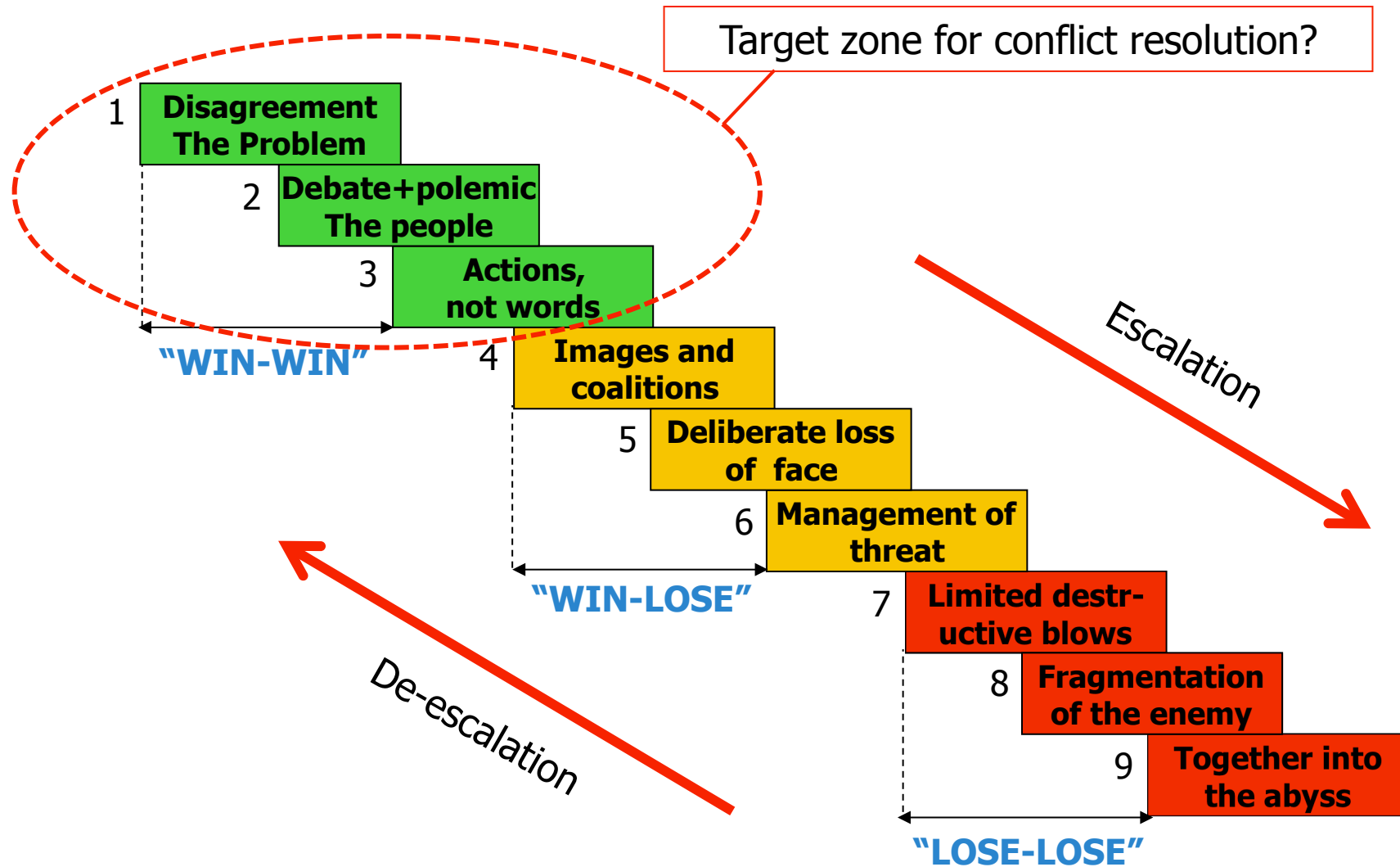


The Challenge

**“We have to start by
defining the process as
part of the problem”**

**David Plant
ICC Paris, 2009**

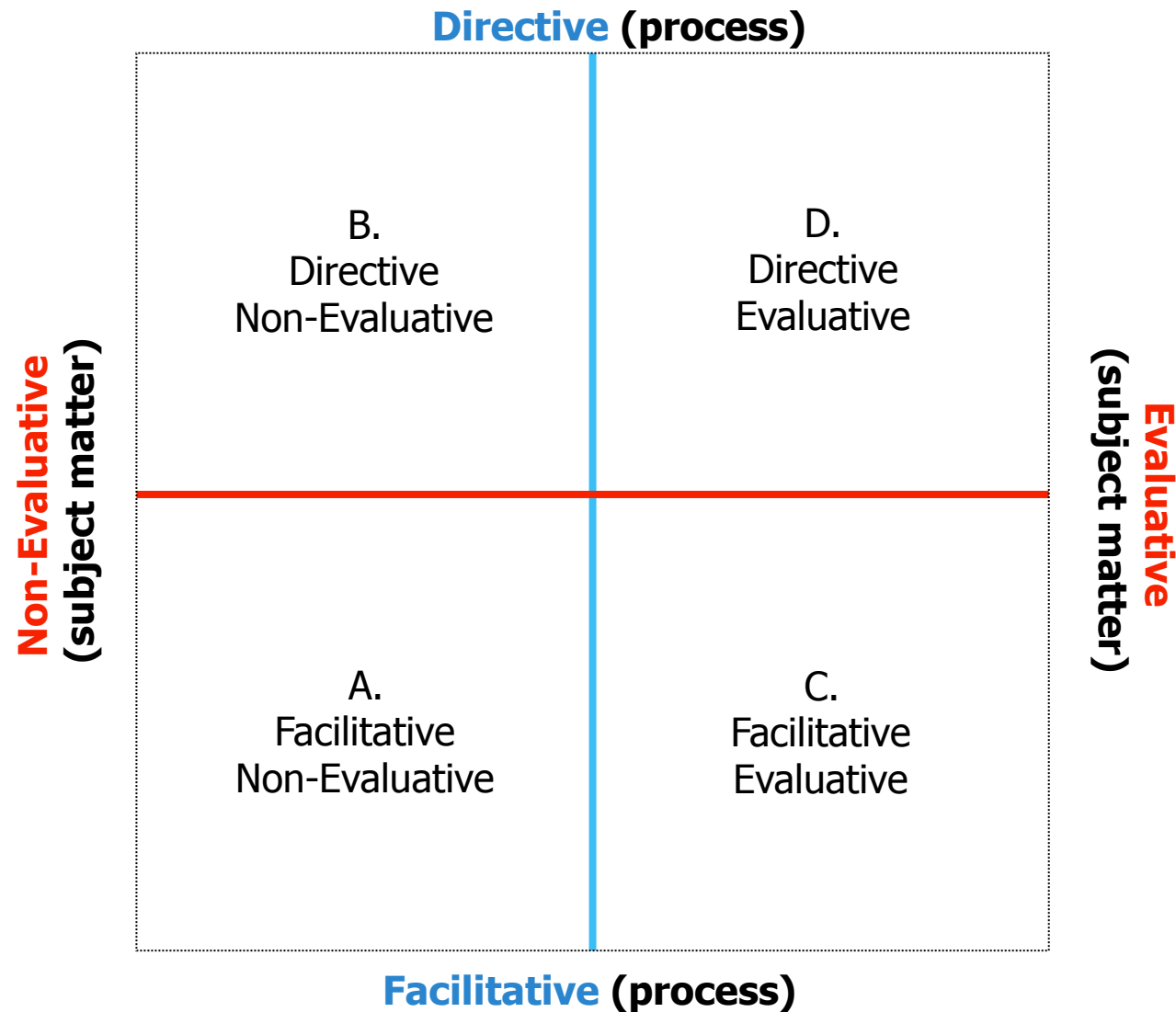
Diagnostics: Conflictology & Escalation (Glas's 9 Steps)



