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Two Topics

1. Choosing the right institution

- a. Ad-hoc v. administered?
- b. Institutions adapted to international business disputes
- c. Main differences between institutional rules?
- d. Standard clauses
- e. Role of institutions if there is no ADR clause
- f. Advantages of Institutional Supervision

2. Choosing the right mediator

- a. Competency (quality)
- b. Style (philosophy)
- c. Suitability (specificity)

The Easy Answer



International Mediation Institute

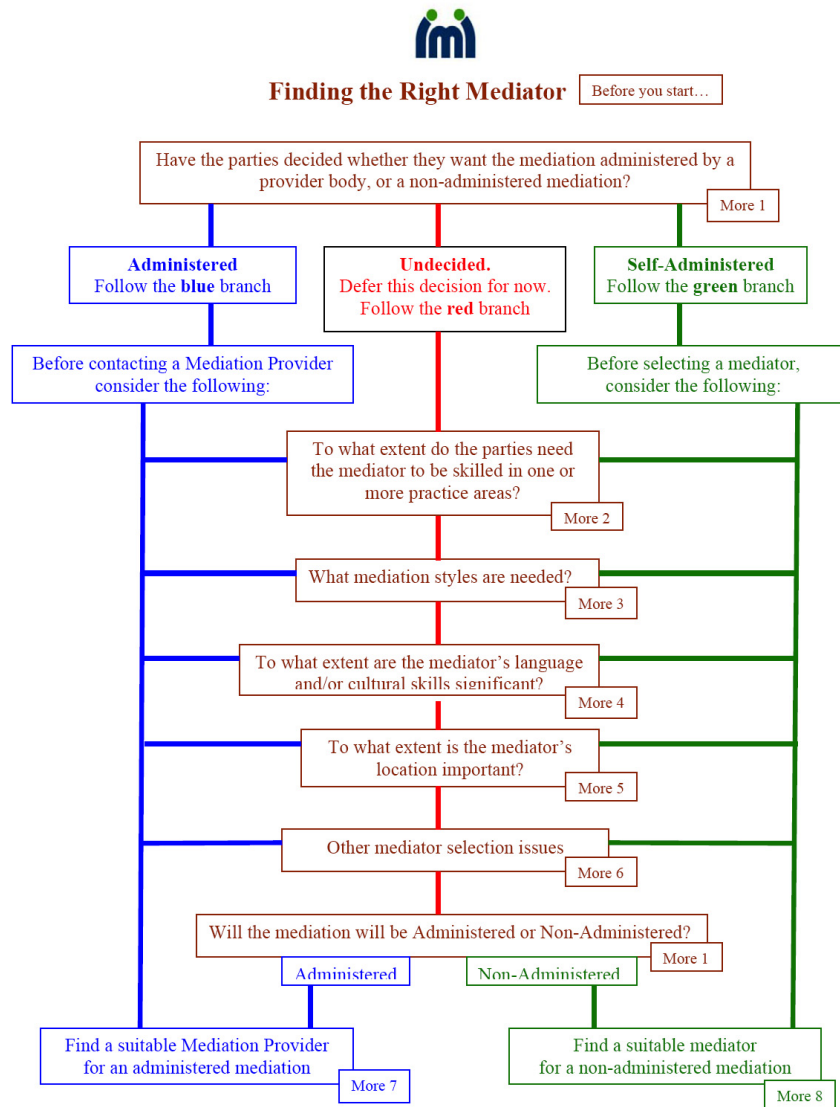
www.IMImediation.org

IMI has become a recognized place to start searching for mediators. A JV by US, Dutch and Singaporean DR Centers, it has assembled an international Independent Standards Committee and aims to provide transparent user feedback on mediators, which prospective parties can use on the Internet. IMI is setting competency criteria and is providing transparent performance feedback from prior users so that choices can focus on suitability criteria.

Competency & Suitability

Types: Evaluative, Facilitative, Transformative, etc.

The IMI Decision Tree: <http://www.imimmediation.org/decision-tree.html>



KEY QUESTIONS

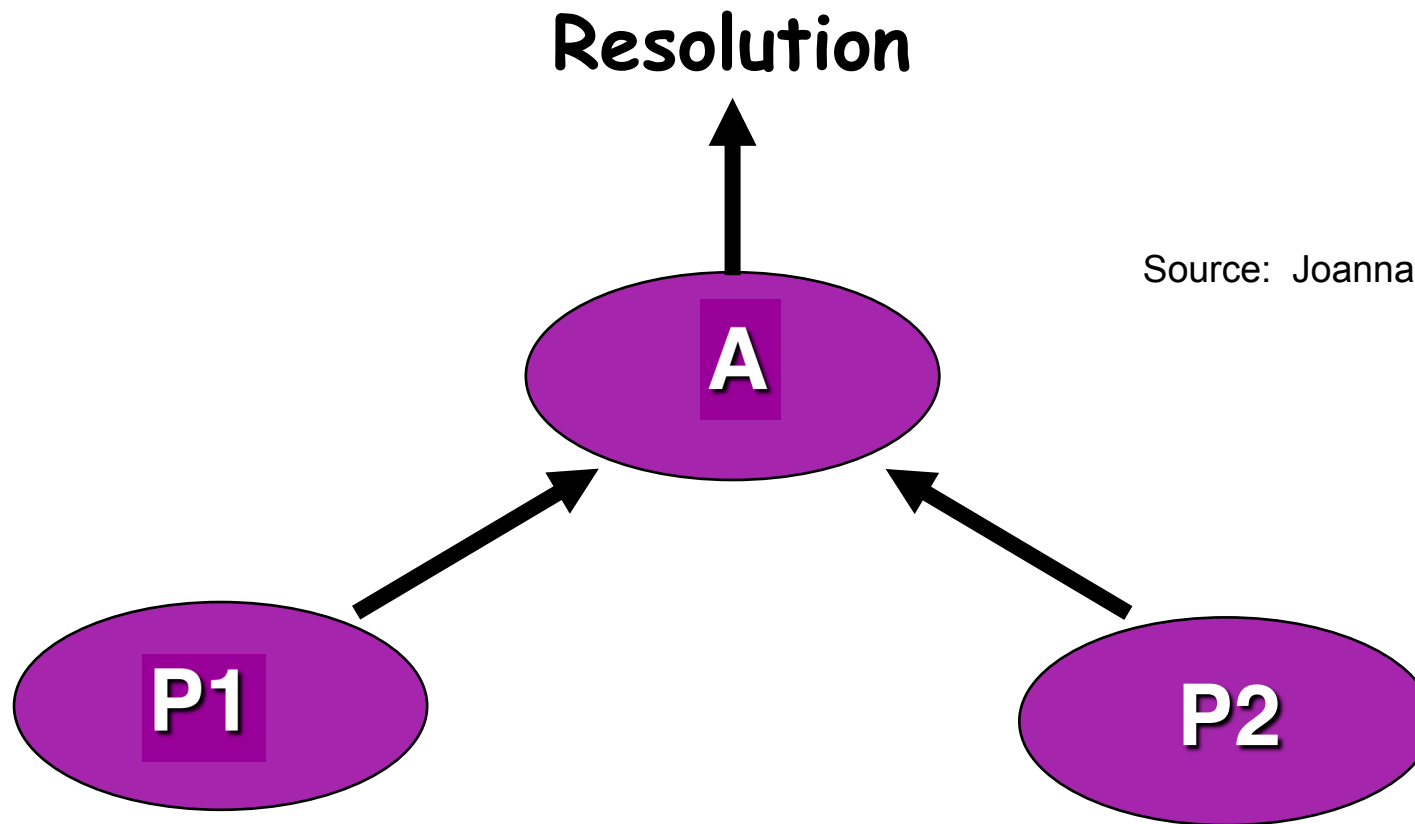
1. Do the parties want an administered process or a self-administered mediation?
2. Do the parties want the mediator to be skilled in one or more practice areas?
3. What mediation style do the parties want?
 - Facilitative
 - Evaluative
 - Transformative
4. To what extent are the mediator's language 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)

