Practical Issues of Cross-Border Mediation

Trier, 14-15 May 2009

Mediation in cross-border disputes: The challenges raised by the European Mediation Directive

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The "Old World" Paradigm

NB. The author apologizes in advance to any colleagues he may offend!

Civil Law Career Judges

France

Criminal Court Justice	Court of Appeal Justice	Supreme Court Justice

Source: http://www.filibustercartoons.com/judges.htm

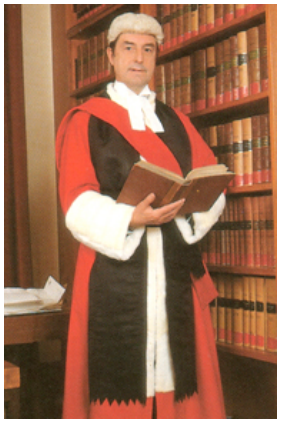
v. Common Law Judges (Former Advocates)

A high court judge

A lower court judge

The Lord Chancellor

More high court justices

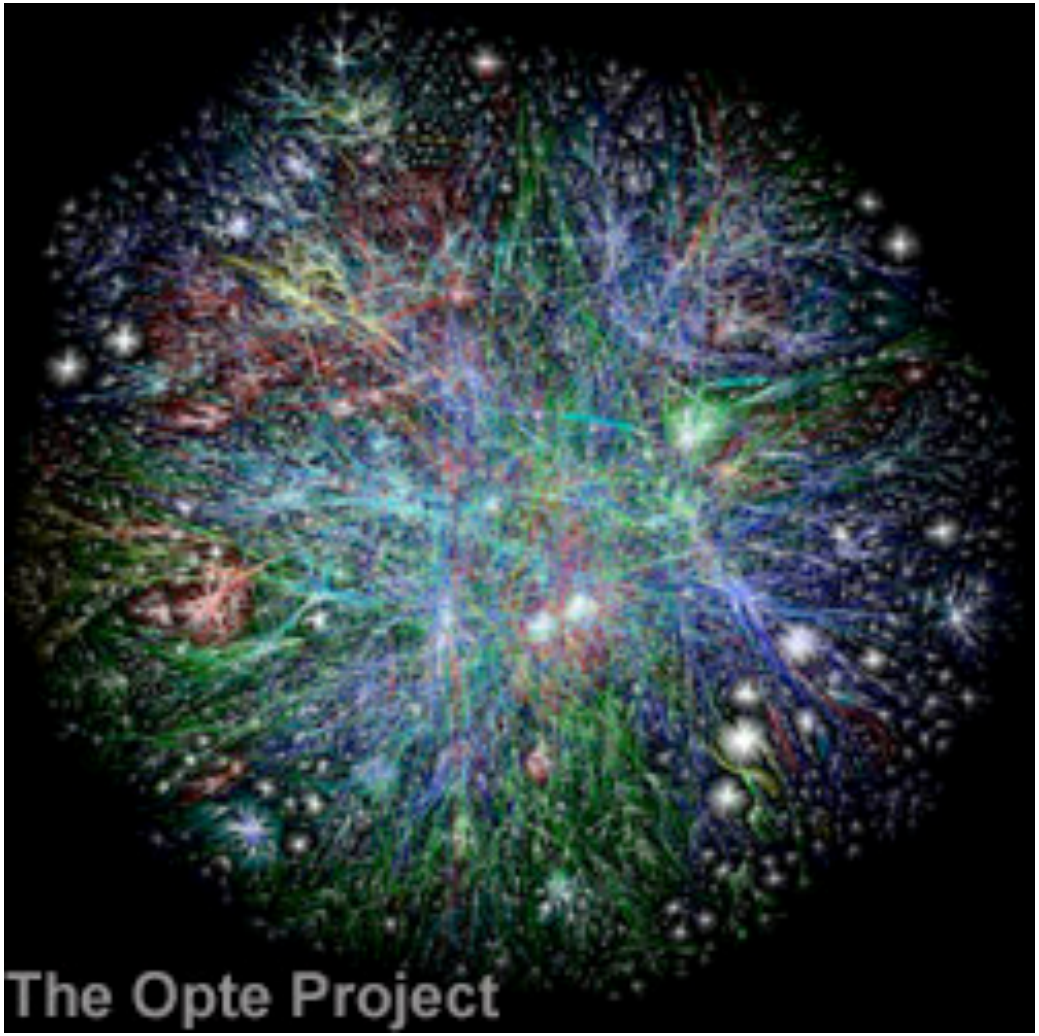


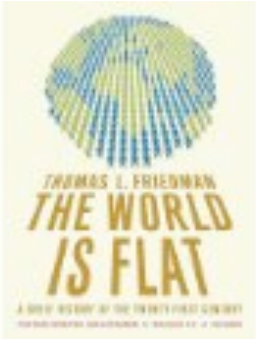
A criminal court judge

A civil court judge

Source: http://www.filibustercartoons.com/judges.htm

The "New World" Paradigm





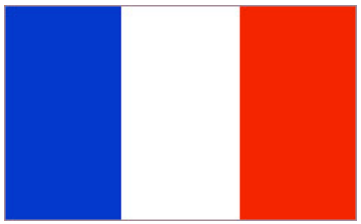
See:
The World is Flat
Thomas Friedman

e.g., The Internet:

Asia Pacific - Red
Europe/Middle East/Central Asia/Africa - Green
North America - Blue
Latin American and Caribbean - Yellow
RFC1918 IP Addresses - Cyan
Unknown - White

