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# Switching Hats: Should the Same Neutral Act as Mediator and Arbitrator?

## Jeremy LACK

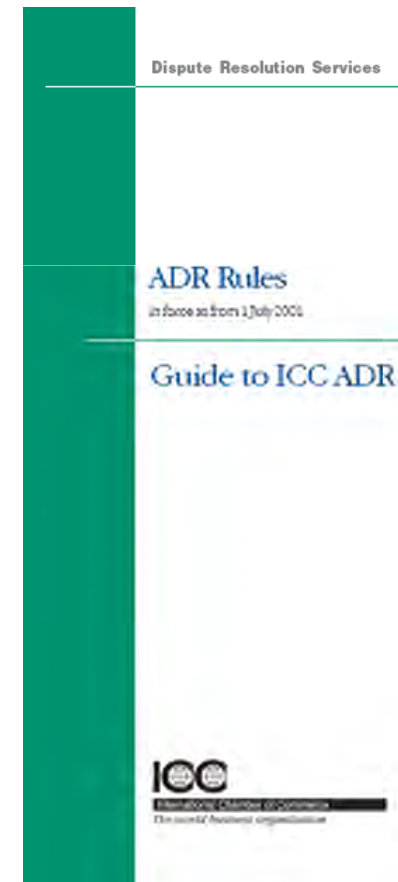
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## Outline

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- **Answer = PARTY AUTONOMY**  
(In small print speak = "Sometimes ... It depends on a new vision of conflict resolution, the neutrals, the institution, the parties, the counsel, the circumstances, etc. etc. etc.")
- **Current cultures and approaches to Conflict Resolution**
- **Of Cheese, Icebergs, Ballet Dancers & Knives**
- **And finally the topic! Should the same person really switch hats?**
- **The issue is not the Neutral switching hats but our approach to conflict resolution.**

## The “Old World” Paradigm

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Source: ICC Publication No. 685, 2008 Edition

# The “New World” Paradigm



**The Internet:** This graph is by far our most complex. It is using over 5 million edges and has an estimated 50 million hop count. We will be producing more maps like this on a daily basis. We still have yet to fix the color system, but all in due time.

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 “new world” requires kaleidoscopic vision

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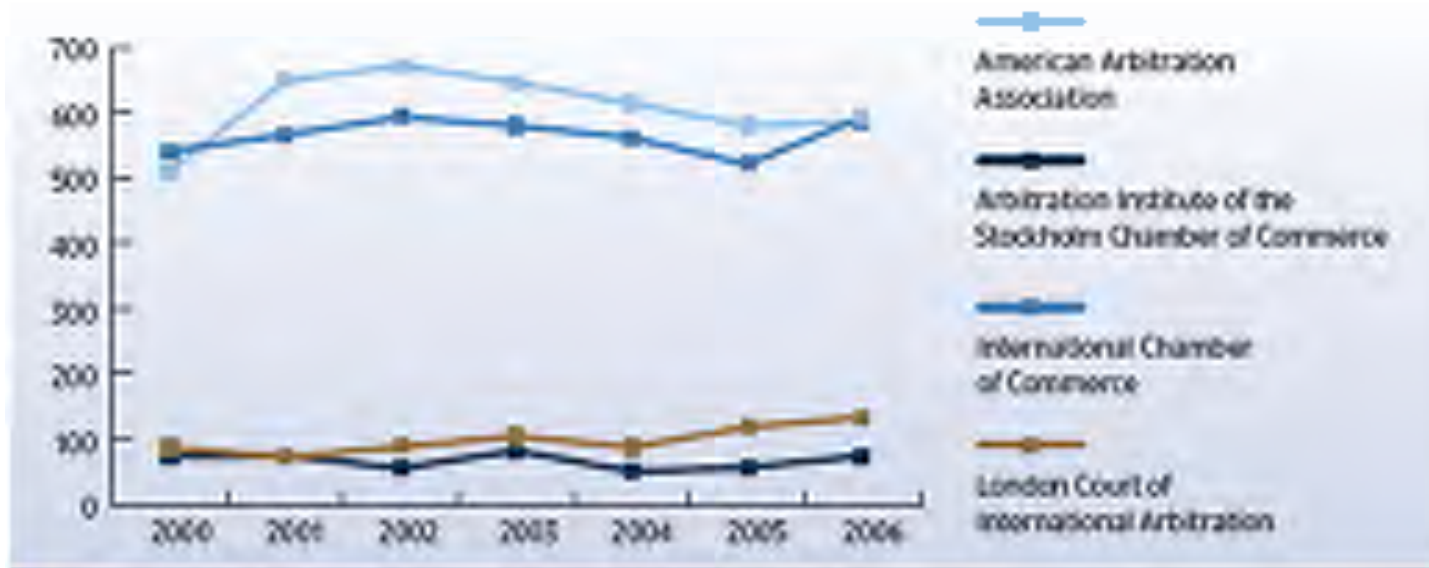
Source: <http://bindweed.com/magicmirror/kaleidoscope-collage.gif>