(Inter)National excellence but confusion re “mediation”



**All have good model
ADR clauses (Med,
Med-Arb, Med-Exp.
Arb, etc).**

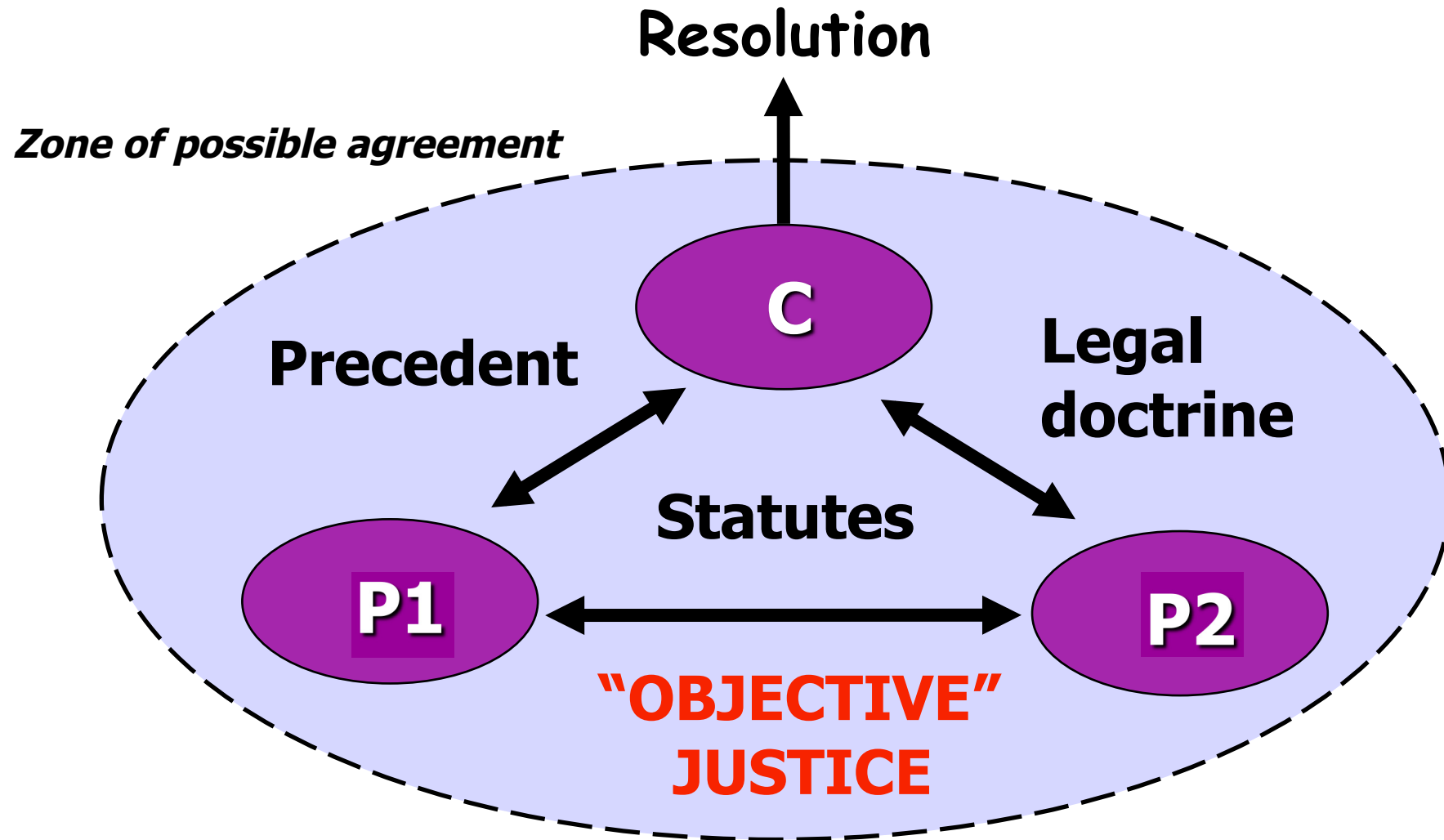
Arbitration or Adjudication



Source: Joanna Kalowski

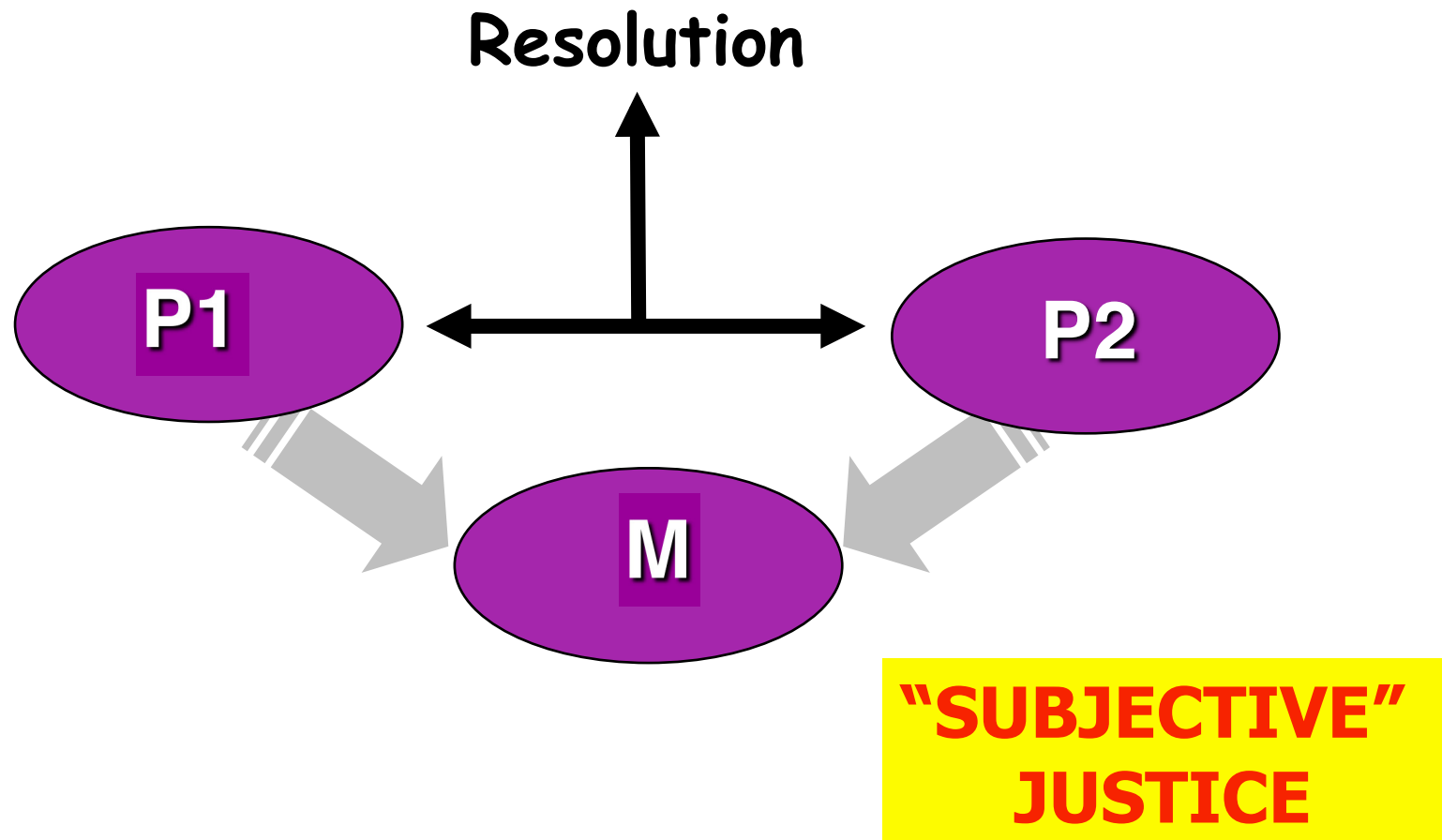
... Conciliation ...