Source: http://www.opte.org/maps/

The Result = Fish in fishbowls

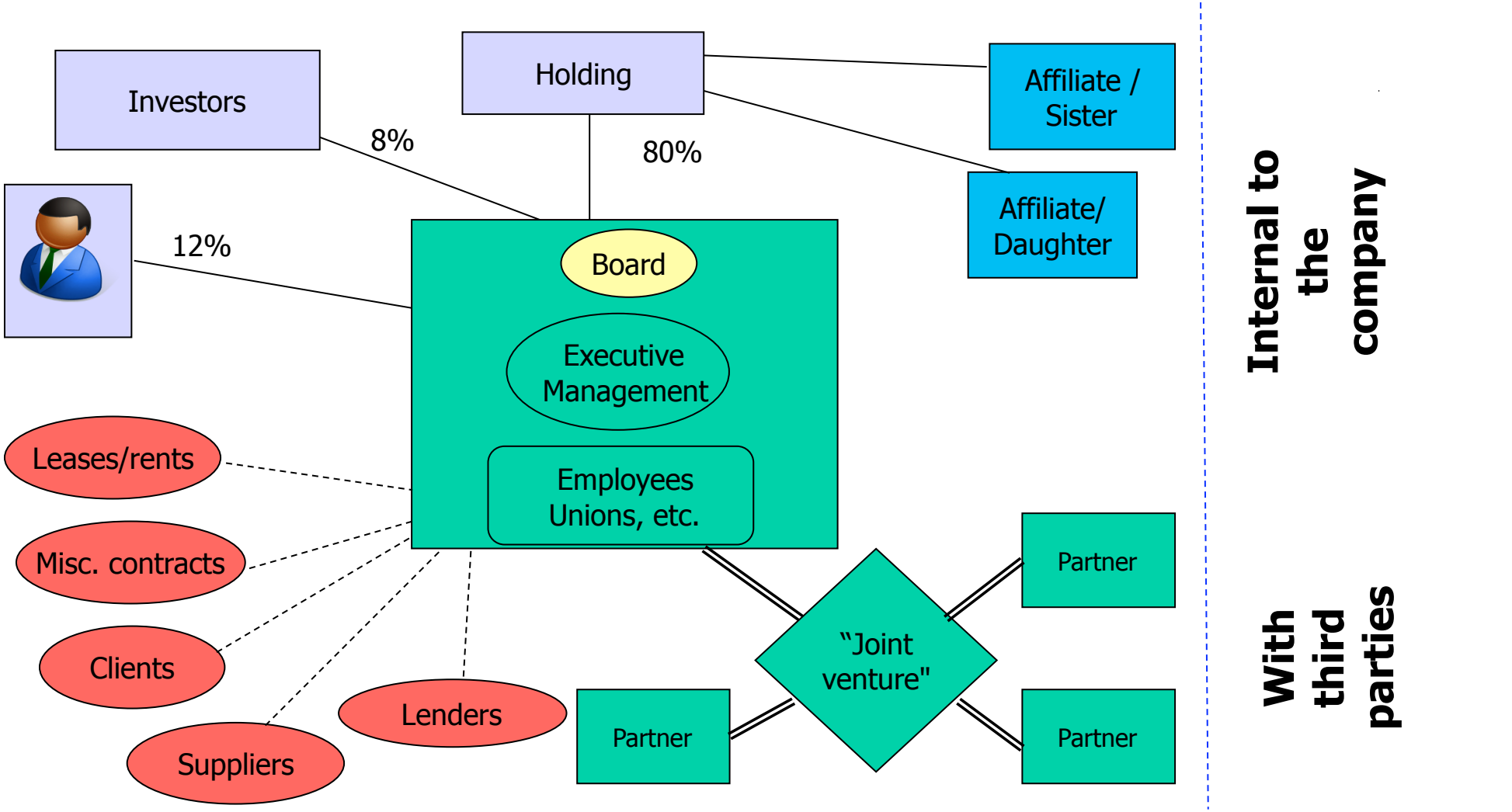


This is compounded by different national rules of civil procedure

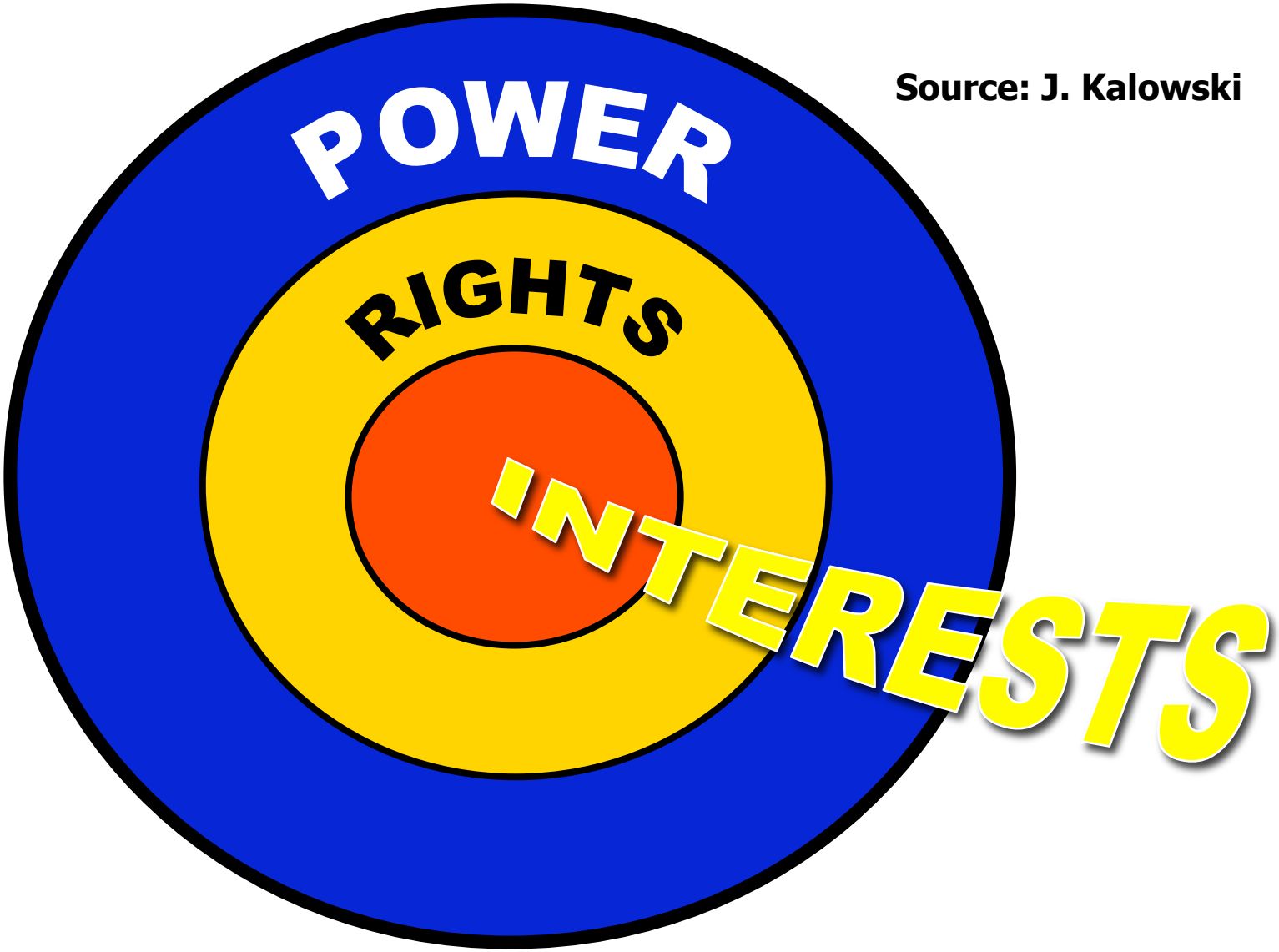
Cross-Border Disputes: kaleidoscopic CR is needed

Source: http://bindweed.com/magicmirror/kaleidoscope-collage.gif

Commercial Cross-Border disputes: The Parties

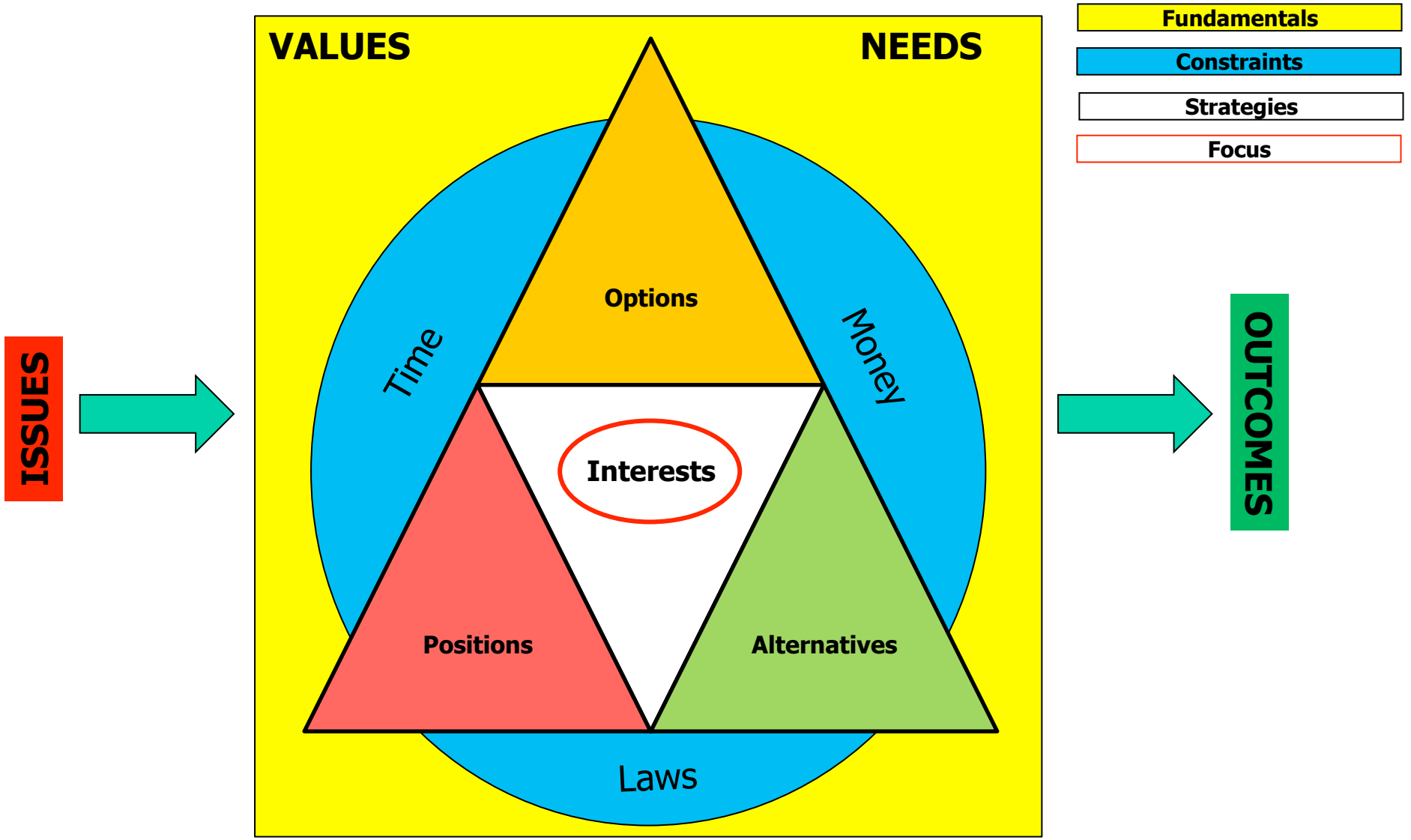


Possible Approaches to Conflict



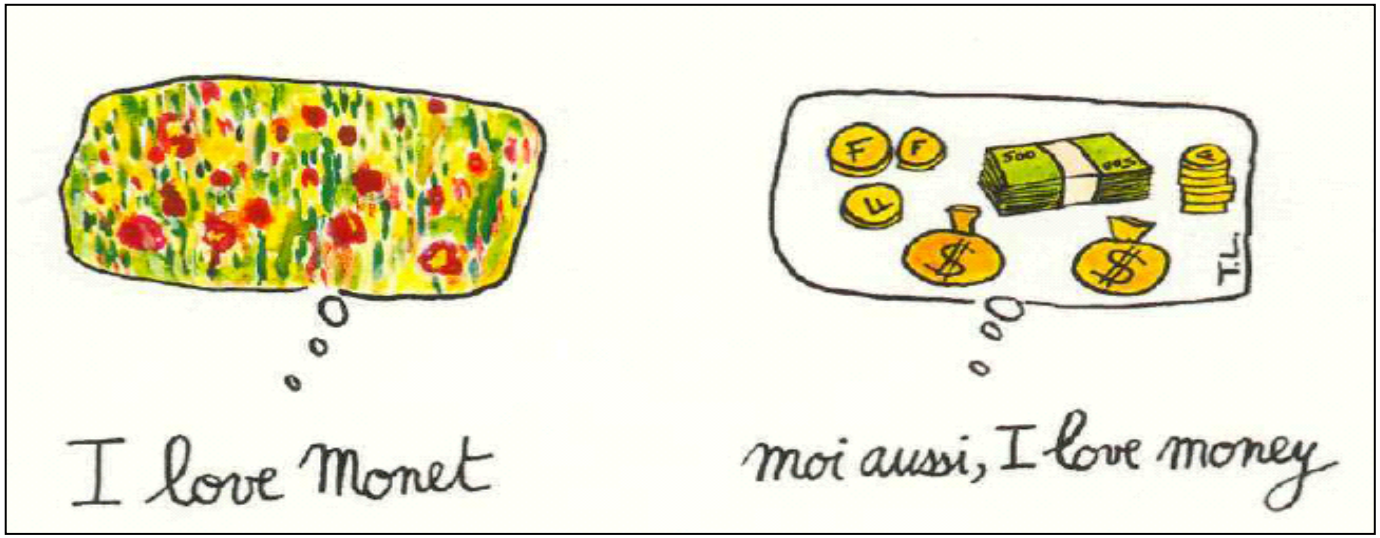
Source: J. Kalowski

The Holistic Approach to Conflict Resolution



The source of cross-border disputes

IncomprehEnsion ?



The hidden face of the conflict

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.