## But how have we “evolved” in dealing with conflicts?



Source: <http://www.didntyouhear.com/wp-content/uploads/2006/10/evolution1.jpg>

### Non-movers: arbitration figures filed by leading institutions remain flat



Source: M. Rushton, Legal Business Arbitration Report 2008 p. 20



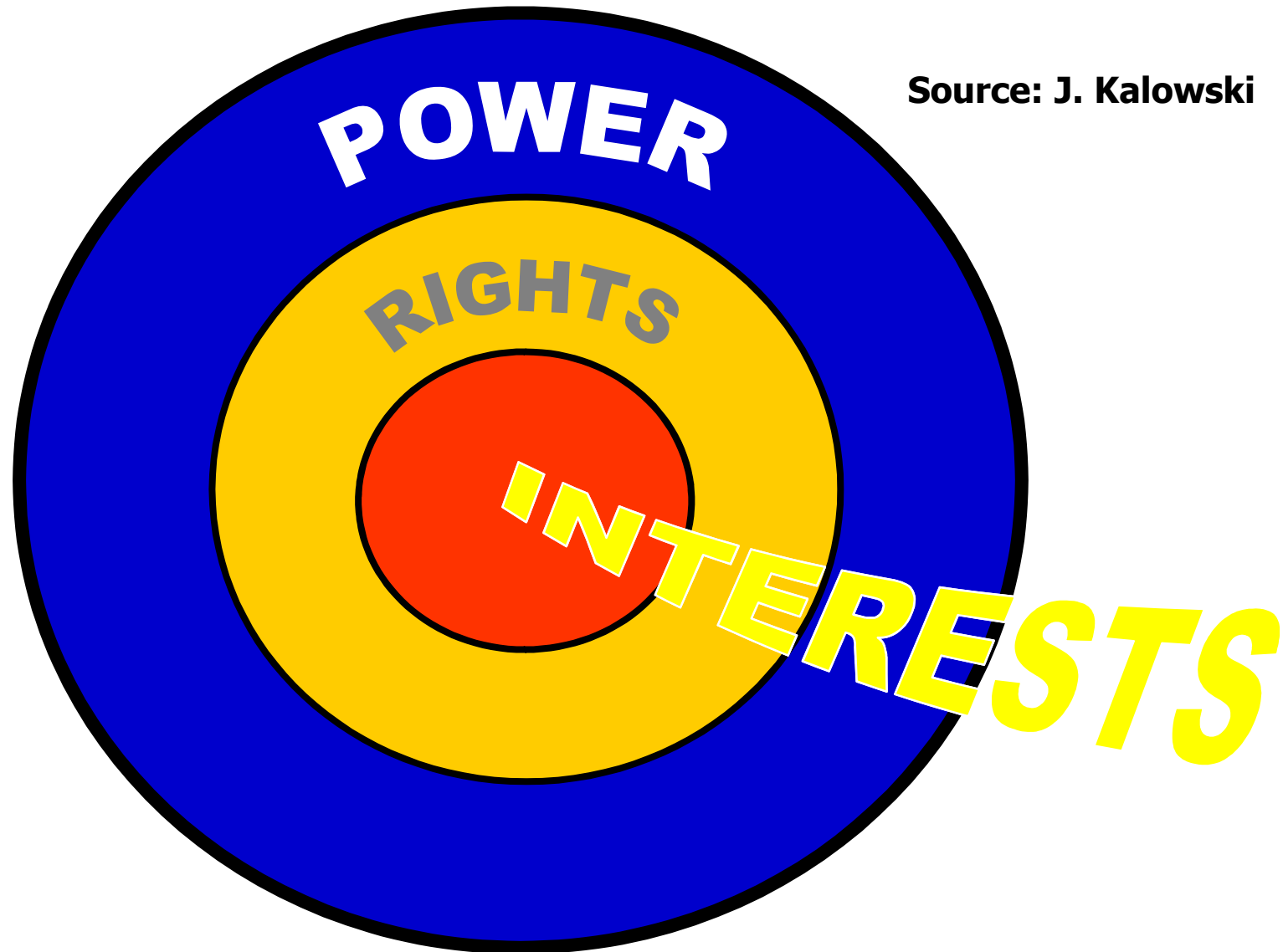
## What is the purpose of private dispute resolution systems?

- Party autonomy (i.e., more choice)
- Flexibility (non-rigidity)
- Pragmatism
- Ongoing control (especially over costs)
- Outcomes, not processes
- Efficiency (in cost and in time)
- A sense of fairness/due process (especially with hindsight)
- Business certainty (enforceability)
- Reaching closure (business-wise and psychologically)
- Confidentiality?