Source: Joanna Kalowski



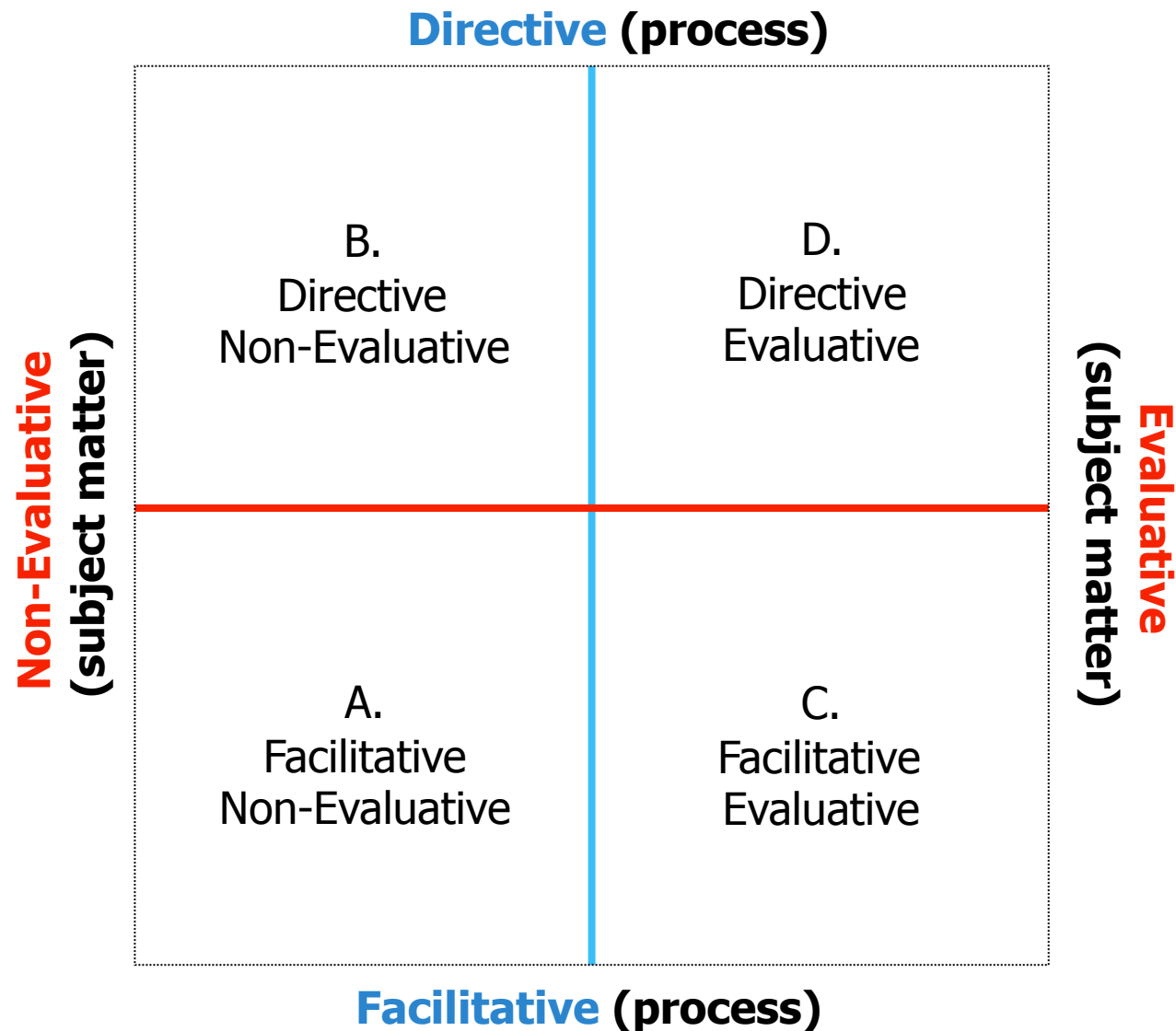
... Mediation

Source: Joanna Kalowski



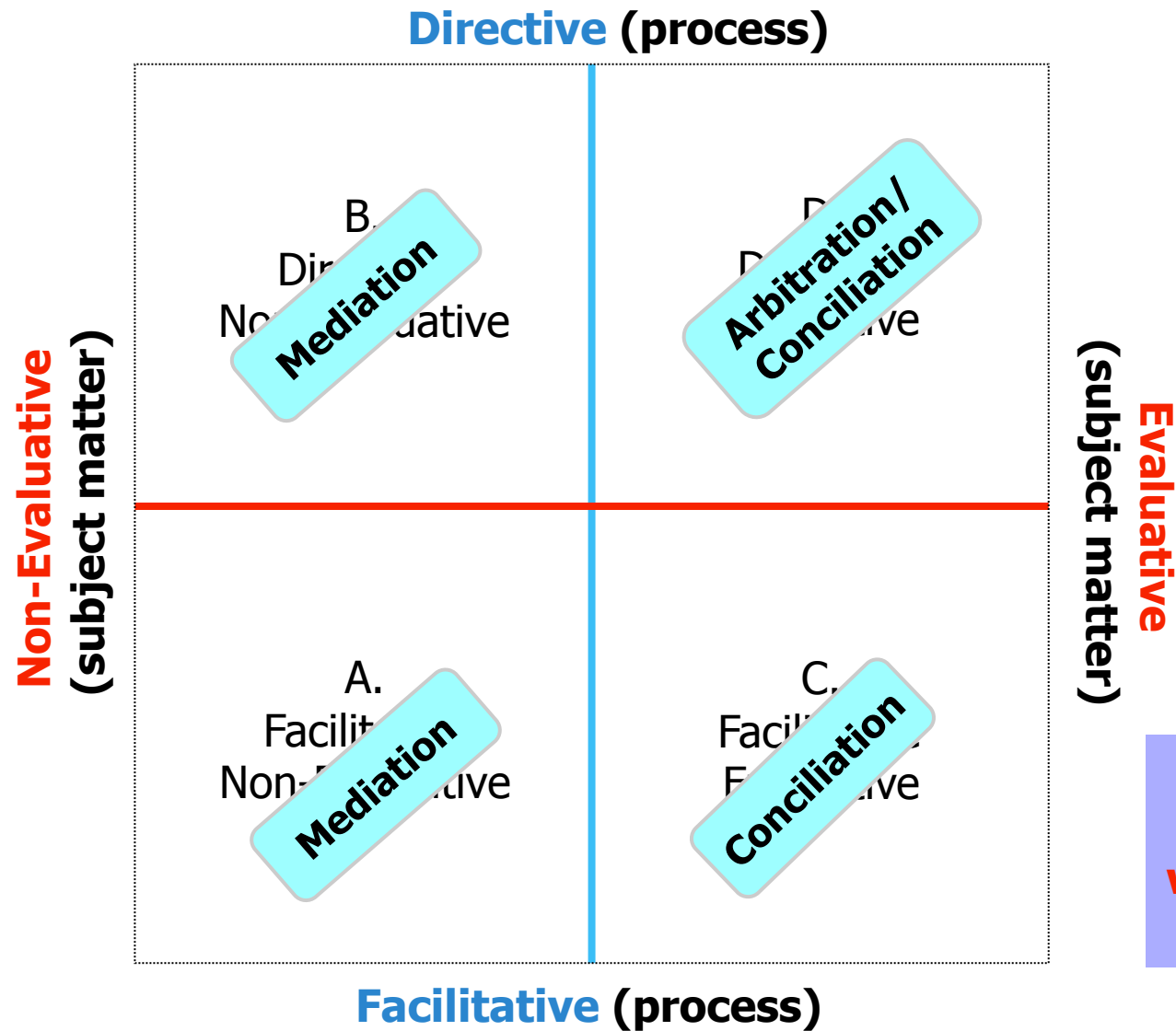
Appointment: 2 axes to consider - Procedure v. Substance

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



What type of process do the parties want?

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



Proposal:
Start at A and
work your way
through?

Selecting for a Positional Negotiation: Evaluative

Zone of possible agreement ("ZOPA")