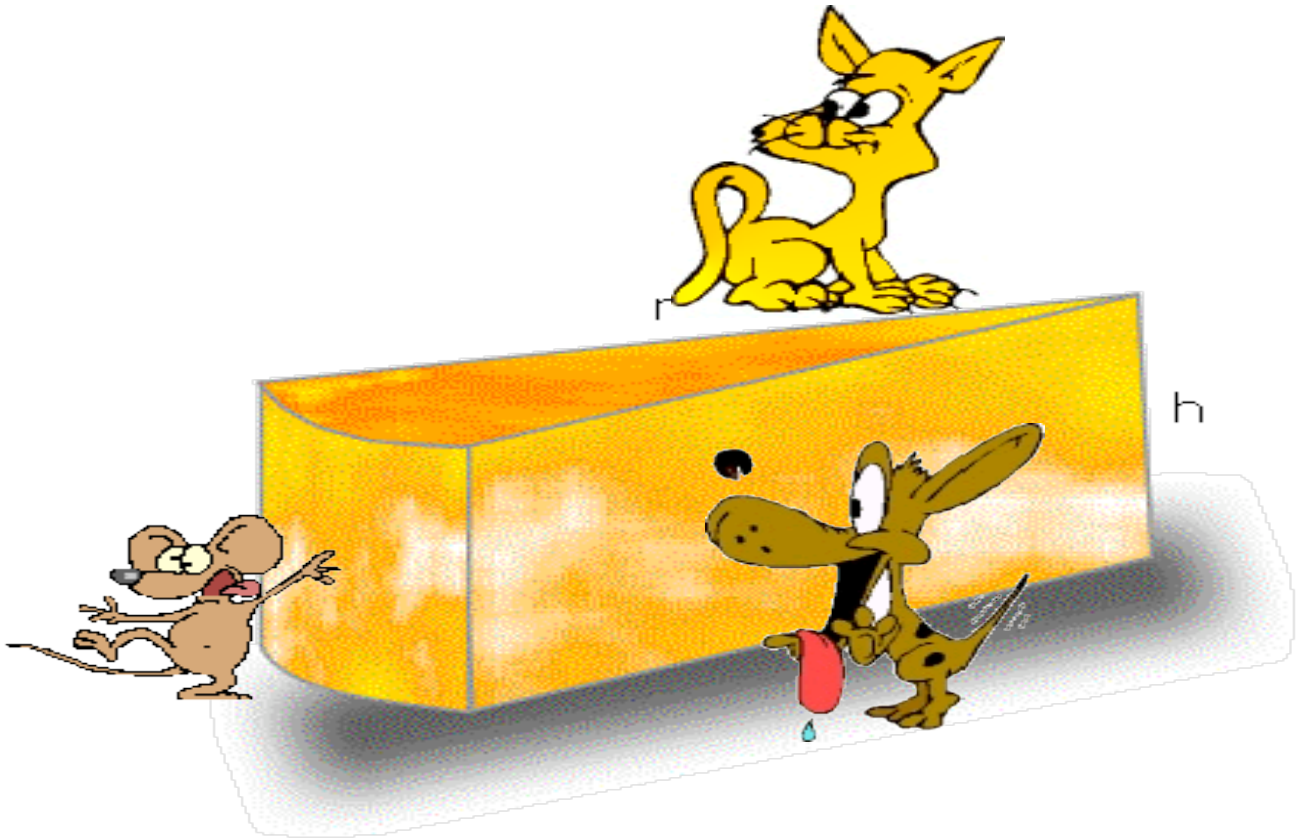
This is especially relevant in cross-cultural conflicts

UNIQUE	preferences adjustment self-image lifestyle relationships values taste finances motivation	INDIVIDUAL
DIFFERENT	**We tend to start at this level and assume intentions.** clothes languages religions foods family patterns status symbols attitudes to money respect patterns work patterns	CULTURAL
SAME	food shelter security identity purpose in life covering belonging self respect self fulfilment (Maslow)	HUMAN

Source: J. Kalowski -- Developed by Sheila Coghill

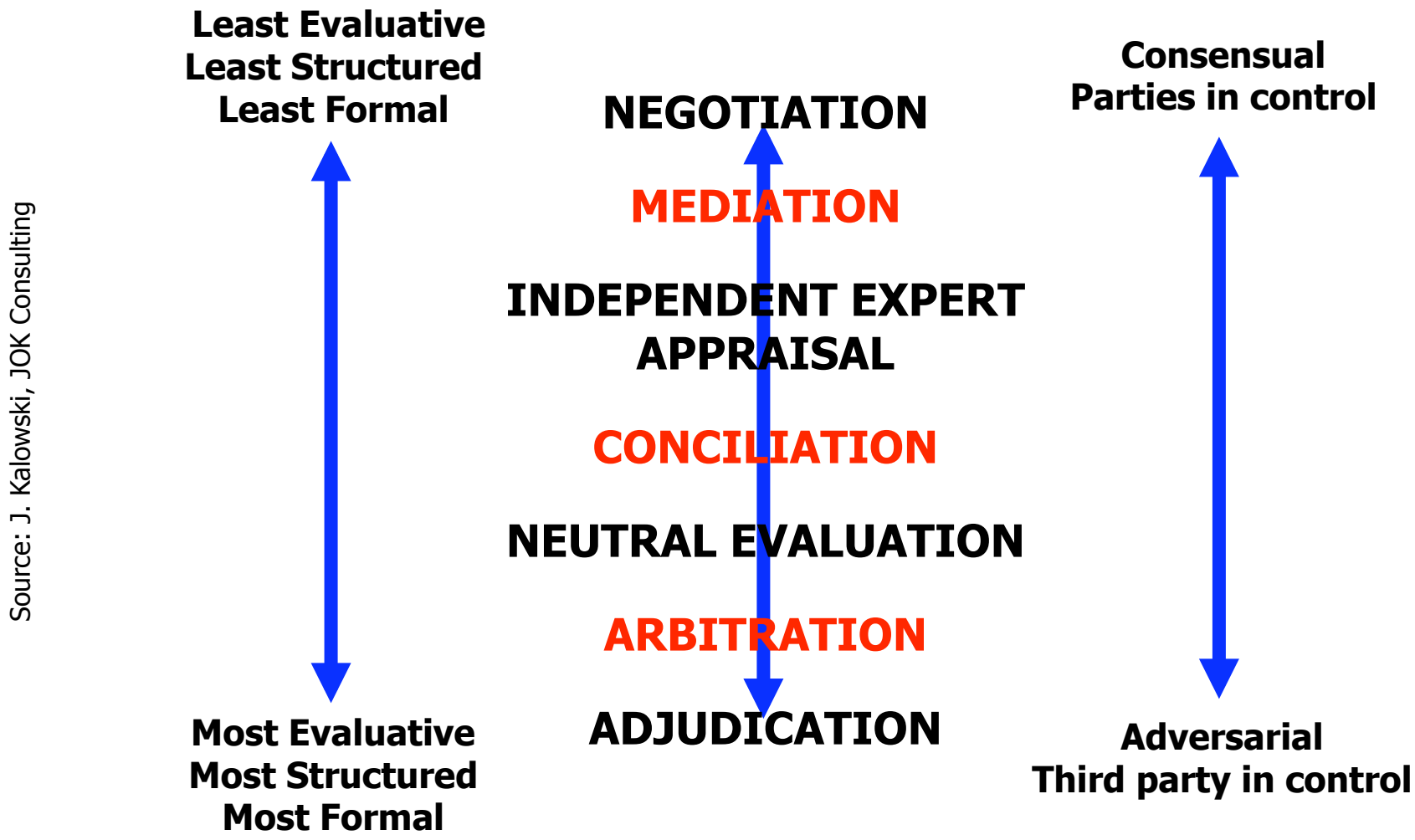
All disputes are like a piece of cheese …

Perceptions = Reality (on a country-by-country basis)



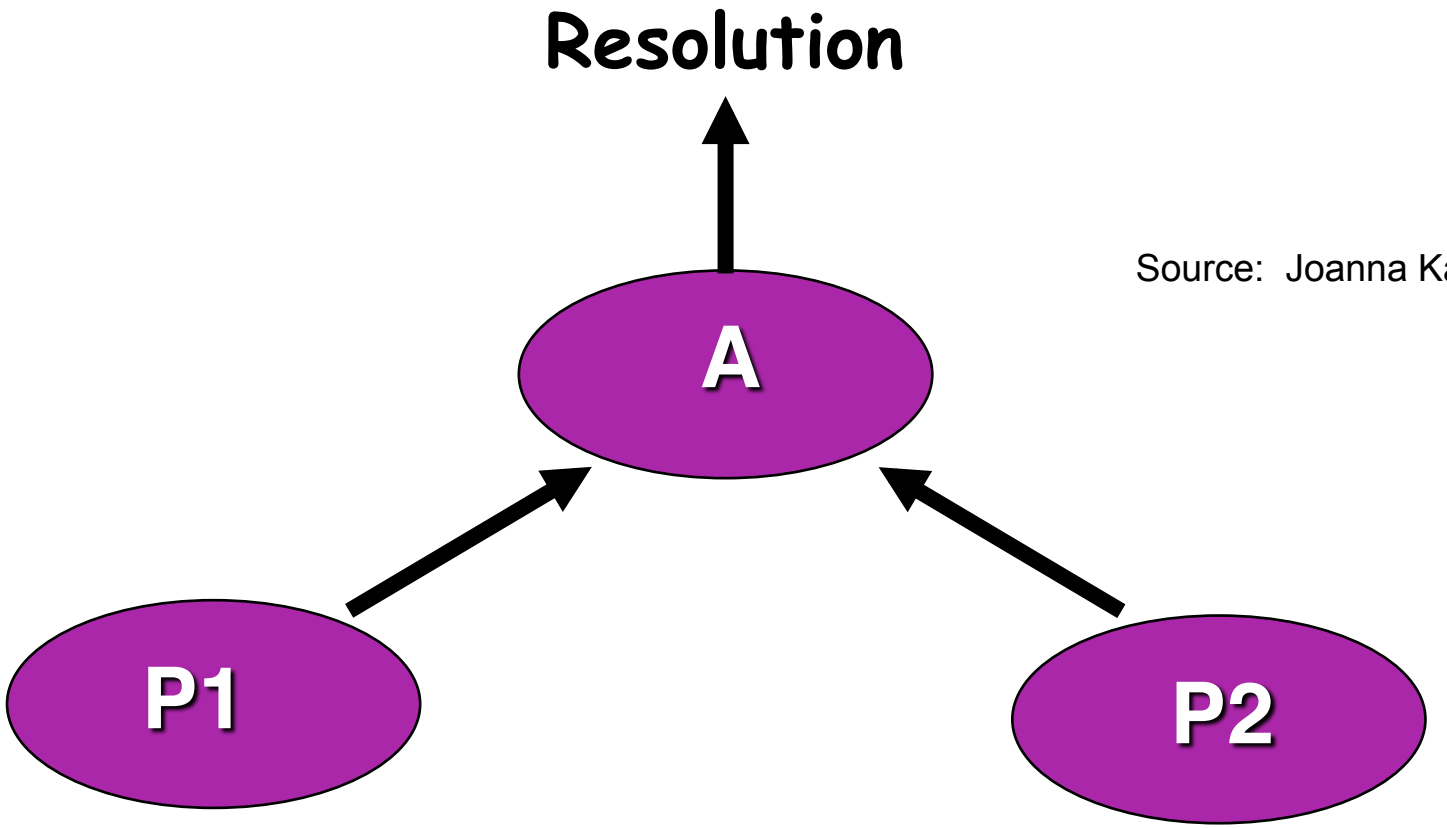
"It isn't that they can't see the solution, it is that they can't see the problem"
Gilbert K. Chesterton

The Process: Appropriate Dispute Resolution (ADR)



Source: J. Kalowski, JOK Consulting

"Arbitration": do we mean the same thing? ...