**Have we gone “off-track”?**  
**How we design the process is part of the problem.**

## A New Focus is Needed: Substantively & Procedurally

Source: J. Kalowski





# The Iceberg of Conflict Resolution

**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.**

# Arbitration & Litigation = a rights-based approach

## THE LEGAL SYLLOGISM (an algorithm):



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

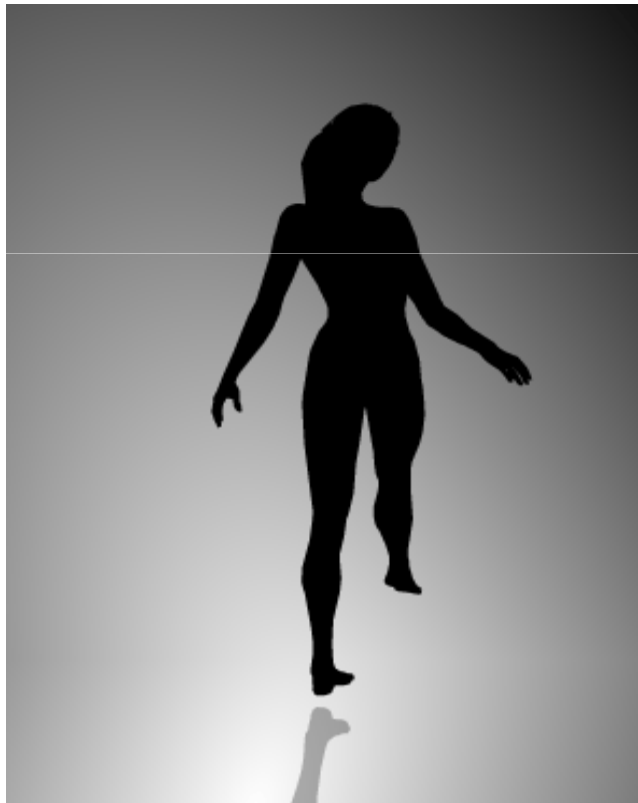
**"We have to rely only on objective facts".  
 "Arbitrators have a "sacred duty" to establish  
 the truth."**

## But "Facts" depend on unconscious biases & 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

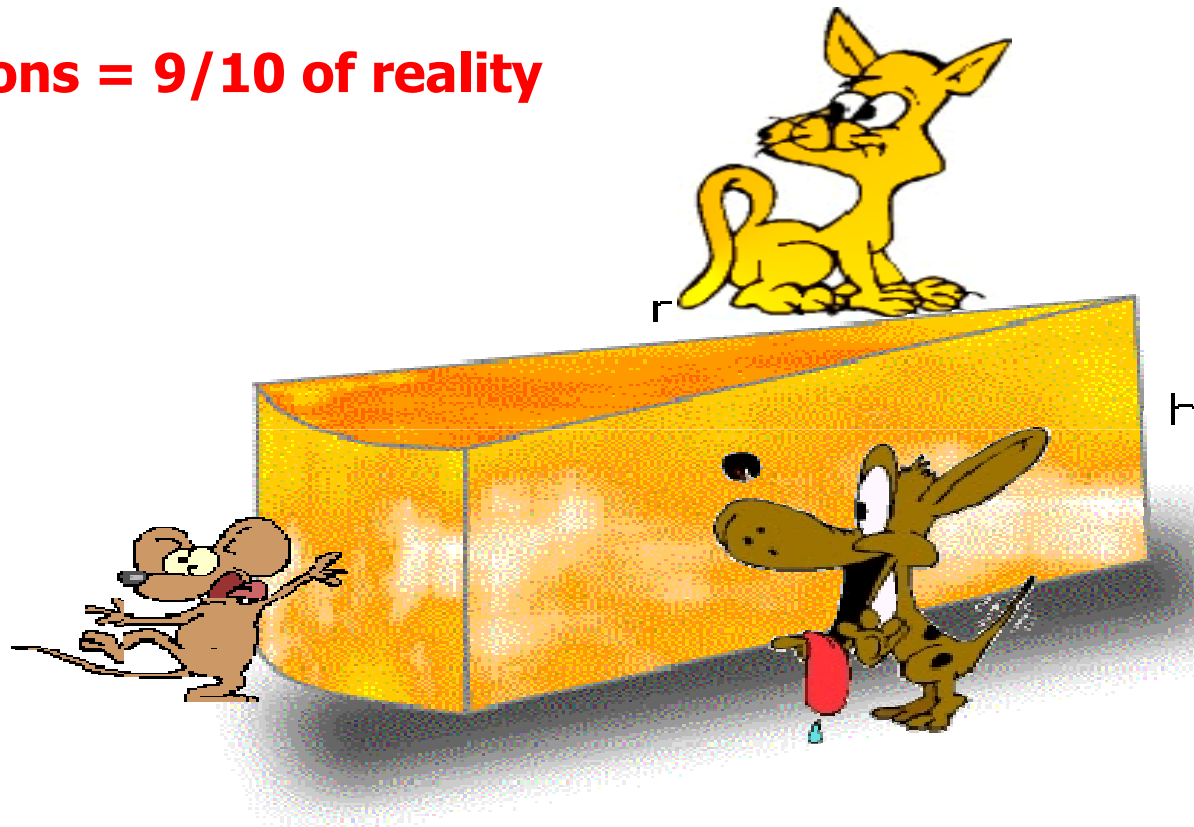
uses feeling  
"big picture" oriented  
imagination rules  
symbols and images  
present and future  
philosophy & religion  
can "get it" (i.e. meaning)  
believes  
appreciates  
spatial perception  
knows object function  
fantasy based  
presents possibilities  
impetuous  
risk taking