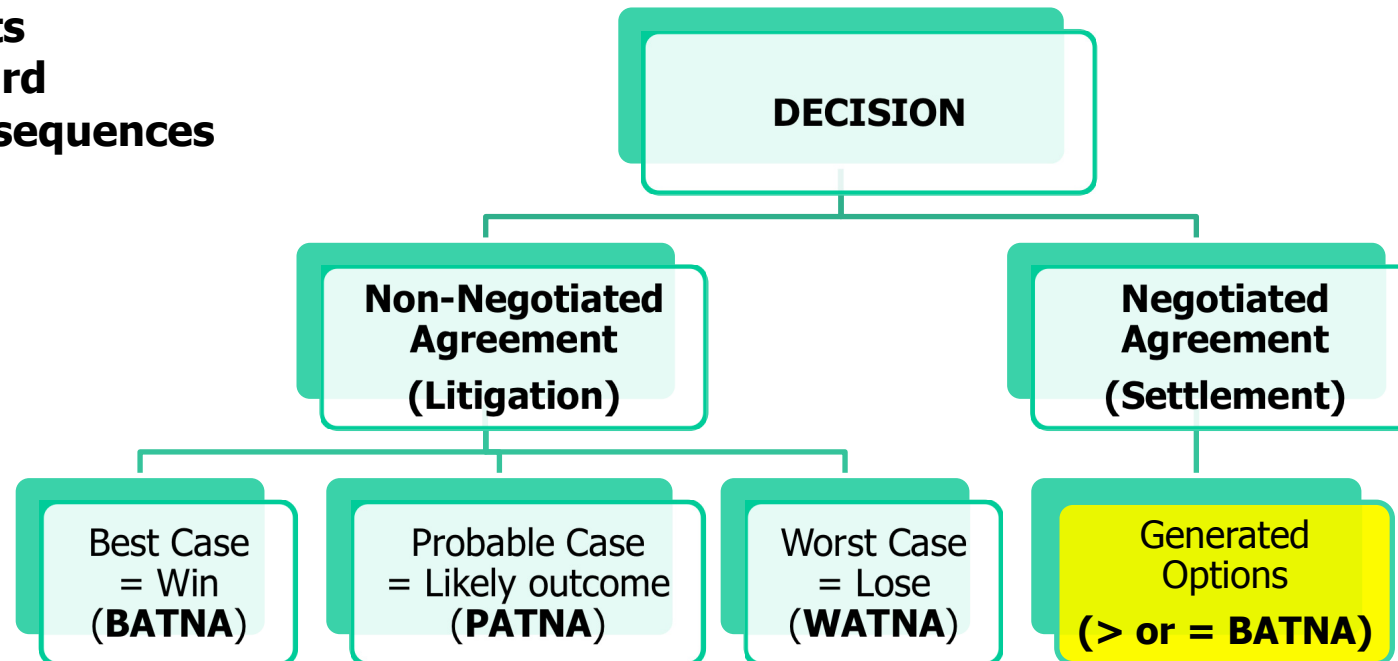


An evaluative mediator can help the parties to understand the strengths and weaknesses of their positions.

Selecting for an Interest-Based Negotiation: Facilitative

Key Parameters

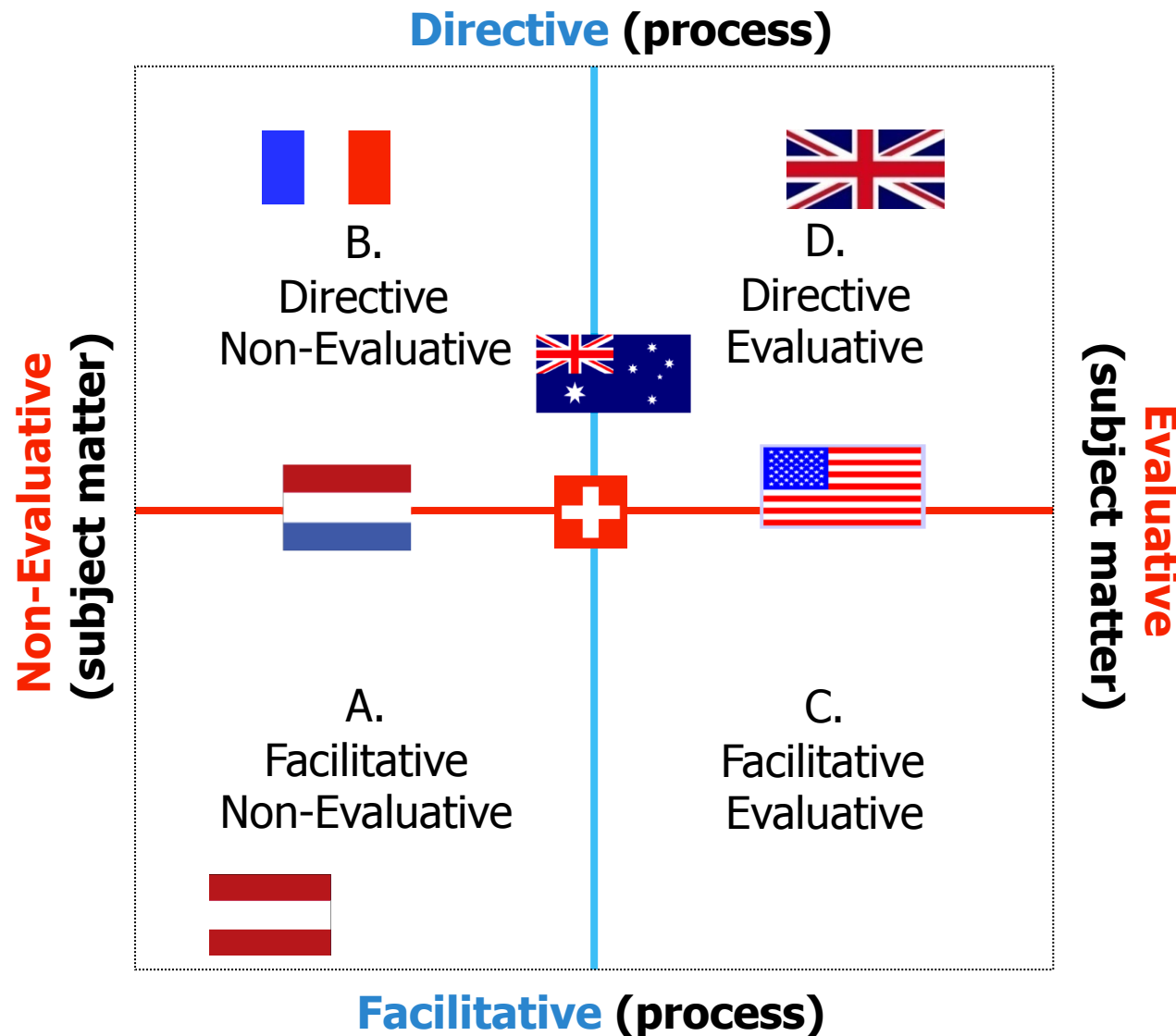
- Time
- Costs
- Award
- Consequences



A facilitative mediator can help the parties to generate options that are worth more than their BATNAs