Source: Joanna Kalowski

"Arbitration": 2 models that vary (civil v. common law)

Source: M. Rushton, Legal Business Arbitration Report 2008 p. 19

The cost of arbitration: common law v civil law

COST ESTIMATE – CIVIL LAW ARBITRATION

	LOW	MID-POINT	HIGH
Three arbitrators (50%)	$100,000	$175,000	$250,000
Arbitration institution	$12,000	$18,500	$25,000
Legal fees	$150,000	$325,000	$500,000
Tribunal expert (50%)	$10,000	$30,000	$50,000
Party direct costs	$5,000	$7,500	$10,000
TOTAL	**$277,000**	**$556,500**	**$835,000**

COST ESTIMATE – COMMON LAW ARBITRATION

	LOW	MID-POINT	HIGH
Three arbitrators (50%)	$200,000	$350,000	$500,000
Arbitration institution	$12,000	$18,500	$25,000
Legal fees	$400,000	$950,000	$1,500,000
Party expert	$30,000	$95,000	$180,000
Party direct costs	$10,000	$15,000	$20,000
TOTAL	**$652,000**	**$1,428,500**	**$2,225,000**

Source: *International Arbitration & Mediation: A Practical Guide*, by McIlwrath & Savage (Kluwer Law International – forthcoming)

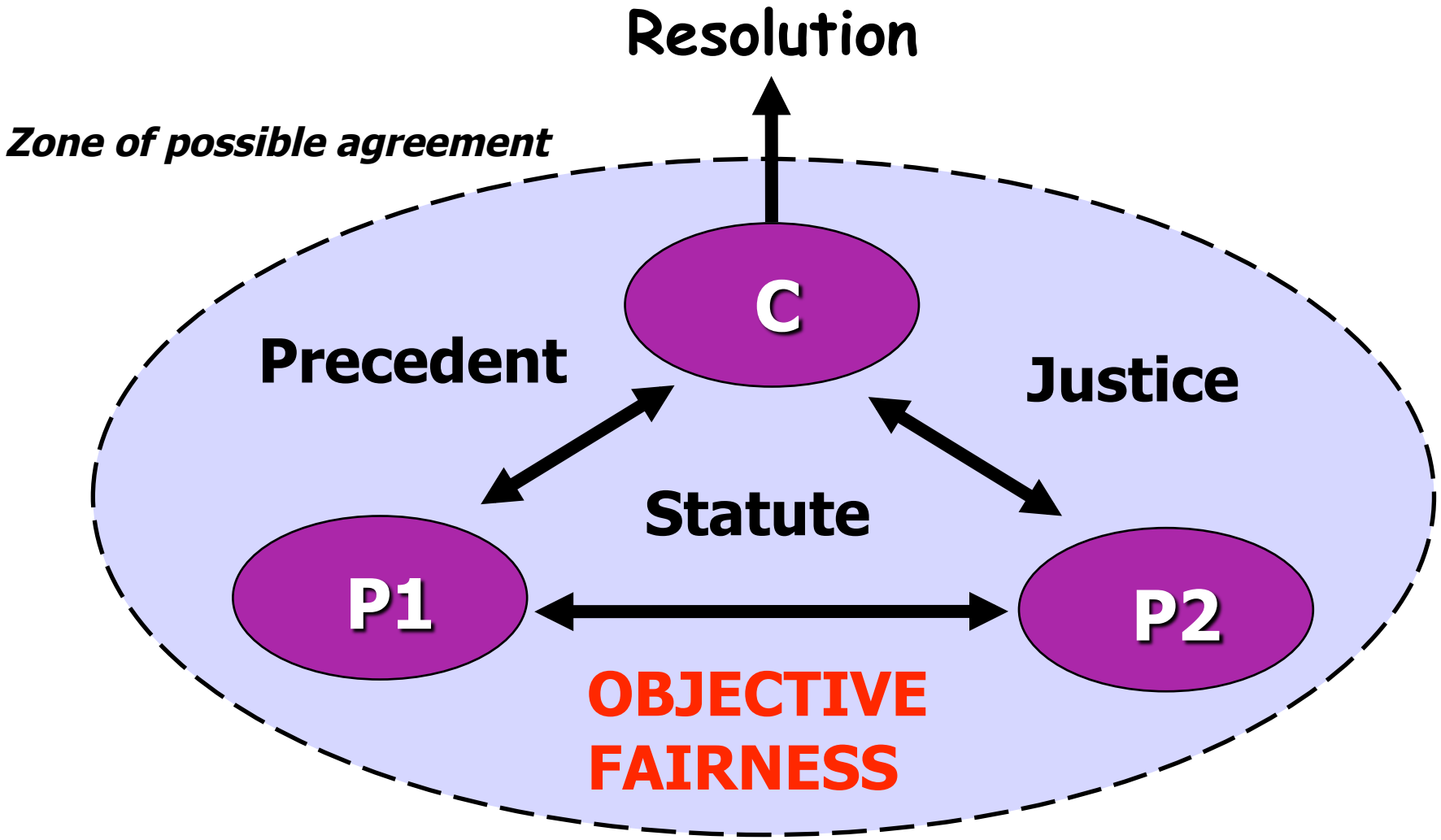
Some key differences:

- Roles of experts
- Discovery
- Evidence
- Rulings
- Costs
- etc

Could this also happen with commercial mediation?

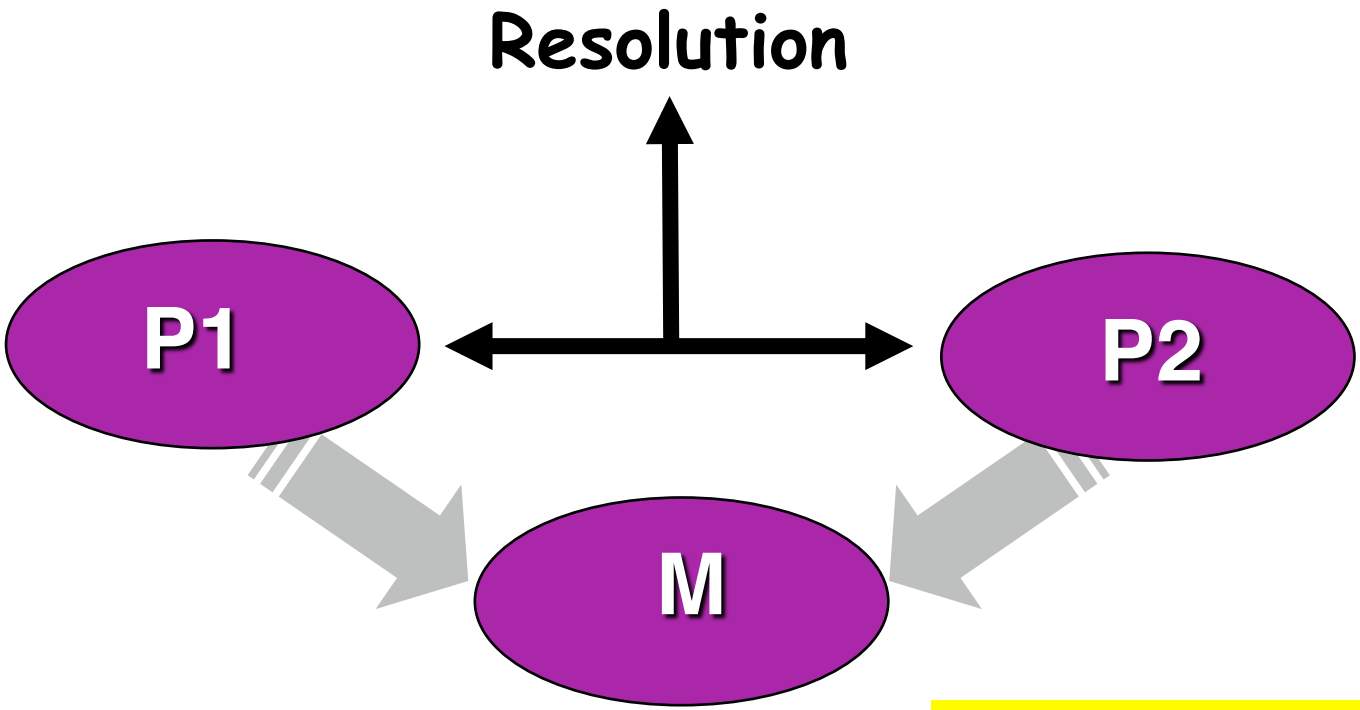
… Conciliation …

Source: Joanna Kalowski



...Mediation

Source: Joanna Kalowski



SUBJECTIVE FAIRNESS

Two model definitions of mediation

An older national definition

"The process by which the participants, with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual agreement that will accommodate their needs."

Folberg & Taylor
Commercial Mediation, 1984

A recent international definition

"A non-binding procedure in which a neutral intermediary, the mediator, assists the parties in reaching a settlement of the dispute."

WIPO Arbitration and Mediation Center
WIPO Publication No. 449(E), v. 2004

Are these definitions different? Can they cover different models of a facilitated negotiation? Are they both covered by the Directive?