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

## All disputes are like a piece of cheese ...

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**Perceptions = 9/10 of reality**



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

# Mediation + Arbitration = more choice & better outcomes?

**Current  
thinking:**

**Med  
Arb  
Med-Arb  
...?**



**Arbitration or  
litigation**

**+**

**Mediation**

**=**

**The “big picture”:  
a more complete  
dispute resolution  
process?**

# The ICC: A Leader in “Amicable Dispute Resolution”

## SUGGESTED ICC ADR CLAUSES

### OPTIONAL ADR

‘The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC ADR Rules.’

### OBLIGATION TO CONSIDER ADR

‘In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider submitting the matter to settlement proceedings under the ICC ADR Rules.’

### OBLIGATION TO SUBMIT DISPUTE TO ADR WITH AN AUTOMATIC EXPIRATION MECHANISM

‘In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, the parties shall have no further obligations under this paragraph.’

### OBLIGATION TO SUBMIT DISPUTE TO ADR, FOLLOWED BY ICC ARBITRATION AS REQUIRED

‘In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, such dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.’

## Combined ADR-ARB Model Clause:

‘In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, such dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.’



# ICC ADR Rules = New Bridges Are Being Created

## ICC ADR RULES

### Preamble

Amicable settlement is a desirable solution for business disputes and differences. It can occur before or during the litigation or arbitration of a dispute and can often be facilitated through the aid of a third party (the 'Neutral') acting in accordance with simple rules. The parties can agree to submit to such rules in their underlying contract or at any other time.

The International Chamber of Commerce (ICC) sets out these amicable dispute resolution rules, entitled the ICC ADR Rules (the 'Rules'), which permit the parties to agree upon whatever settlement technique they believe to be appropriate to help them settle their dispute. In the absence of an agreement of the parties on a settlement technique, mediation shall be the settlement technique used under the Rules. The Guide to ICC ADR, which does not form part of the Rules, provides an explanation of the Rules and of various settlement techniques which can be used pursuant to the Rules.

### Article 1

#### Scope of the ICC ADR Rules

All business disputes, whether or not of an international character, may be referred to ADR proceedings pursuant to these Rules. The provisions of these Rules may be modified by agreement of all of the parties, subject to the approval of ICC.

### Article 2

#### Commencement of the ADR Proceedings

##### A Where there is an agreement to refer to the Rules

##### 1

Where there is an agreement between the parties to refer their dispute to the ICC ADR Rules, any party or

Amicable settlement is a desirable solution for business disputes and differences. **It can occur before or during the litigation or arbitration** of a dispute and can often be facilitated through the aid of a third party (the 'Neutral') acting in accordance with simple rules. The parties can agree to submit to such rules in their underlying contract or at any other time.



# Why not aim for “Holistic Dispute Resolution”?

## The drivers:

- Costs
- Time
- Outcomes



1. Is one integrated “hybrid” process possible?
2. Can one neutral do it all?
3. Should we use two neutrals?
4. Can the neutrals work as one team?