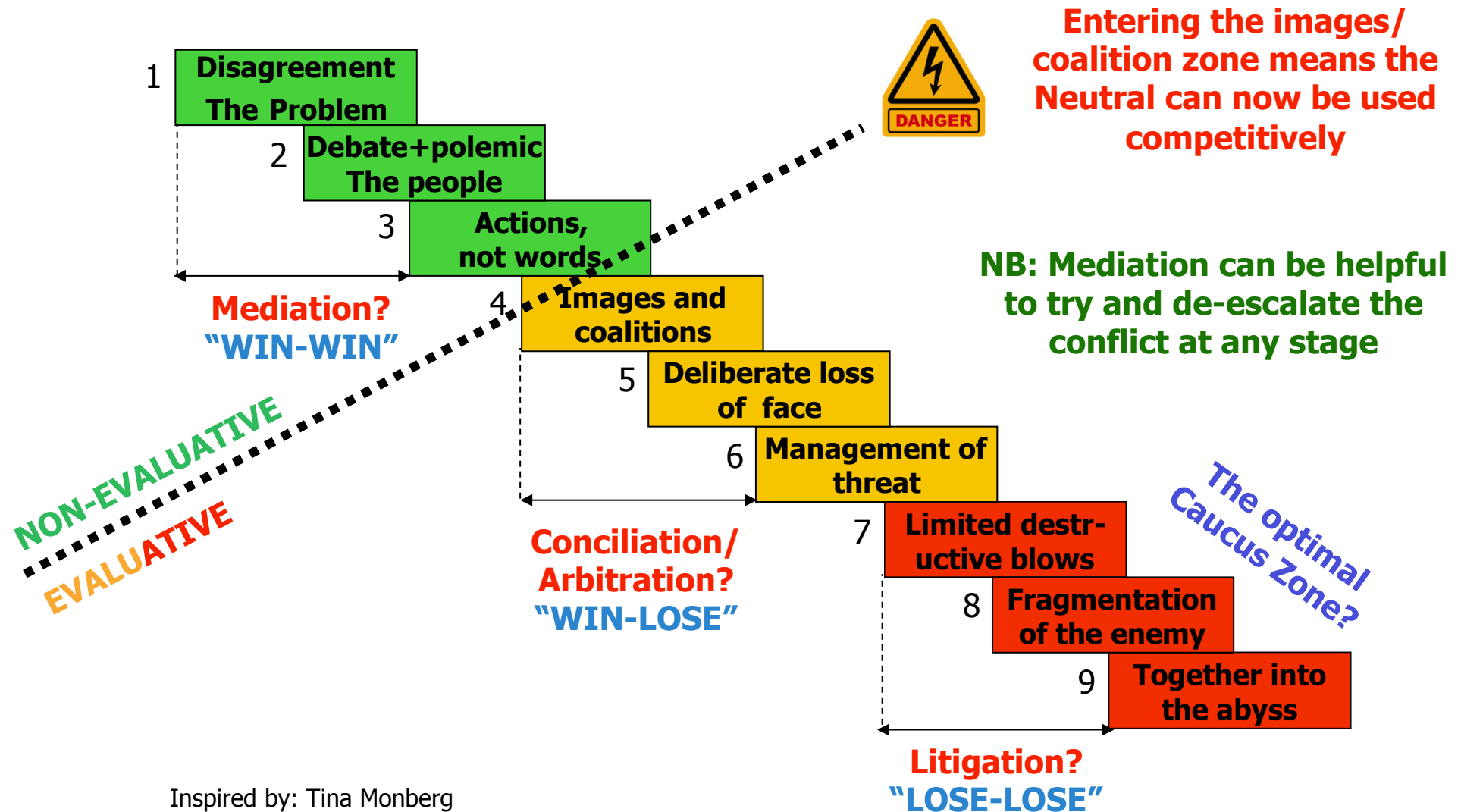
Inspired by: Tina Monberg
Source: F. Glas's "Confronting Conflict"

Two axes to consider: Procedural and Substantive