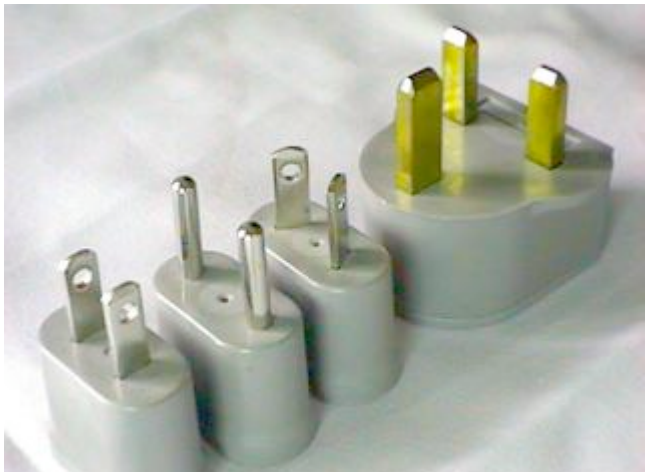
The New EU Mediation Directive

Austria
Belgium
Bulgaria
Cyprus
Czech Republic
Denmark
Estonia
Finland
France
Germany
Greece
Hungary
Ireland
Italy
Latvia
Lithuania
Luxembourg
Malta
Netherlands
Poland
Portugal
Romania
Slovakia
Slovenia
Spain
Sweden
United Kingdom

- 27 Member States
- 23 Official Languages
- 500 million people
- GDP (PPP) 2007 (IMF) estimate
  - Total $14.712 trillion
  - Per capita $28,213
- 3 Candidate Countries
  - Turkey (72.5 million people)
  - Croatia (4.4 million)
  - Macedonia (2.1 million)

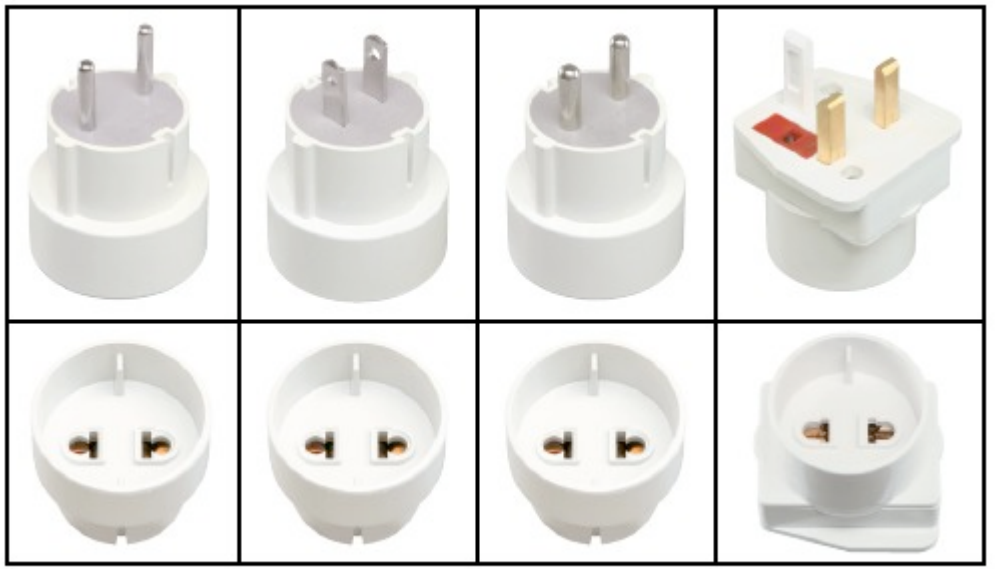
The Problem: EU plugs and phone sockets …

DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2008 on certain aspects of mediation in civil and commercial matters

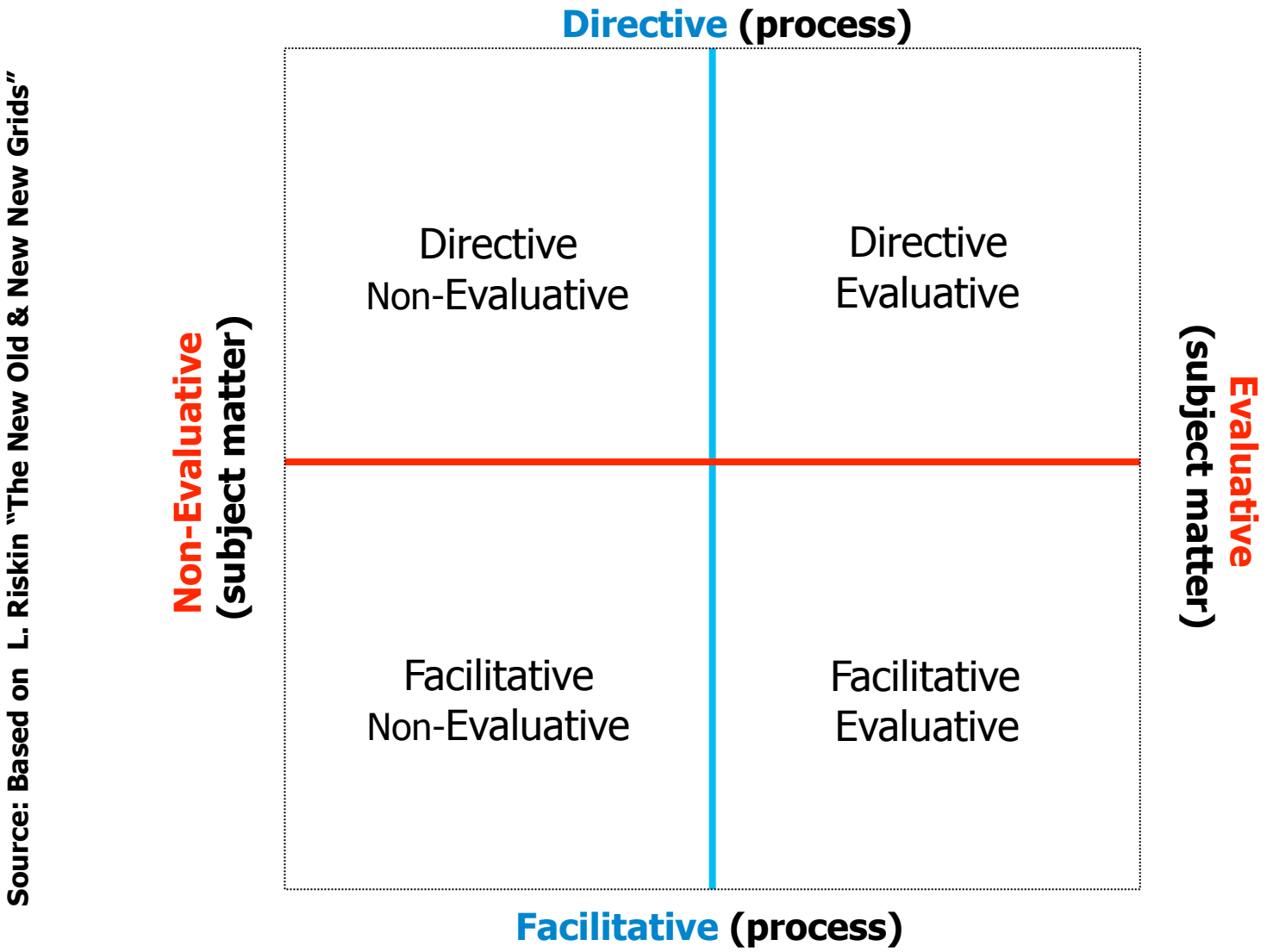


What is meant by "mediation" in the Directive?

What is meant by "mediation" in a cross-border setting?



What type of mediation process did the parties intend?



Arbitration & Conciliation = Evaluative approaches

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."

Consumer Disputes: Evaluative « Out-of-Court » ADR (30.3.98)

Communication from the Commission on "the out-of-court settlement of consumer disputes" (COM(1998)198)

"In addition to court procedures, a whole range of "out-of-court methods" specifically designed to resolve consumer disputes currently exist in Europe. Sometimes these are supplementary or prior procedures, such as mediation or conciliation; sometimes they offer access to alternative mechanisms, such as arbitration. Since a given method may differ from country to country, and in order to avoid confusion as a result of this terminological diversity, it should be made clear that this Communication concerns methods which, no matter what they are called, lead to the settling of a dispute through the active intervention of a third party who proposes or imposes a solution. It does not concern procedures that merely involve an attempt to bring the parties together to convince them to find a solution by common consent.

Systems for the out-of-court settlement of consumer disputes differ greatly as regards their structure, operation and implementation."

Consumer Disputes: The Evolution to « Facilitative » (4.4.01)

COMMISSION RECOMMENDATION of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC)

Recital (3): "On 30 March 1998 the Commission adopted Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (1). However the scope of that Recommendation was limited to procedures which, no matter what they are called, lead to the settlement of a dispute through the active intervention of a third party, who proposes or imposes a solution. It did not concern procedures that merely involve an attempt to bring the parties together to convince them to find a solution by common consent."

(16) Before the parties agree to a suggested solution on how to settle the dispute they should be allowed a reasonable amount of time to consider the details and any possible conditions or terms.

(17) In order to ensure that procedures are fair and flexible and that consumers have the opportunity to make a fully informed choice, they must be given clear and understandable information in order that they can reflect on whether to agree to a suggested solution, obtain advice if they wish or to consider other options.

I. SCOPE

1.This recommendation applies to third party bodies responsible for out-of-court consumer dispute resolution procedures that, no matter what they are called, attempt to resolve a dispute by bringing the parties together to convince them to find a solution by common consent.

II. PRINCIPLES (Impartiality, Transparency, Effectiveness, Fairness)

D. Fairness:

1. The fairness of the procedure should be guaranteed. In particular … (d) prior to the parties agreeing to a suggested solution for resolving the dispute, they should be allowed a reasonable period of time to consider this solution.

2. The consumer should be informed in clear und understandable language, before agreeing to a suggested solution, of the following points: (a) he has the choice as to whether or not to agree to the suggested solution; (b) the suggested solution may be less favourable than an outcome determined by a court applying legal rules; (c) before agreeing to or rejecting the suggested solution he has the right to seek independent advice; (d) use of the procedure does not preclude the option of referring his dispute to another out-of-court dispute resolution mechanism, in particular within the scope of Recommendation 98/257/EC, or of seeking legal redress through his own judicial system; (e) the status of an agreed solution.

The European Code of Conduct (« Facilitative ») 2002?

EUROPEAN CODE OF CONDUCT FOR MEDIATORS ***(NB: No "Suggested Solution" language)***

This code of conduct sets out a number of principles to which individual mediators can voluntarily decide to commit, under their own responsibility. It is intended to be applicable to all kinds of mediation in civil and commercial matters.