## Combining ADR Processes

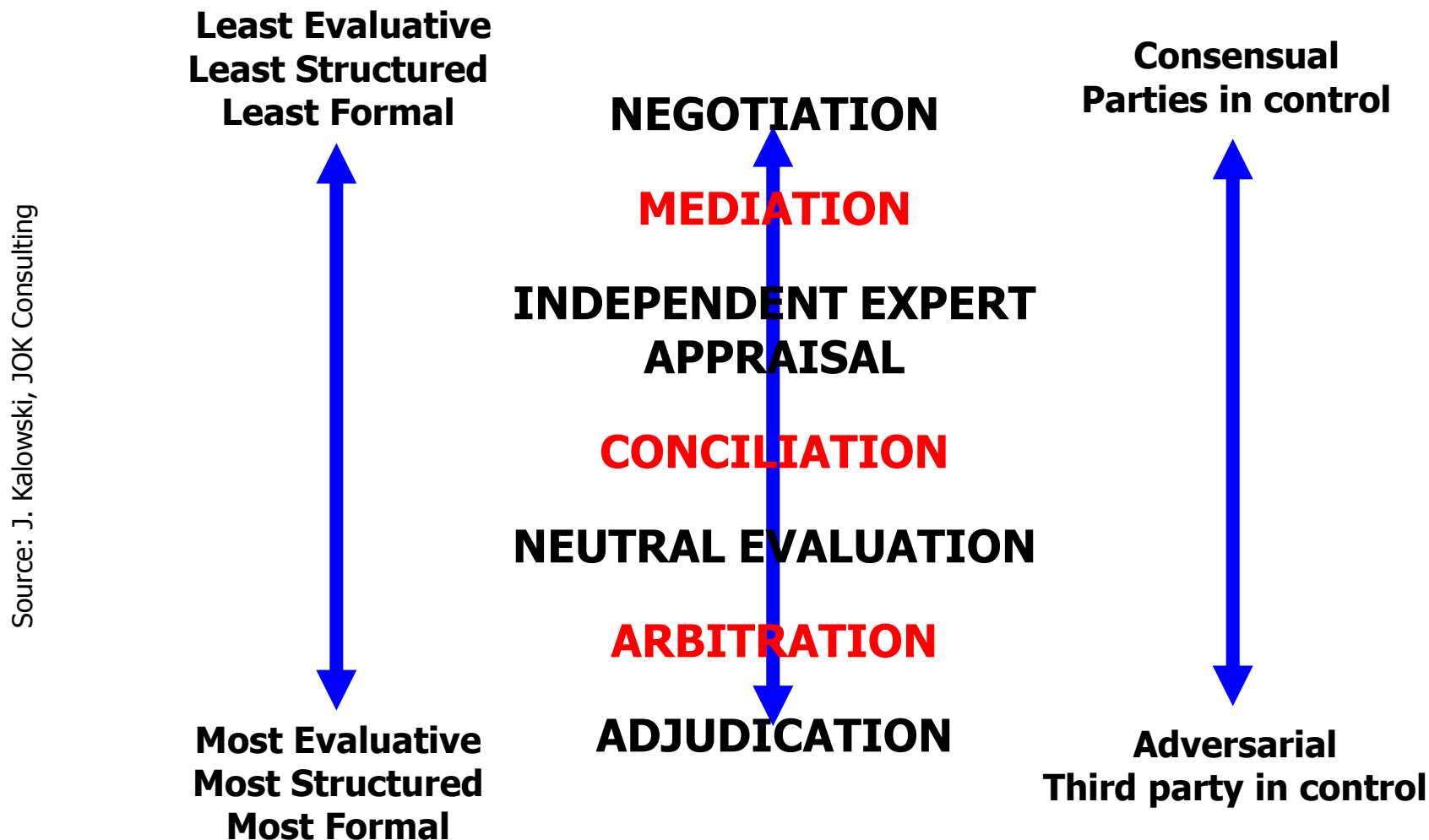
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**Think Global!  
Think Case-by-  
Case!**

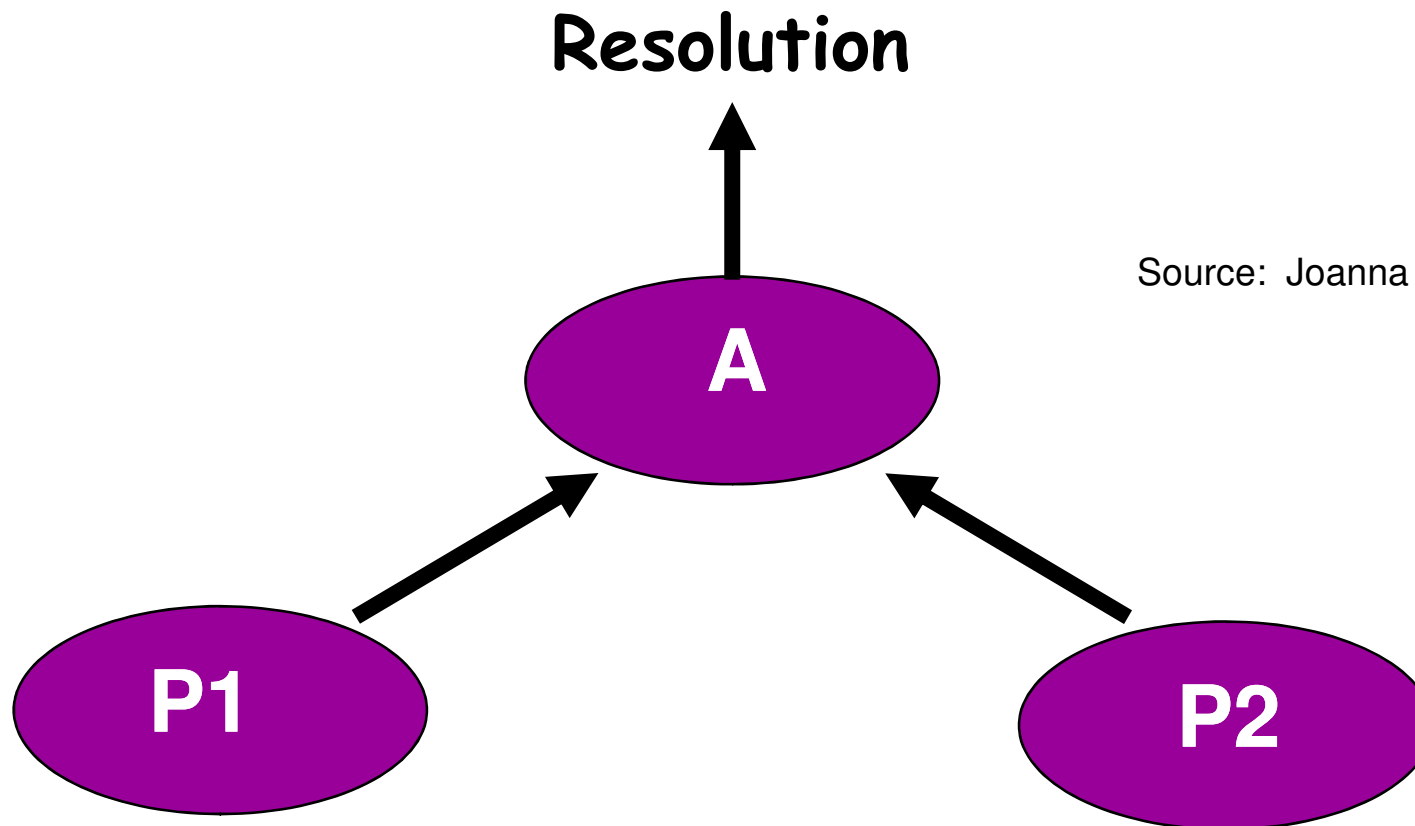
- New tools exist
- New processes should become possible