Source: Based on L. Riskin "The New Old & New New Grids"



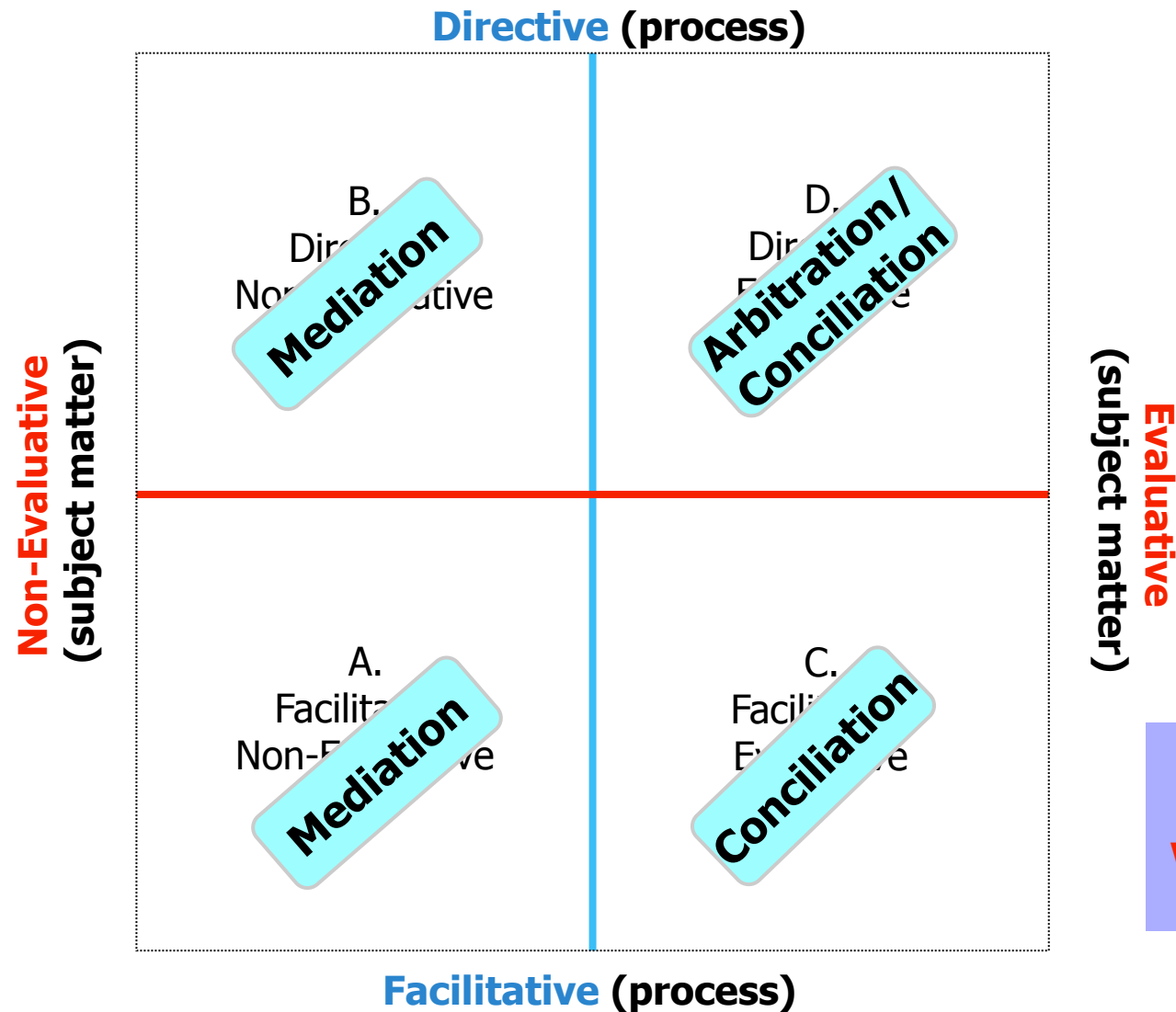
Aligning DR Process(es) to Conflict Diagnosis(es)