Organisations providing mediation services can also make such a commitment, by asking mediators acting under the auspices of their organisation to respect the code. Organisations have the opportunity to make available information on the measures they are taking to support the respect of the code by individual mediators through, for example, training, evaluation and monitoring.

For the purposes of the code mediation is defined as any process where two or more parties agree to the appointment of a third-party – hereinafter "the mediator" – to help the parties to solve a dispute by reaching an agreement without adjudication and regardless of how that process may be called or commonly referred to in each Member State. ***(= non-adjudicative?)***

Adherence to the code is without prejudice to national legislation or rules regulating individual professions.

Organisations providing mediation services may wish to develop more detailed codes adapted to their specific context or the types of mediation services they offer, as well as with regard to specific areas such as family mediation or consumer mediation.

1. COMPETENCE AND APPOINTMENT OF MEDIATORS

1.1 Competence: Mediators shall be competent and knowledgeable in the process of mediation. Relevant factors shall include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.

Family Disputes: Evaluative or Facilitative ADR? (2007)

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 7 December 2007

CEPEJ(2007)14

European Commission for the Efficiency of Justice (CEPEJ)

Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters

No definition of mediation (although it appears 118 times in the text).

"26. Where family mediation is concerned, member states unanimously recognise the importance of the child's best interests. However, the criteria for recognizing the child's best interests vary according to national legislations." *(= Evaluative?)*

"29. Having in mind that the European Code of Conduct for Mediators in civil and commercial mediation is gaining general recognition by various mediation stakeholders throughout Europe, it is recommended that member states promote this Code as a minimum standard for civil and family mediation, taking into account the specific nature of family mediation." *(= Facilitative?)*

Civil Mediation: Blending Evaluative & Non-Evaluative ADR

COUNCIL OF EUROPE COMMITTEE OF MINISTERS Recommendation Rec (2002)10 of the Committee of Ministers to member States on mediation in civil matters (Adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers' Deputies)

Guiding Principles concerning mediation in civil matters

I. Definition of mediation

For the purposes of this Recommendation, "mediation" refers to a dispute resolution process whereby parties negotiate over the issues in dispute in order to reach an agreement with the assistance of one or more mediators.

II. Scope of application

This Recommendation applies to civil matters. For the purpose of this Recommendation, the term "civil matters" refers to matters involving civil rights and obligations including matters of a commercial, consumer and labour law nature, but excluding administrative or penal matters. This Recommendation is without prejudice to the provisions of Recommendation No. R(98)1 on family mediation.

Conclusion: Mediation = facilitated negotiation (evaluative or non-evaluative)

UNCITRAL Model Law on International Commercial Conciliation - 2002

Article 1. Scope of application and definitions

(1) This Law applies to international commercial conciliation.

(2) For the purposes of this Law, "conciliator" means a sole conciliator or two or more conciliators, as the case may be.

(3) For the purposes of this Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

Article 6. Conduct of conciliation

(1) The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted.

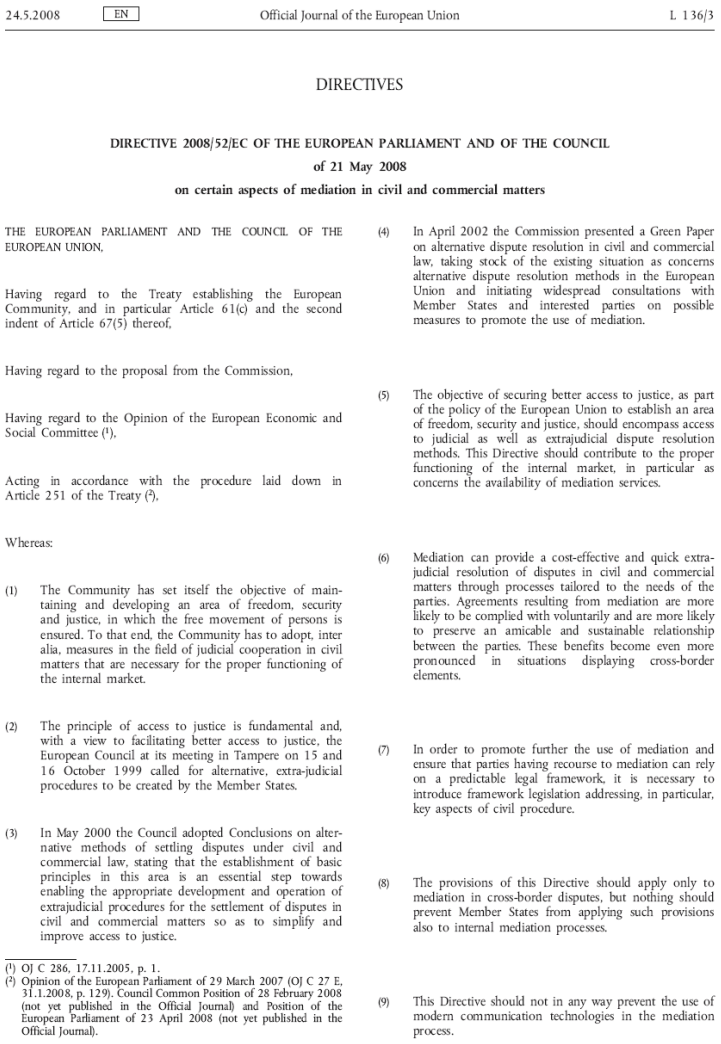
(2) Failing agreement on the manner in which the conciliation is to be conducted, the conciliator may conduct the conciliation proceedings in such a manner as the conciliator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

(3) In any case, in conducting the proceedings, the conciliator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.

Conclusion = Confusion: Does Conciliation = Mediation?

The new EU Directive 2008/52 (What is meant by "Mediation"?)



24.5.2008 EN Official Journal of the European Union L 136/3

DIRECTIVES

DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 21 May 2008
on certain aspects of mediation in civil and commercial matters

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee (1),

Acting in accordance with the procedure laid down in Article 251 of the Treaty (2),

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. To that end, the Community has to adopt, inter alia, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

(2) The principle of access to justice is fundamental and, with a view to facilitating better access to justice, the European Council at its meeting in Tampere on 15 and 16 October 1999 called for alternative, extra-judicial procedures to be created by the Member States.

(3) In May 2000 the Council adopted Conclusions on alternative methods of settling disputes under civil and commercial law, stating that the establishment of basic principles in this area is an essential step towards enabling the appropriate development and operation of extrajudicial procedures for the settlement of disputes in civil and commercial matters so as to simplify and improve access to justice.

(4) In April 2002 the Commission presented a Green Paper on alternative dispute resolution in civil and commercial law, taking stock of the existing situation as concerns alternative dispute resolution methods in the European Union and initiating widespread consultations with Member States and interested parties on possible measures to promote the use of mediation.

(5) The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services.

(6) Mediation can provide a cost-effective and quick extra-judicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.

(7) In order to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure.

(8) The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.

(9) This Directive should not in any way prevent the use of modern communication technologies in the mediation process.

(1) OJ C 286, 17.11.2005, p. 1.
(2) Opinion of the European Parliament of 29 March 2007 (OJ C 27 E, 31.1.2008, p. 129). Council Common Position of 28 February 2008 (not yet published in the Official Journal) and Position of the European Parliament of 23 April 2008 (not yet published in the Official Journal).

(10) This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should apply in civil and commercial matters. However, it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law.

(11) This Directive should not apply to pre-contractual negotiations or to processes of an adjudicatory nature such as certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or to processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute.

(13) The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time-limits for a mediation process. Moreover, the courts should be able to draw the parties' attention to the possibility of mediation whenever this is appropriate.

The definition of "mediation": the confusion continues …

"Article 3
Definitions
For the purposes of this Directive the following definitions shall apply:

(a)'Mediation' means a structured process, **however named or referred to**, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.

(b) 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation."

The definition is tautologous (« mediation » is defined by « mediator », and vice-versa) and seems to include an evaluative process (despite recitals 10-13).

The Hague Convention: Mediation v. Conciliation?

HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

FEASIBILITY STUDY ON CROSS-BORDER MEDIATION IN FAMILY MATTERS *drawn up by the Permanent Bureau*
Preliminary Document No 20 of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference

1.3 Terminology

Mediation does not have a single established definition and can mean different things in different jurisdictions and even different things within the same jurisdiction. This makes any analysis difficult and raises a note of caution when reviewing sources relating to mediation in different jurisdictions. For the purposes of this study, the term mediation is used to refer to a process in which a neutral third party (or third parties) seeks to assist the parties to reach their own agreement, whatever this procedure may be called in the jurisdiction. The aim of mediation and one of the fundamental principles recognised across the world, is to empower the parties to reach their own decisions about their own affairs without undue interference from the State. Mediation is short-term and is focussed on resolving specific defined issues and can thus be differentiated from longer-term non-specific processes such as counselling. The above definition of mediation also distinguishes it from other forms of alternative dispute resolution such as arbitration where the arbitrator makes the decision to resolve the dispute and the parties are legally bound by the decision made.