“Stereotyping” National Mediation Trends

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

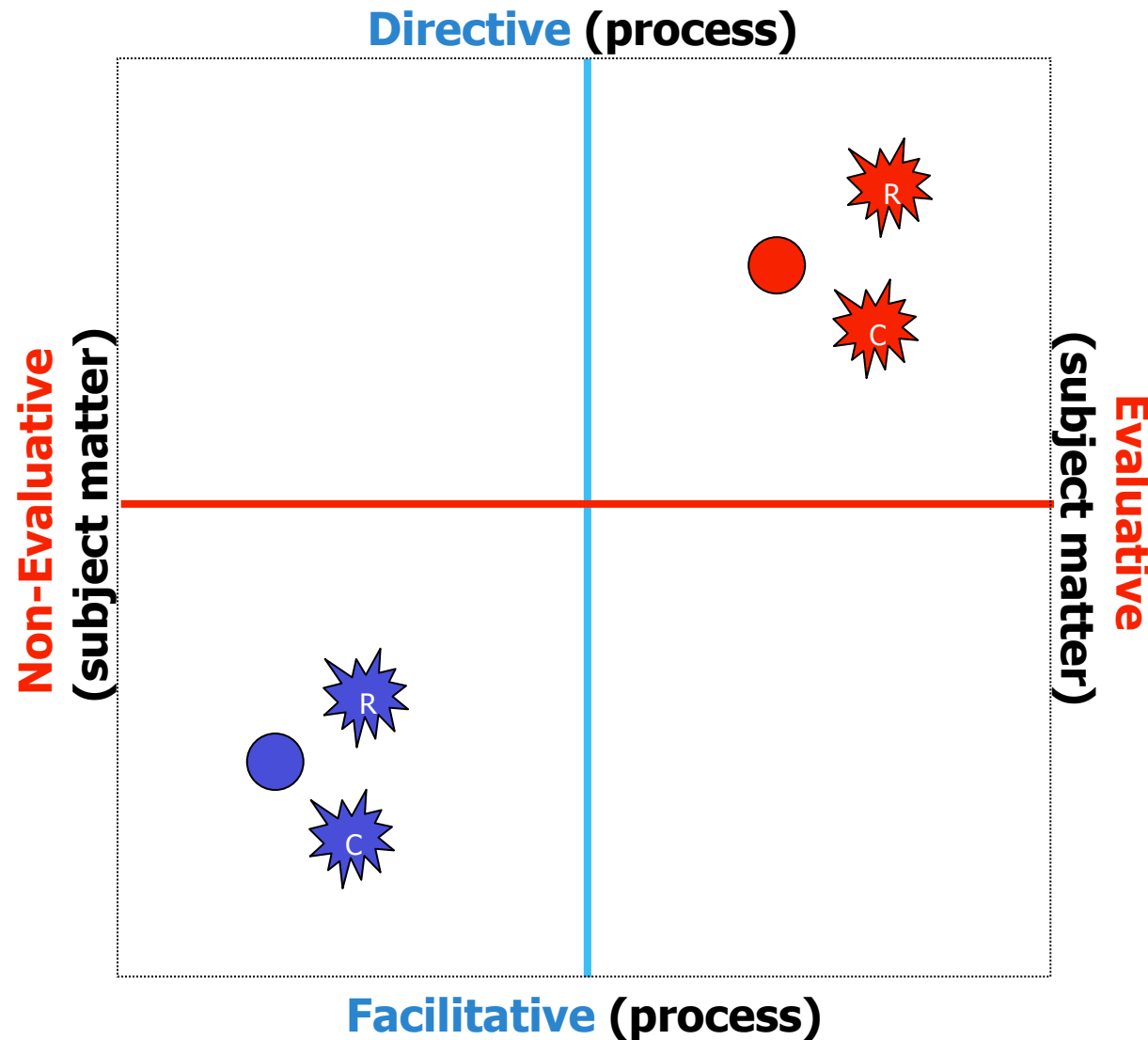


Danger!

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 whichever one suits them best.

Cross-Border Mediation: The danger of assuming ...

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



Key

○ = Neutral

★ = Counsel

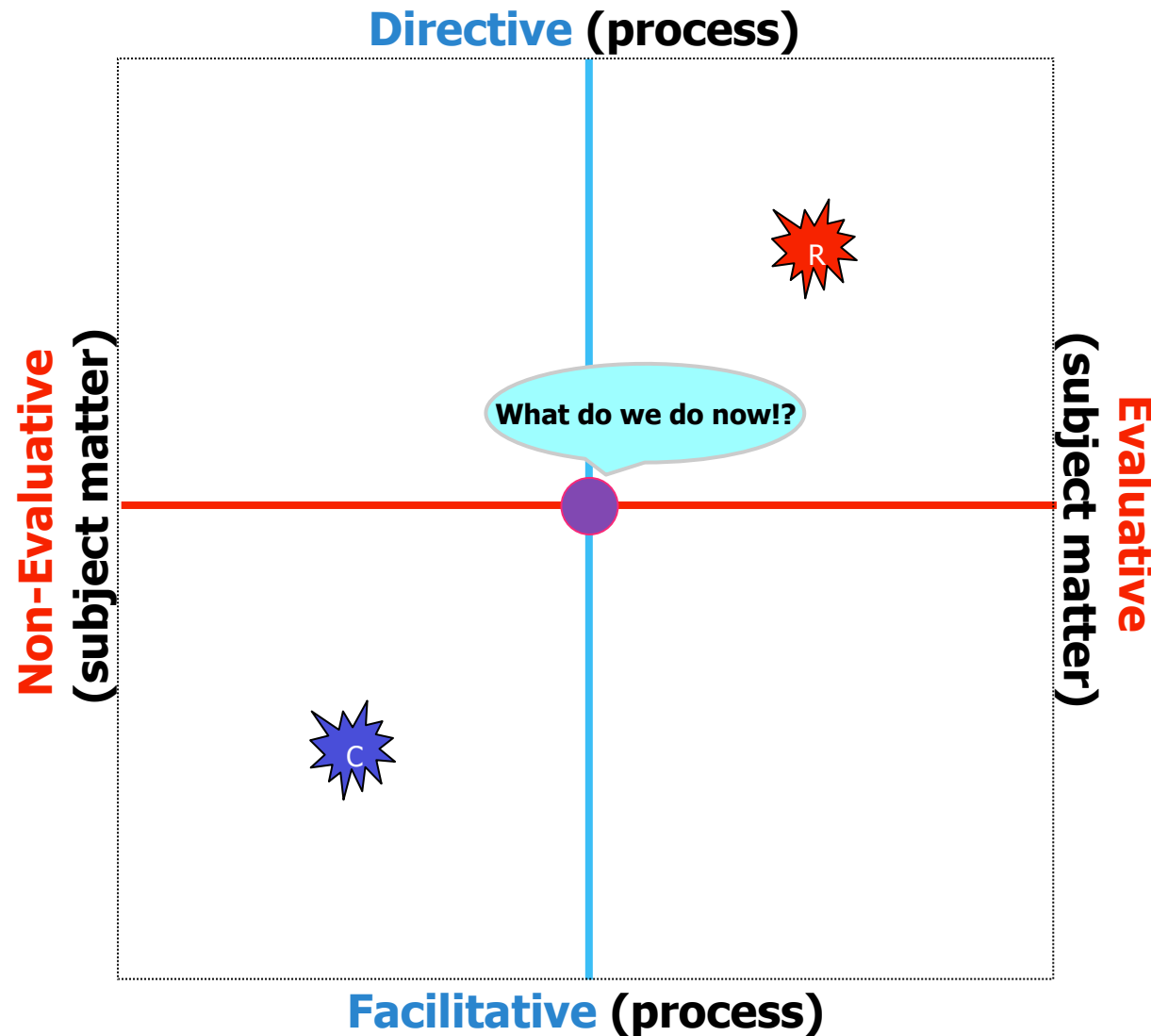
Directive v. Facilitative
= as to process