Inspired by: Tina Monberg
Source: F. Glas's "Confronting Conflict"

What type of process do the parties want & why?

Source: Based on L. Riskin "The New Old & New New Grids"



Proposal:
Start at A and
work through to
C or D?

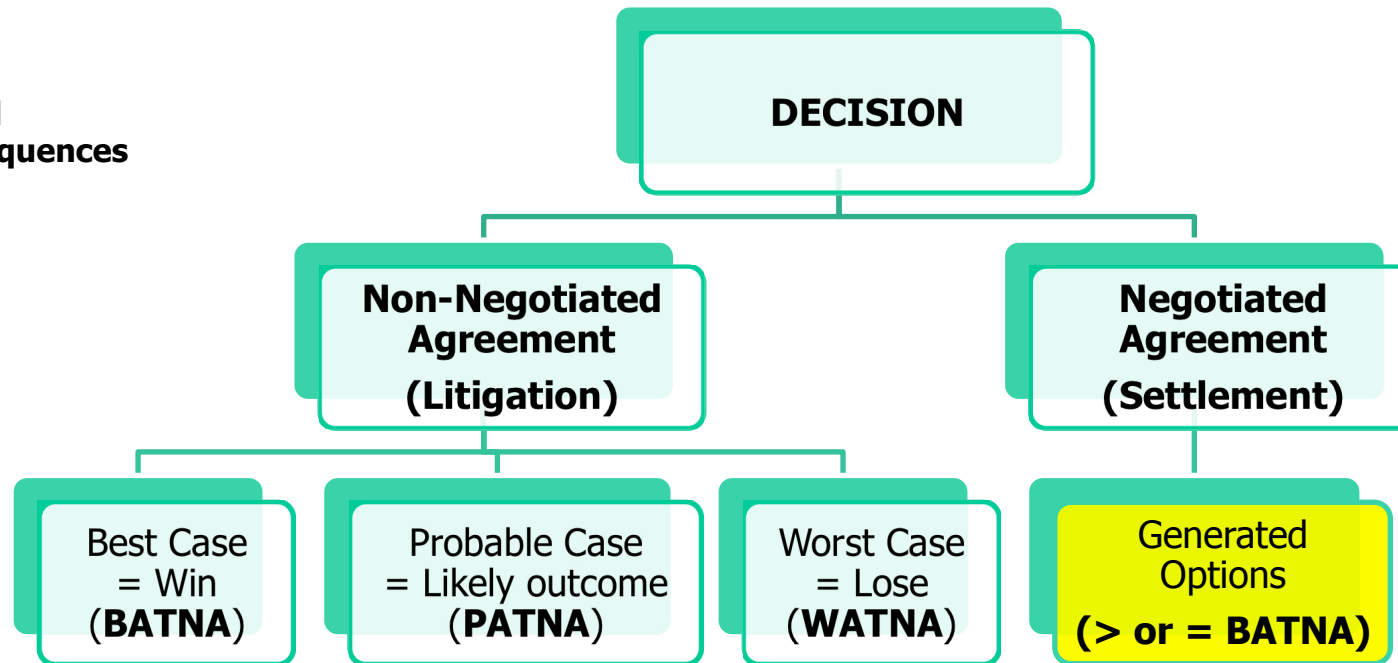
Evaluative Approach: Analysis of the Parties' Alternatives