National definitions suggest different national concepts

« La médiation est un processus amiable et confidentiel de résolution des différends. »
Centre de Médiation et d'Arbitrage de Paris (CMAP) (FR)

"Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution."
Centre for Effective Dispute Resolution (CEDR) (UK)

"Mediation is a process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences."
JAMS (USA)

"Mediation is an alternative method of dispute resolution whereby two or more parties ask a neutral third party, the mediator, to assist them in settling a dispute or in avoiding future conflicts. The mediator facilitates the exchange of opinions between the parties and encourages them to explore solutions that are acceptable to all the participants. Unlike an expert the mediator does not offer his or her own views nor make proposals like a conciliator, and unlike an arbitrator he or she does not render an award."
Swiss Rules Of Commercial Mediation of the Swiss Chambers of Commerce and Industry (CH)

What does this mean in practice? …

An Anglo-Saxon model of mediation ("Efficiency")

Mediation

- Generally adjunct to litigation or arbitration, can involve unwilling participants

Complex process (usually late-stage process, e.g., after exchange of documents):

1. Issue - choosing mediator
2. Briefing counsel
3. Issue - choosing venue and date
4. Prepare case summaries and bundle
5. Everyone gathers
6. Formal statement (usually by lawyer) [by complainant(s)]
7. Formal replies (usually by lawyer) [by defendant(s)]
8. Caucuses with mediator shuttling between the parties
9. Occasional joint meetings (<40% of time)
10. Meetings between various parties in parallel
11. Mediator usually forms view of what could settle, and then attempts to bring parties to that point
12. Pressure to complete settlement within the time available (1-2 days)
13. Either settlement is reached and documented then and there, or no settlement reached

Source: InterResolve (UK)

An Ostro-Germanic model of mediation ("Perfectionism")

Source: J. Lack based on discussions with KonfliktKultur

Mediation

1. Issue - choosing mediator (co-mediation is advocated whenever possible; preferably a man and a woman)
2. Briefing of parties and lawyers (if lawyers have been retained) about the Mediator's preferred style of mediation and the mediator(s)' fees
3. Issue - choosing venue and date (a neutral place, and at least one stay overnight for people to be able to reflect on the following morning)
4. Case summaries and bundles of documents can be sent to the mediator(s), but if so are exchanged between the parties. Summaries should focus on the parties' needs and interests, and not on past facts.
5. Everyone gathers for a first joint session
6. Formal statement by whoever wishes to go first (preferably by party rather than lawyer)
7. Formal statements from other party/parties (preferably the party/parties rather than their lawyers)
8. NO CAUCUSING: ALL SESSIONS ARE JOINT. The mediator(s) seldom separate and work mainly in joint sessions (>60% of time).
9. Occasional group exercises to bring out needs and interests, and give the parties an opportunity to show they have understood one-another's needs and interests.
10. Possible meetings between various parties (without the mediator(s) needing to be present)
11. The mediator(s) avoid(s) forming a view of what could settle, but work with the parties to explore and generate as many options for mutual gain as possible (e.g., brainstorming sessions, and assessing options as against expressed needs and interests).
12. Avoid time pressures to complete settlement. Try to give as much time as possible to ensure parties have had full opportunity to reflect on the settlement terms, and still agree with them.
13. Either settlement is reached and documented then and there, or no settlement is reached and the mediator(s) continue(s) to be available to the parties to identify why a settlement was not reached and possible additional steps that could be taken to resolve any remaining differences.

A French model of mediation ("Conceptualism")

Mediation (Primarily Institutional)

Etape 1 : Introduction

1. Accueil du médiateur : aisance relationnelle, courtoisie, présentation personnelle, installation des parties.
2. Rappel des objectifs de la médiation : la recherche commune de la solution.
3. Les principes fondamentaux : indépendance, neutralité, impartialité, la confidentialité, les pouvoirs de transiger, la force de l'accord.

Etape 2 : Compréhension des faits : « l'accord sur le désaccord »

1. La gestion du dialogue : partage du temps entre les parties, écoute équilibrée, apaisement des passions. Respect de l'impartialité
2. Interventions du médiateur : les questions ouvertes (utilité, pertinence), les reformulations (clarté, exactitude).
3. Identification des problèmes : accord sur les termes et sur leur importance.

Etape 3 : Besoins et enjeux – Des positions vers la recherche des intérêts

1. La compréhension par le médiateur des besoins de chaque partie : domaine (juridique, financier, relationnel), importance (points de blocage ou accord facile).
2. La compréhension par chacune des parties des besoins de l'autre : dialogue, reformulation, questions.
3. La gestion des apartés : moment, (pertinence, durée), clarté du procédé (envers chacune des parties). Respect de la confidentialité, retour en plénière

Etape 4 : La recherche des solutions

1. Le médiateur « facilitateur » ou « aviseur » : participation à la recherche de la solution, suggestion de sa solution.
2. La progression de l'accord : identification des premiers points de rencontre.
3. Conclusion de la médiation : rappel des formalités qui suivent (rédaction de l'accord, signature, exécution).

Source: CMAP

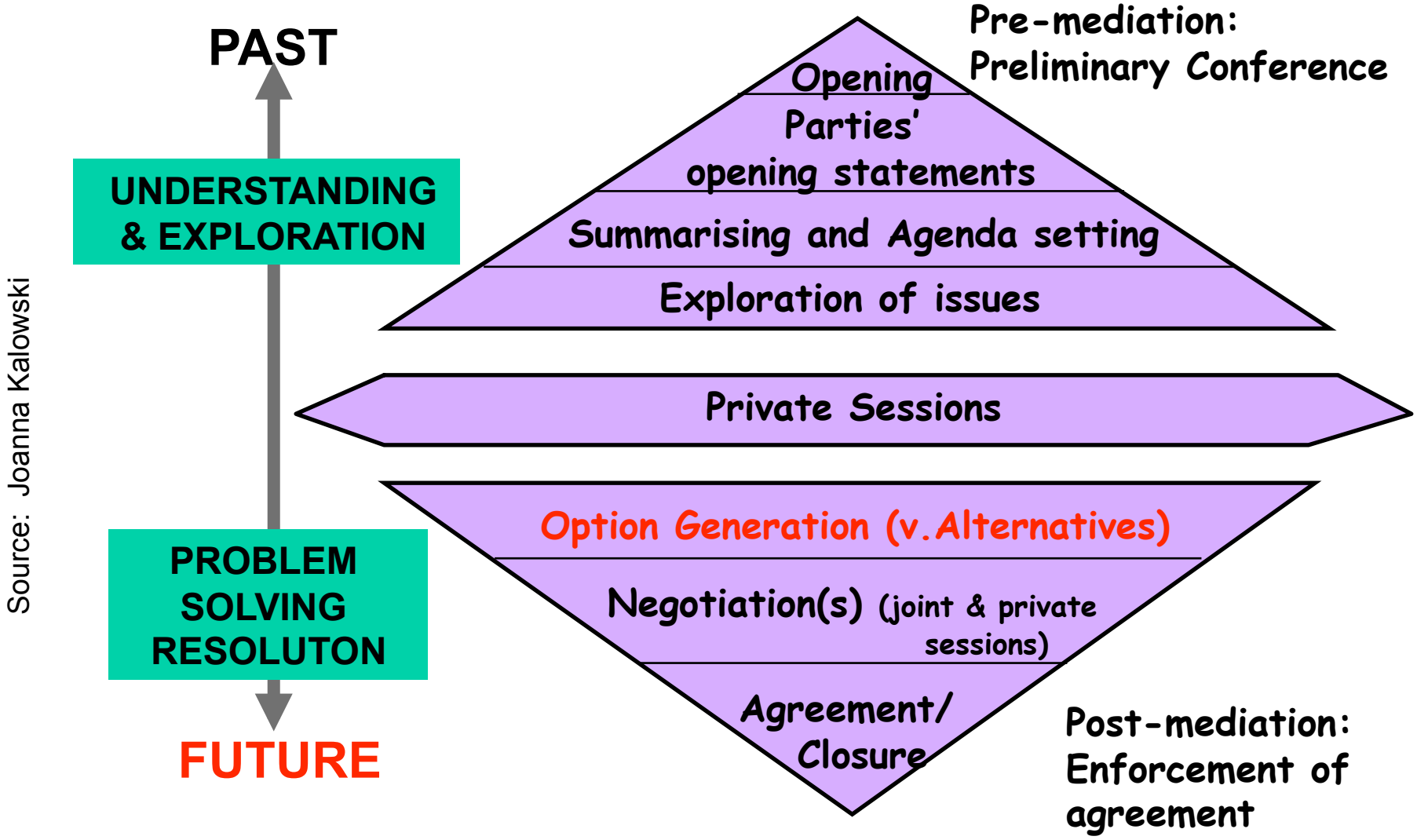
A Dutch model of mediation ("Pragmatism")

Average duration of a mediation	4 x ½ day sessions
No. of disputes resolved in a single mediation	15%
Percentage of cases reaching a settlement	79%
Willingness of the parties to repeat mediation	92%
Average value of thedispute	Euro 5 million
Average cost	Euro 3,500.00 / party

(Source: ACB, NL 2006)

http://www.mediation-bedrijfsleven.nl/english.shtml

An Australian model ("Holisticism")



An emerging « Swiss mix » (Geneva)

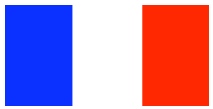
Mediation
1. Informal (possibly institutional = Swiss Chambers of Commerce, WIPO). May be suggested by the court (as opposed to conciliation, which is often mandatory).
2. Appointment of mediator by the parties (often from lists of mediation associations, e.g., CSMC, FSM, FSA or local government lists of accredited mediators)
3. Initial phone contacts between the mediator and the parties (often through their attorneys) for "contracting" of the mediation process (preliminary issues: e.g., place, language, participants, time to be allocated, submissions (if any) to be reviewed in advance by the mediator -- these process details can be "re-contracted" at any time)
4. Signature of a written mediation agreement (if none already exists, covering fees, allocation of expenses, specific rules (e.g., document retention policies etc)
5. First joint session (introductory presentations, identification of key issues and possible values/criteria/ parameters for resolution of the dispute)
6. Joint sessions and/or caucuses (mainly for checking in with the parties and possible discussions on how to raise issues in joint session, rather than for interest probing and problem solving)
7. Presentation of needs and interests of the parties, and assessment of where they stand on the Glasl scale
8. Assessment of alternatives to mediation (BATNAs, WATNAs, PATNAs)
9. Identifying where the parties agree to disagree (and why)
10. Assessment of alternatives in view of needs/interests established
11. Brainstorming for possible options ("win-win" as a possible objective)
12. Parties discuss terms of a settlement agreement (or how to best continue the dispute e.g., cheaper; evidence;-gathering. risk management etc)
13. Execution of detailed settlement agreement (usually drafted by counsel)
14. Possibility of registering the settlement agreement with a judge ("homologation") (similar to "consent award" process in arbitration)
NB. Some Swiss mediators prefer to work in co-mediation. Some also prefer to work in several short sessions (e.g. 1.5 to 2.5 hours per session).

Compiled from: B. Sambeth, E. Fiechter, J. Lack

Different national cultures do reflect different processes

= ?

Which system to choose for a cross-border dispute?



UK/US = Efficiency
- Time pressure
- Emphasis on an outcome
- Much caucusing (emotions?)