Evaluative v. Non-Eval.
= as to substance

- **Anglo-Saxon mediation (time pressure: 1-2 days; more use of caucuses)**
- **Continental mediation (less time pressure, less caucuses)**

Cross-Border Mediation: Mediating the process as well

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



Key

○ = Neutral

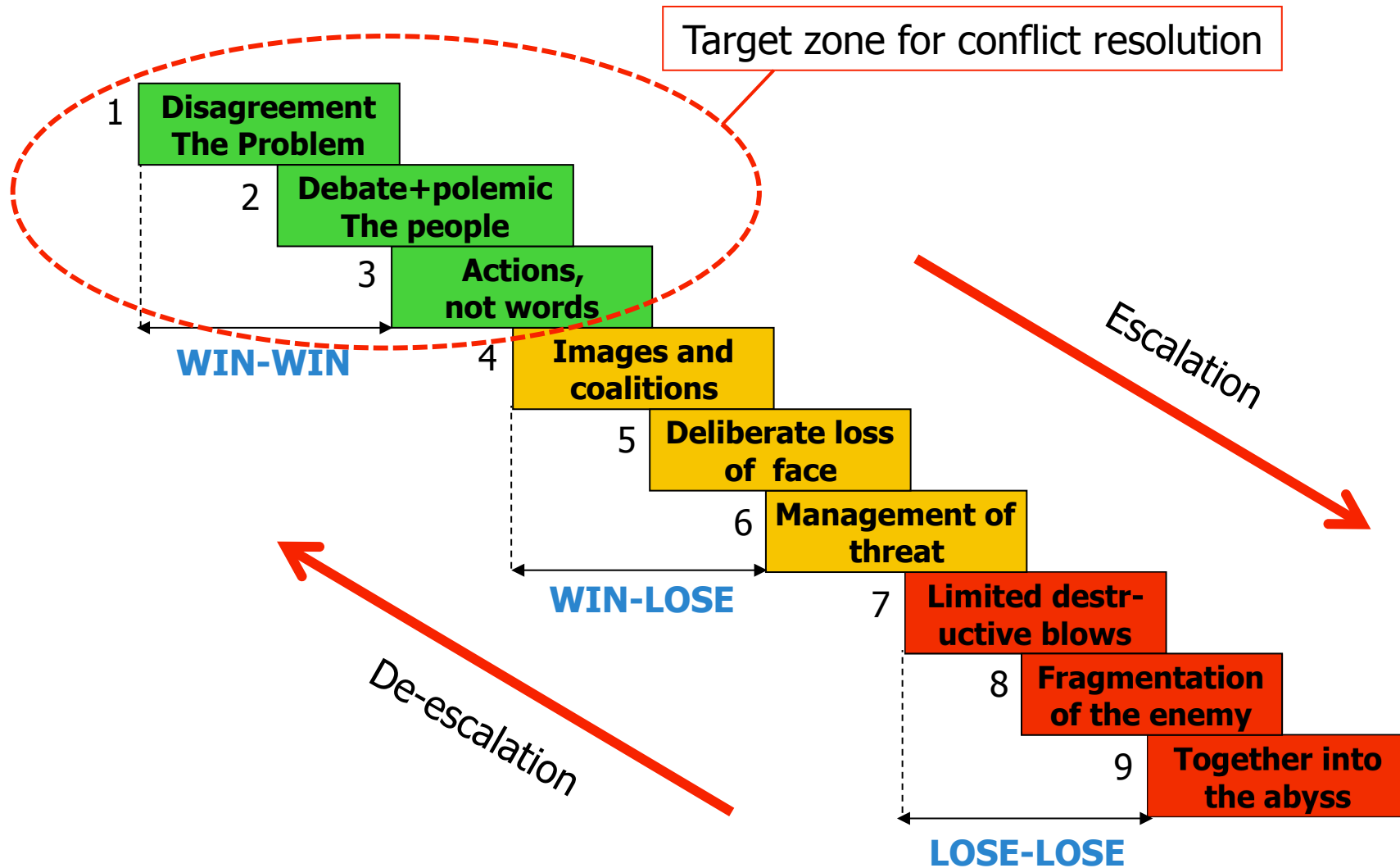
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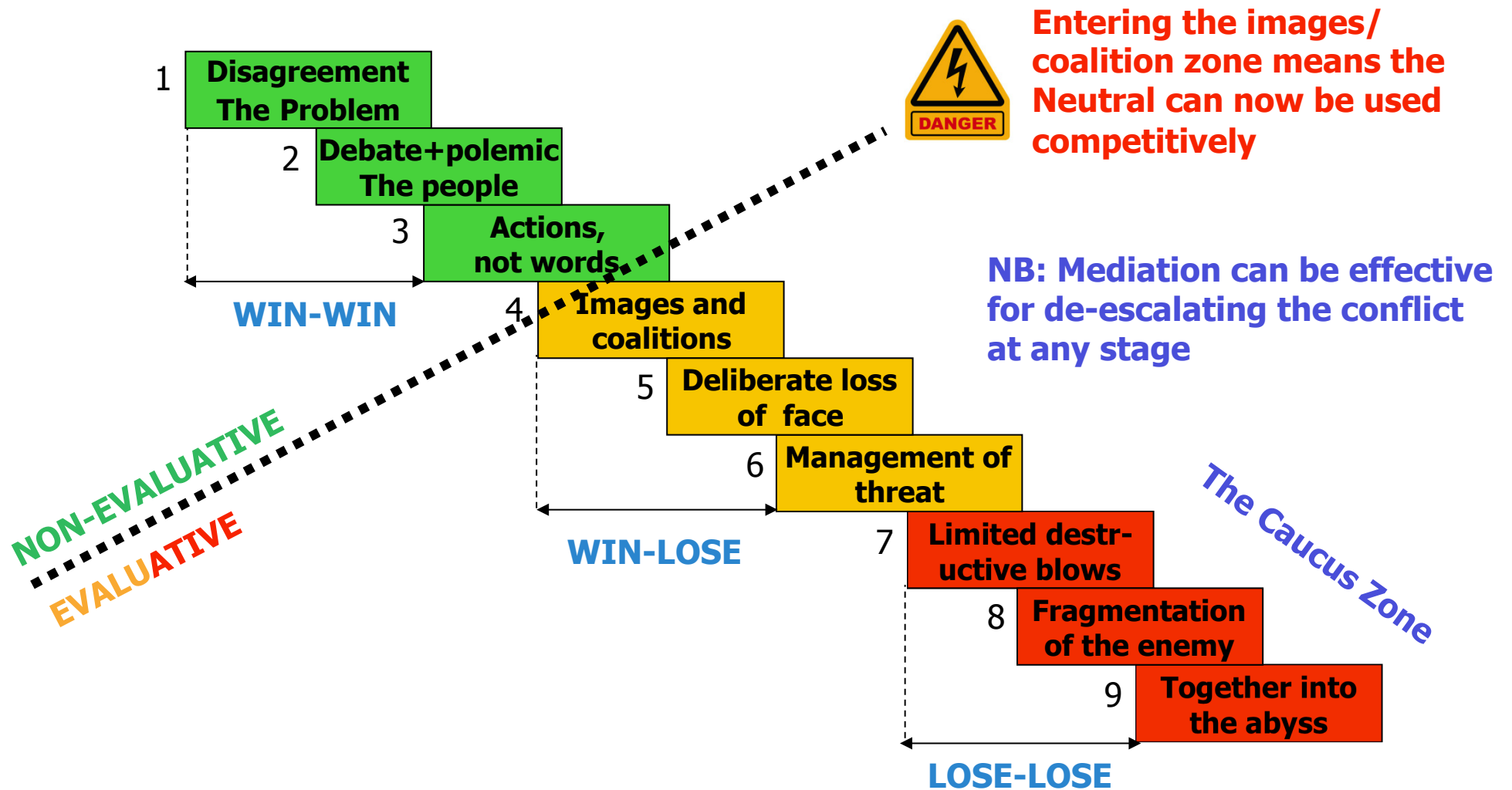
- **Cross-border mediation**