		PARTY A	PARTY B
BATNAS	Time		
	Cost		
	Outcome		
	Consequences		
WATNAS	Time		
	Cost		
	Outcome		
	Consequences		
PATNAS	Time		
	Cost		
	Outcome		
	Consequences		

“Non-Evaluative” Approach: Seeking New Options

Key Parameters

- Time
- Costs
- Award
- Consequences



Is it possible to consider and generate win-win options that are worth more than each party's BATNA.

The Limits of "Evaluative" ADR

THE LEGAL SYLLOGISM (an algorithm):



Facts (past & present)
+
Applicable law(s)
=
Outcomes
(«conclusions»)

"We have to rely only on the objective facts".
"We have a 'sacred duty' to establish the truth."

"Facts" assume no biases or subjective perceptions

The Right Brain vs Left Brain test ... do you see the dancer turning clockwise or anti-clockwise? If clockwise, then you use more of the right side of the brain and **vice versa**. Most of us would see the dancer turning anti-clockwise though you can try to focus and change the direction; see if you can do it.

LEFT BRAIN FUNCTIONS

uses logic
detail oriented
facts rule
words and language
present and past
math and science
can comprehend
knowing
acknowledges
order/pattern perception
knows object name
reality based
forms strategies
practical
safe



RIGHT BRAIN FUNCTIONS

uses feeling
"big picture" oriented
imagination rules
symbols and images
present and future
philosophy & religion
can "get it" (i.e. meaning)
believes
appreciates
spatial perception
knows object function
fantasy based
presents possibilities
impetuous
risk taking

<http://www.news.com.au/dailytelegraph/story/0,22049,22535838-5012895,00.html>

Can we accept both parties' opposite perceptions?

The dancer turns
CLOCKWISE
If we see her as standing
on her **LEFT FOOT**



The dancer turns
ANTI-CLOCKWISE
If we see her as standing
on her **RIGHT FOOT**



The Limits of “Non-Evaluative” ADR



- No certainty of outcome
- Can get lost in time (and costs?)
- “Win-Win” perfection may be impossible
- Parties may not be psychologically capable
- Neutral may not be psychologically capable
- Parties may want a proposal or compromise
- Need for business certainty (e.g., immediate world-wide enforceability)
- There are times when a court order is needed

“This does not work in my culture”.

“What if we don’t settle?”