AT (& DE) = Perfectionism
- Whatever time it takes
- 2 neutrals
- No caucusing
- Emphasis on process

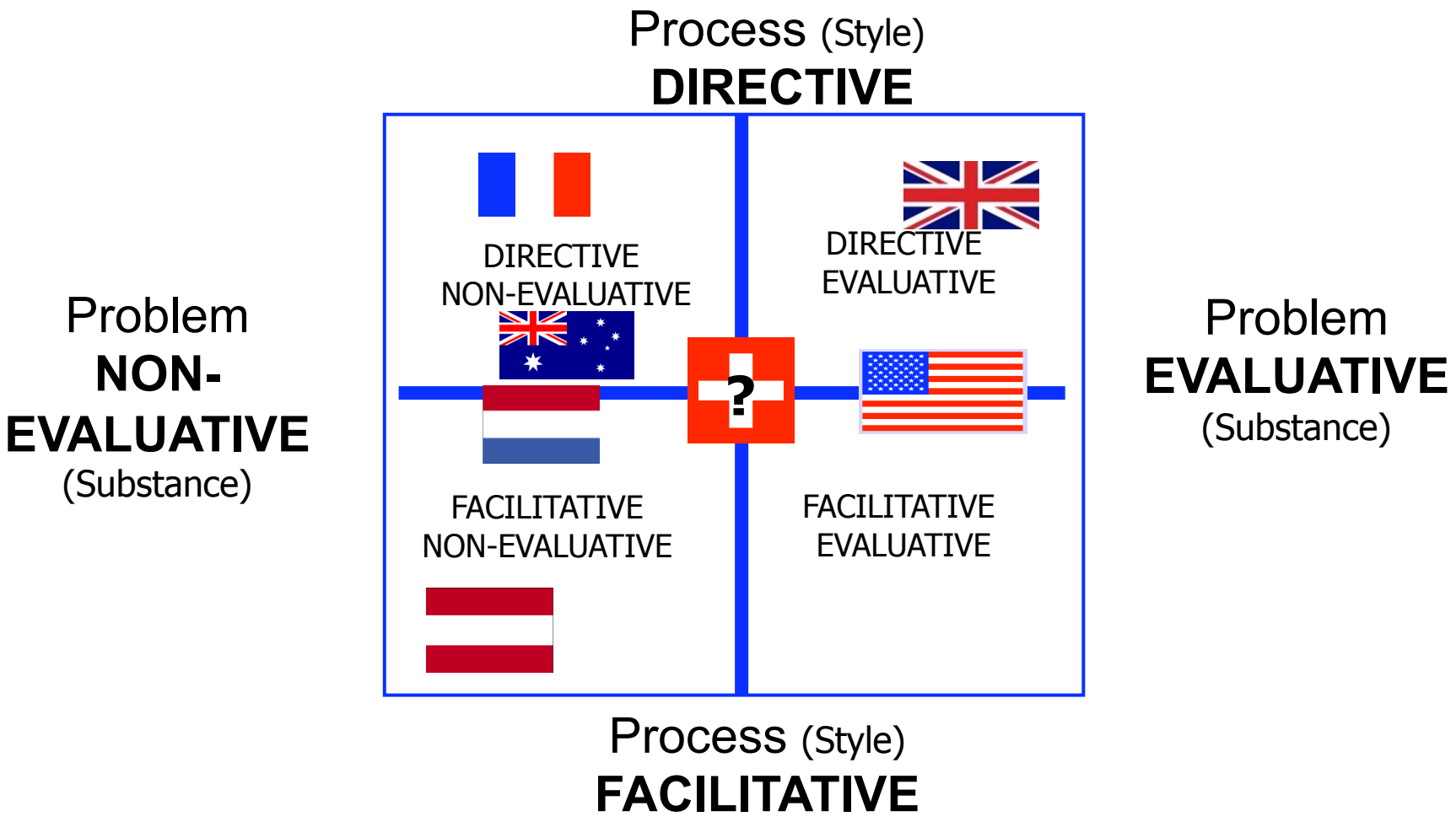
FR = Conceptualism
- 4 steps
- Confidential
- Little other emphasis

NL = Pragmatism
- 4 half days on ave.
- Little caucusing
- Process + outcome + cheap

AU = Holisticism
- Time (past & future)
- Broad and flexible

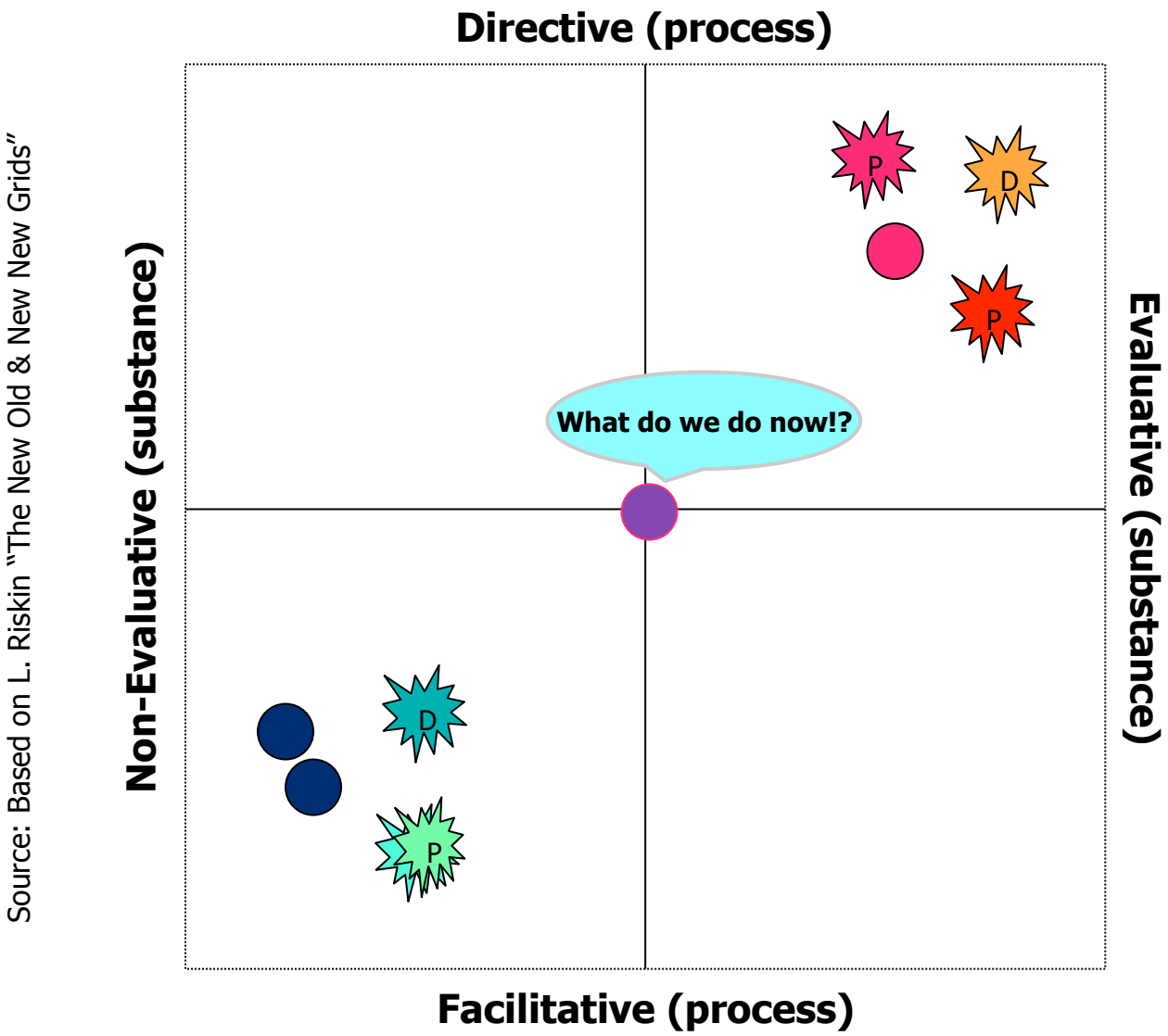
"Stereotyping" using a Riskin Grid

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



NB. It is impossible to generalize. The parties and the mediator should be aware that different models can exist (even within the same country) and choose whatever suits best.

How to manage this variety of models as mediators?



Key

◯ = Neutral

✸ = Counsel

"Directive" v. "Elicitative "
= **procedural issues**

"Evaluative" v. "Non-Eval."
= **substantive issues**

- **Anglo-Saxon mediation**
- **Continental mediation**
- **Cross-border mediation**

A variety of new mediation styles are emerging

What are we aiming for?

1. A **conciliative** style aimed chiefly at reducing the fighting that primarily uses physical calming and spatial tools such as separation, reassurance, sympathetic tone of voice and caucusing;
2. An **evaluative** or directive style aimed mainly at settlement that primarily uses intellectual and logical tools such as analysis, distinction, debate, instruction, compromise and reductionism;
3. A **facilitative** style aimed primarily at resolution that primarily uses emotional calming and affective tools such as listening, empathy, acknowledgement, summarization, reframing and dialogue;
4. A **transformative** style aimed principally at personal transformation that primarily uses emotional/relational calming and meaning-altering tools such as recognition and empowerment, along with participation, responsibility and relationship building;
5. A *spiritual, heart-based,* or **transcendent** style aimed at personal learning, letting go, forgiveness and reconciliation that primarily uses spiritual/heart calming tools such as centering, mindfulness, direct heart-to-heart communication, compassionate inquiry, wisdom and insight;
6. A **systems design** style aimed at preventing systemic dysfunctions that primarily uses environmental/systems thinking and design principles to change the context, culture and environment in which conflicts occur.

Source: Ken Cloke, **Let a Thousand Flowers Bloom: A Holistic, Pluralistic and Eclectic Approach to Mediation (2007)**

IMI: Forging a global mediation profession … a 1st step

International Mediation Institute

www.IMImediation.org

There is no single mediation process. IMI is trying to help render different mediation styles transparent, and to help users find competent and suitable mediators. The parties should feel confident with any neutral given the emphasis on party autonomy in mediation, so long as the mediator is competent. IMI is seeking to set high basic competency criteria and transparent performance feedback from users so that choices can focus on suitability criteria.

Competency v. Suitability

Types: Evaluative, Facilitative, Transformative, etc.

(NB. June 30th Deadline for Mediators to Register!)

The challenge that lies ahead for cross-border mediation

We will need to integrate different models of mediation into cross-border disputes …

This will have to be considered globally and inclusively.