Conflictology & Escalation: Glasl's 9 Steps



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

Evaluative DR Processes & Conflict Diagnosis



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

The McIlwrath KNOL (More detailed criteria are available online)

1. The Mediator's credentials

- a)"mental model" (family history, education, and professional training)
- b)cross-cultural experience (e.g., trainings, travel or education)
- c)professional experience (source profession and business experience)
- d)national trainings & continuing professional development interests
- e)subject matter expertise/areas of specialization
- f)his/her understanding of "neutral, impartial and independent" or "multi-partial"
- g)his/her understanding of what "confidentiality" means and how to handle this issue

2. The Mediator's preferred procedural approaches

- a)facilitative/elicitive, evaluative, transformative, narrative etc?
- b)attitude towards emotions and how to deal with them
- c)use of caucuses (when and why)
- d)(un)willingness to coach the parties
- e)(un)willingness to direct the process ("director" v. "orchestrator")?
- f)how they like to involve clients & attorneys (e.g., restrictively v. actively)
- g)what preparation work they request pre-mediation (e.g., fully or partial)
- h)attitude to time and use of deadlines
- i)willingness/ability to co-mediate and work with other neutrals / co-mediation
- j)attitudes to hybrid processes
- k)familiarity with brainstorming and trust-generating techniques

3. The Mediator's cultural preferences

- a)formality v. informality of proceedings
- b)propensity to be "left brain" v. "right brain" oriented, neither or both
- c)preferences as to venue & a "social" program
- d)attitude to power and distance to power
- e)individualism v. collectivism (seeking consensus v. a majority decision)
- f)(dis)comfort with emotions and the importance (or lack of importance) in demonstrating empathy
- g)preference to avoid uncertainty v. comfort with uncertainty (e.g., on procedural or substantive issues)
- h)creativity and willingness to "experiment" with the parties

Source:
<http://knol.google.com/k/finding-an-international-mediator#>

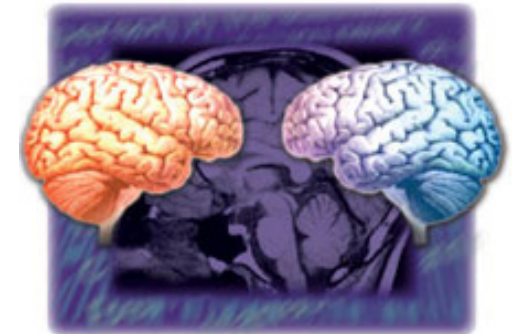
Procedural Choices

1. Nominations by Each Side
2. Selected from Roster
3. Selected by Judge / Court
4. Selected by Named Dispute Resolution Organization
5. Selected by Other Side (e.g., from IMI database)

Source: Hal Abramson

Consider Co-Mediation: Flexibility & Creativity

- 2 equal peers (anti-coalition protection)
- 1 lead mediator + 1 colleague
- One shadow mediator in background
 - Sparring partner & support
 - Shadow advisor / coach



Are 2 brains better than 1?

1. Identical Mediators

1. Process skills
2. Multi-tasking /splitting the team

2. Different Mediators (competition and/or diversity)

1. Substantive v. Procedural
2. Evaluative v. Non-Evaluative
3. "Good Cop" v. "Bad Cop"

3. Complementary approaches = different mental models

1. Random mix
2. Cultural Mix
3. Professional Mix
4. Gender Mix