# The Process: Appropriate Dispute Resolution (ADR)



# Arbitration ...

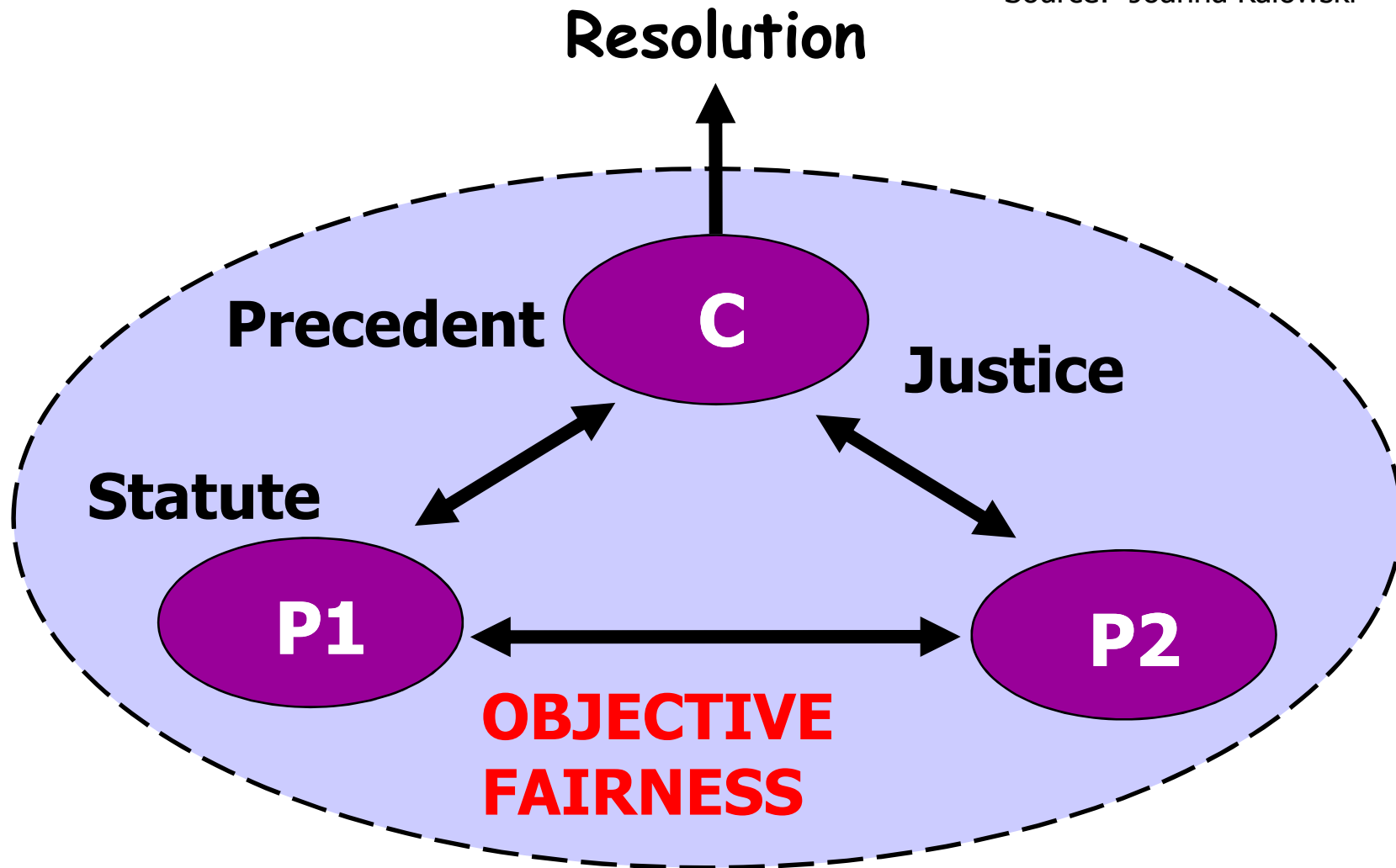
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Source: Joanna Kalowski