When NOT to mediate or rely only on mediation

GOOD REASONS

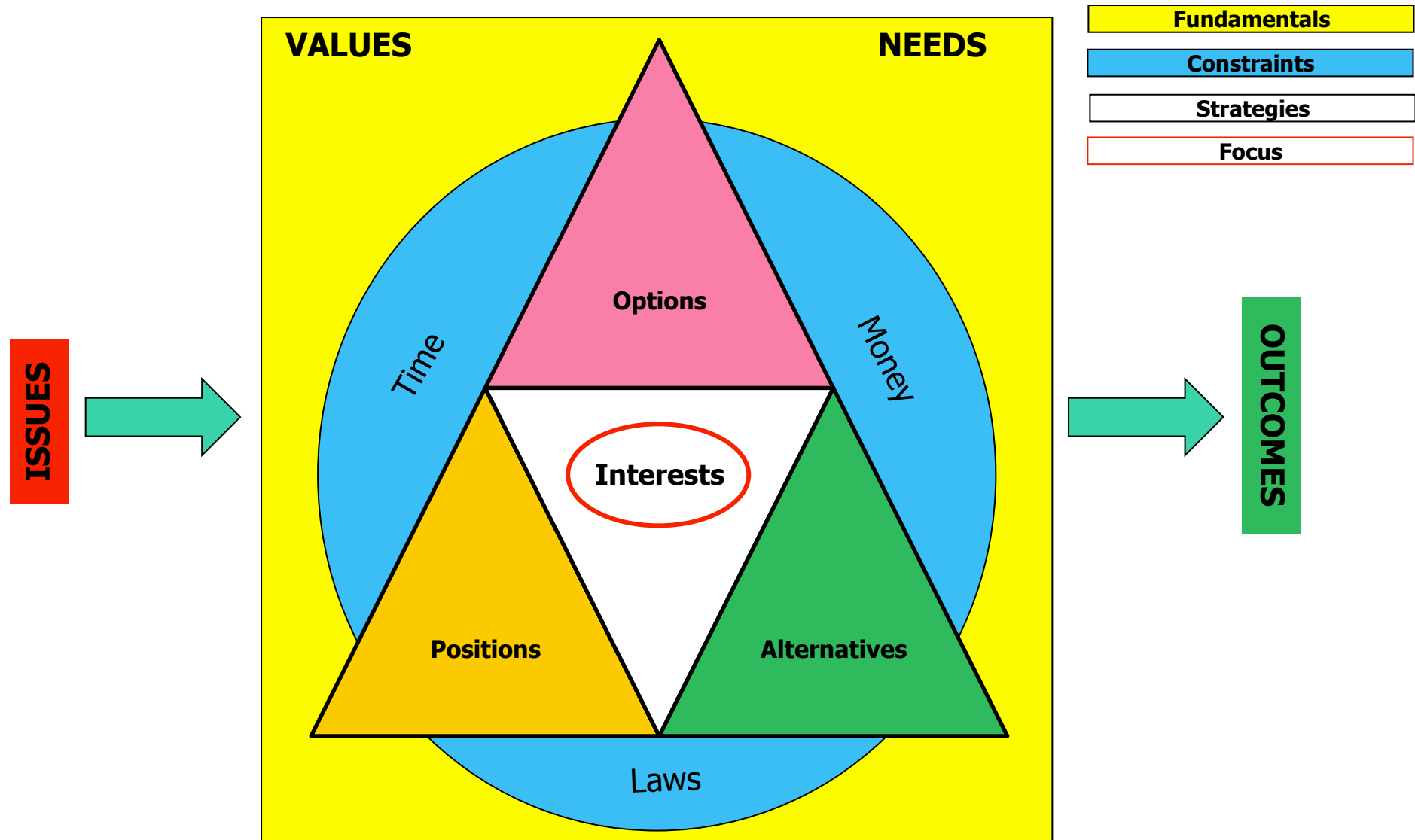
- A precedent is needed
- There is an abusive imbalance in power
- There is a risk of illegal collusion (e.g., a cartel)
- The neutral is dangerously unqualified
- The mediation could harm one of the parties
- Certainty of outcome is needed by a specific date

BAD REASONS

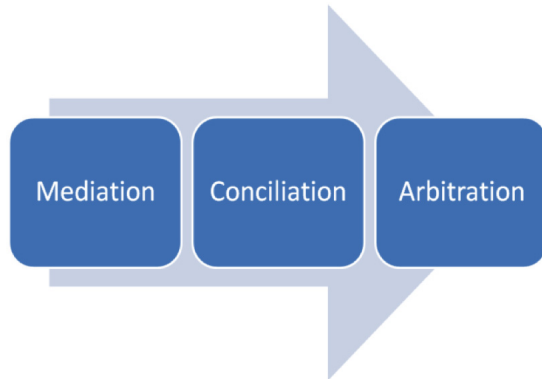
- “Mediation is a sign of weakness”
- “It is too soon to mediate”
- “We tried to negotiate, so a mediator won’t add anything”
- “You cannot negotiate with people who are in bad faith”

Mediation is not a magic drug, but should be used much more!

A Holistic & Customized Approach to Resolving Disputes

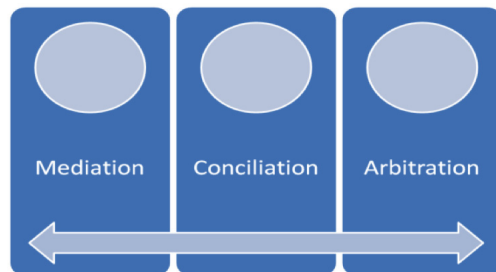


Process Design: Towards Hybrid Vigour



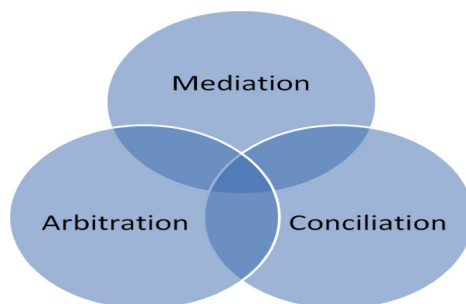
Sequential

- Med-Arb
- Arb-Med
- Arb-Med-Con-Med-Arb
- Consent awards



Parallel

- Med//Arb
- Carve-outs
- Windows
- Shadow mediation
- Partnering



Hybrid

- MEDALOA
- Dispute Boards
- Co-"medarbiters"
- ???