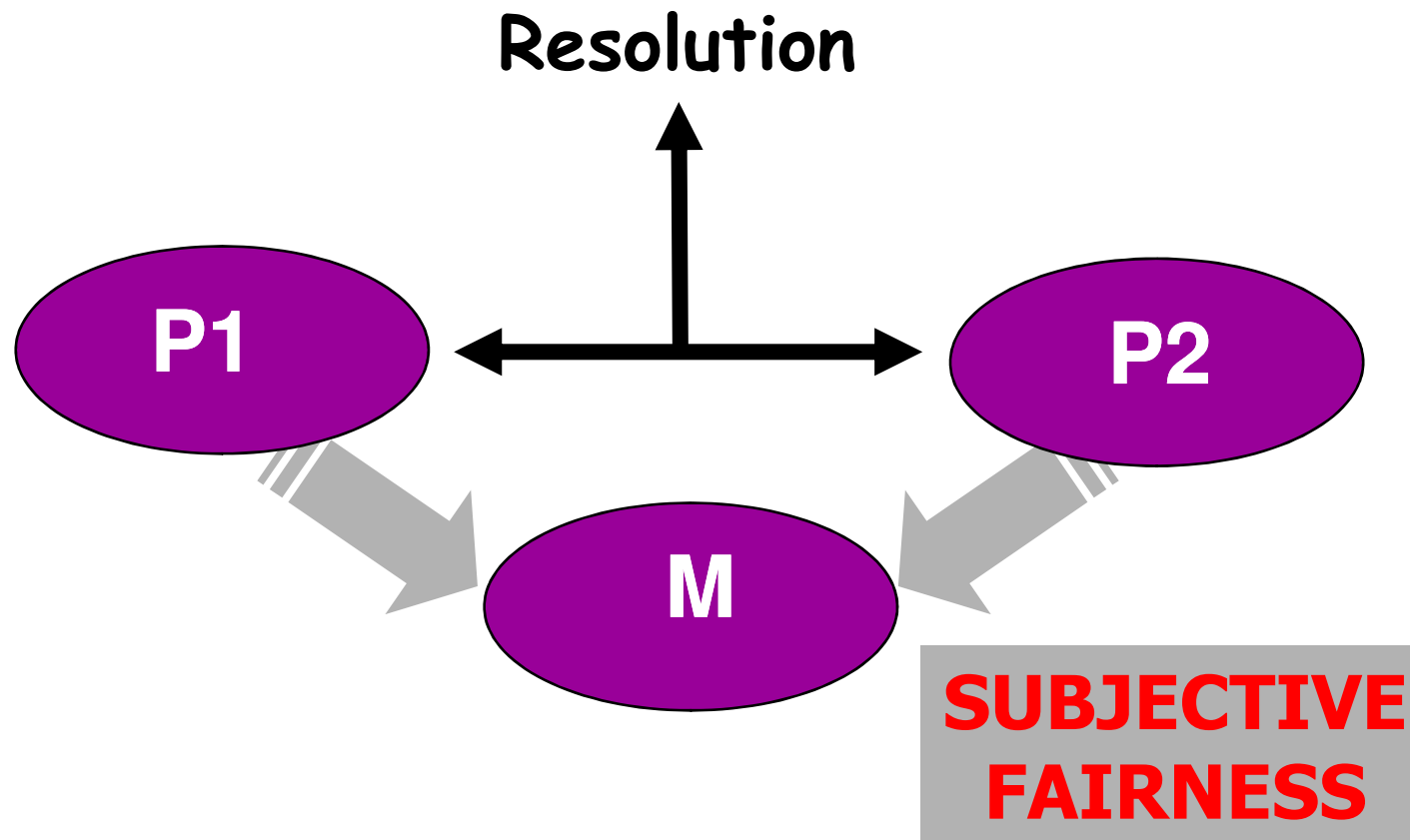
## ... Conciliation ...