Factors

- Parties
- Certainty of outcome
- Costs
- Time & deadlines
- Applicable law(s)
- Languages
- Skill sets
- Venue & distances
- Institutional rules
- Nationalities/cultures
- Counsel
- Neutrals (roles & no.)
- Availabilities
- Advisors & Experts
- Confidentiality
- Discovery
- Implementation
- Enforcement

Example 1: Benefits of Arb//Med with separate neutrals

- Eastern European company/EU Company Joint Venture for software. One party terminates. An arbitration is initiated. Preliminary issues: Qu. 1: Is the termination valid? (French Law of “Contrats synallagmatiques” applies). Qu 2: Is an affiliate covered by the arbitration clause?
- Tribunal issues and Interim Award (Ans. 1: Yes, termination was valid. Ans. 2: no, affiliate is not included)
- French Court orders mediation in proceedings involving affiliate
- Real interests = the future, co-ownership complications
- Could this not have been done by the same panel of neutrals?
- See the new CEDR Rules for the Facilitation of Settlement in International Arbitration and the creation of Mediation Windows (
http://www.cedr.com/about_us/arbitration_commission/Rules.pdf)
- “Mediation Window” means a period of time during an arbitration that is set aside so that mediation can take place and during which there is no other procedural activity.

Example:

IP Case
Termination
of JV; impact
on the future

An
opportunity
for a
Mediation
Window?

Example 2: Arb-Med for Valuation/Quantum Disputes

- Goal: Create a pressure cooker to reach an agreement in case negotiations reach an impasse.
- A 3-part process in one day:
 - arbitration (3 hours)
 - lunch (2 hours, parties only without the neutral), and
 - mediation (3 hours)
- The same neutral swapped hats (although it could have been done by two neutrals with 1 hat each)
 1. The neutral issued his arbitral decision (a number, no explanation) during lunch (placed it in a sealed envelope)
 2. The neutral met the parties after lunch as their mediator, and worked with them to reach a facilitated outcome (which was achieved, due to the pressure of the envelope)
- The sealed envelope was prominently displayed on the table throughout the mediation. It would have been opened after 3 hours and the parties would have been bound by the award it contained.

Example:

BAT
Valuation of
IP assets for
M&A deal



Source: "Einstein's Lessons in Mediation", Managing Intellectual Property, July 2006

Example 3: MEDALOA when time is short

MEDALOA = Mediation and Last Offer Arbitration

French = « Arbitrage sur dernières offres »

- Goal: to create another pressure cooker, more psychological this time as there is no “sealed envelope” from a third party.
- Combination of mediation + arbitration, conducted over several sessions
- Involves the same neutral for both phases, who can take into account information learned in caucus (should mention this)
- The final arbitration stage is triggered by a deadline having been reached. The neutral acts as a “med-arbiter” who can only choose between two final last offers (one from each party). There can be oral argument as to which offer the neutral should choose.
- Possible variations
 - «Baseball arbitration» («final offer arbitration»)
 - «Night baseball arbitration» (neutral’s suggestion is drafted and compared to the binding offer).

Example:

Skyguide
Averting a
strike that
would have
closed down
Swiss airports

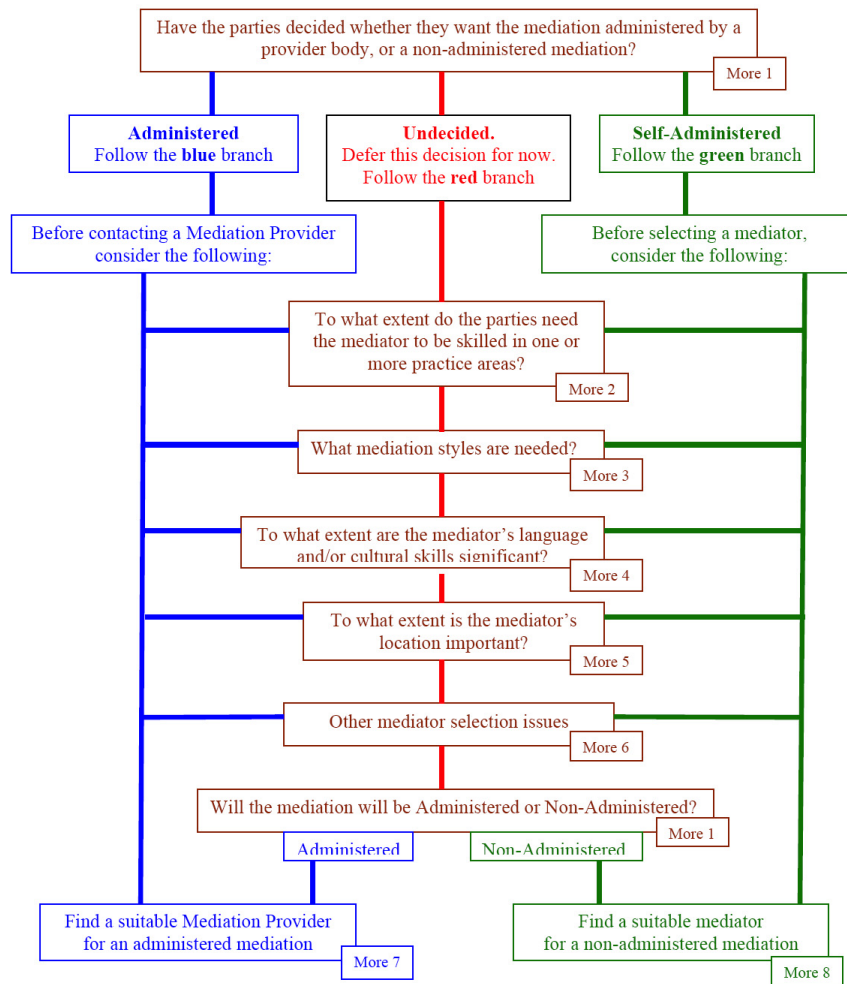


How to Select the Right Neutrals: The IMI Decision Tree



Finding the Right Mediator

Before you start...



<http://www.imimmediation.org/decision-tree.html>

KEY QUESTIONS

1. Do the parties want an administered process or a self-administered mediation?
2. Do the parties want the mediator to be skilled in one or more practice areas?
3. What mediation style do the parties want?
 - Facilitative
 - Evaluative
 - Transformative
4. To what extent are the mediator's language or cultural skills significant?
5. To what extent is the mediator's location important?
6. Other key mediator selection issues
 - Availability
 - Costs
 - Use of Caucuses & Emotions
 - Code of Conduct
 - Mediator Profiles
 - References
 - Research/Feedback
 - Flexibility & hybrids (e.g., MEDALOA)

Olé!: Online Evaluation Form for ADR Process Analysis

PARTY CONFLICT RESOLUTION PREPARATION FORM

Olé!

Welcome to Olé! – online évaluation

- Olé! is a collaborative process between Client and Law Firm designed to evaluate the potential to resolve conflicts early - reducing risk, uncertainty, cost and time.
- It requires Client and Law Firm to share the role of leading litigation strategy.
- Olé! is short, quick and simple.
- Olé! stimulates the right questions to be asked - and answered.

This Olé! questionnaire is based on a document prepared by BATMARK LTD in 2002 to help companies to prepare their assessment of conflicts and dispute resolution options. It has been amended since then by ALTENBURGER LTD legal + tax to add specific questions to help parties and their counsel to prepare for mediation or other Appropriate Dispute Resolution (ADR) proceedings. As a result, it is likely to contain confidential and legally privileged information once filled out, and should be treated accordingly. It may be provided to a neutral or a mediator only with the Party's consent. In such cases, the Party and its counsel should take such measures to ensure that there is no waiver of any Attorney/Client privilege.

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DISPUTE NAME/REF. NO: _____

NAME OF PARTY: _____

NAME OF COUNSEL: _____

DATE OF PREPARATION: _____

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WHAT'S INSIDE OLÉ!?

A form deigned by BAT with the help of the CPR Institute, CEDR, Miryana Nestic, David Shapiro, Jeremy Lack (2010)

I. Basics

- 1.1 Basic Facts
- 1.2 Positions Taken
- 1.3 Stakeholder Analysis
- 1.4 Other Considerations

II. Collaborative Analysis

- 2.1 Underlying Interests Analysis
- 2.2 Historic Costs
- 2.3 Future Cost Projections
- 2.4 Historic Strategy
- 2.5 Quantum Analysis
- 2.6 SWOT – Client
- 2.7 SWOT – Other Party
- 2.8 BATNAs
- 2.9 WATNAs
- 2.10 PATNAs
- 2.11 Chart Summarizing Alternatives
- 2.12 Conflict Resolution Options
- 2.13 Future Strategy

III. Preparations for Mediation

- 3.1 Style of Mediation
- 3.2 Negotiation Approach
- 3.3 Mediation Representation Plan
- 3.4 Mediator Assistance
- 3.5 Impediments Analysis
- 3.6 Information gathering
- 3.7 Other Considerations

IV. Implementation

- 4.1 Action Items
- 4.2 Task Allocations
- 4.3 Deadlines

V. Ongoing Review

VI. Performance Measurement Metrics

VII. Feedback

<http://www.imimmediation.org/ole>

In Conclusion: ADR Hybrids Create Greater Autonomy

- How satisfactory are national court litigation/arbitration on their own?
- How long & costly is the process, what is the certainty of “success”?
- What happens if you “win” (what is % compliance & consequences)?
- How easily can your outcome be enforced abroad?
- Could a mediative step add value?
- Can you afford to ignore ADR?

ADR hybrids can help the parties to design something:

- **Faster**
- **Cheaper**
- **Better.**