Source: Joanna Kalowski

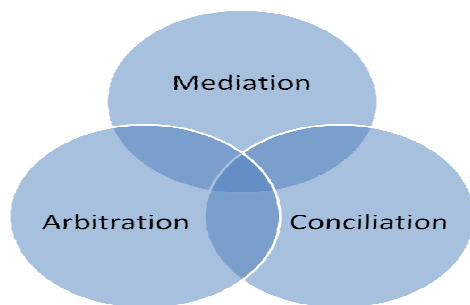
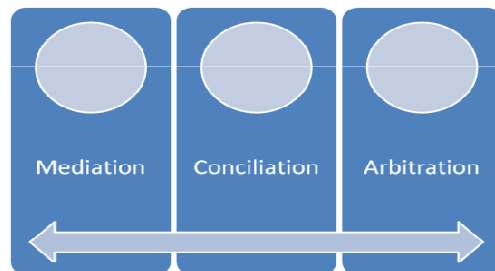
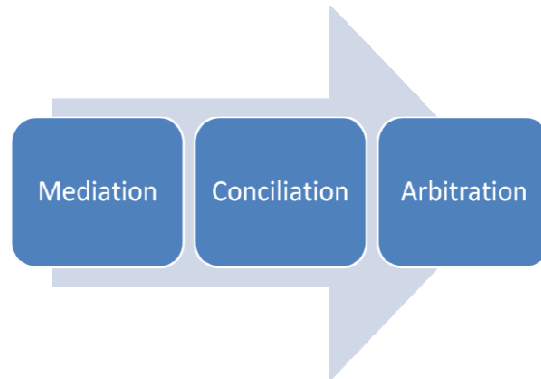


## ... Mediation

Source: Joanna Kalowski



# Process Design Considerations



## Sequential

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

## Parallel

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

## Hybrid

- MEDALOA
- 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



# Mediation + Arbitration: fundamentally compatible

Criteria	Compatibility YES	Compatibility NO
Degree of Regulation		
Goals of Procedure		
Procedure	Needs special consideration	
Confidentiality		
Decisional Powers		
Voluntariness		
Neutrality and Independence		
Qualification of Neutral		
Legal Relationship Neutral/Parties		
Acceptance Third Persons/Lawyers		
Formal Basis of Procedure		
Place, Language, Applicable Law		
Caucus	Needs special consideration	
Challenge of Neutral	Needs special consideration	
Result		
Appeal/subsequent Court Proceeding	Needs special consideration	
Enforcement		

Source: R. Dendorfer

HEUSSEN  
Rechtsanwalts-gesellschaft mbH

## Switching Hats: Example 1 -- Arb-Med

- 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 during the lunch break (and 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 in it.

### Example:

**BAT**  
Valuation of  
IP assets for  
M&A deal



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

## Example 2 -- MEDALOA (Hybrid Med-Arb)

### 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 (B. Sambeth Glasner in this case), which is a necessity for MEDALOA.
- 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



# Hybrids? We Still Have a Way to Go! (e.g., ICC ADR Rules)

## FOREWORD

ICC has over eight decades of experience in devising rules to govern and facilitate the conduct of international business. These include those designed to resolve the conflicts that inevitably arise in trading relations.

The ICC ADR Rules are the result of discussions between dispute resolution experts and representatives of the business community from seventy-five countries. Their purpose is to offer business partners a means of resolving disputes amicably, in the way best suited to their needs. A distinctive feature of these rules is the freedom the parties are given to choose the technique they consider most conducive to settlement. Failing agreement on the method to be adopted, the fallback shall be mediation.

As an amicable method of dispute resolution, ICC ADR should be distinguished from ICC arbitration. They are two alternative means of resolving disputes, although in certain circumstances they may be complementary. For instance, it is possible for parties to provide for ICC arbitration in the event of failure to reach an amicable settlement. Similarly, parties engaged in an arbitration may turn to ICC ADR if their dispute seems to warrant a different, more consensual approach. The two services remain distinct, however, each administered by a separate secretariat based at ICC headquarters in Paris.

The ICC ADR Rules, which replace the 1988 ICC Rules of Optional Conciliation, may be used in domestic as well as international contexts.

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Guide to ICC ADR, Part 1 Introduction: “ADR’, as used by ICC, therefore **does not include arbitration** but only proceedings which do not result in a decision or award of the Neutral which can be enforced at law.”

# Is Med-Arb possible for ICC Consent Awards?

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## Rules of Arbitration

in force as from 1 January 1998

Cost scales effective as of 1 January 2008

### Article 13

#### Transmission of the File to the Arbitral Tribunal

The Secretariat shall transmit the file to the Arbitral Tribunal as soon as it has been constituted, provided the advance on costs requested by the Secretariat at this stage has been paid.

### Article 26

#### Award by Consent

If the parties reach a settlement **after** the file has been transmitted to the Arbitral Tribunal in accordance with Article 13, the settlement shall be recorded in the form of an Award made by consent of the parties if so requested by the parties and if the Arbitral Tribunal agrees to do so.

**The ICC Rules are unclear on this:** What happens if the parties wish New York Convention enforceability to their settlement agreement? Was a settlement reached "*after the file was transmitted to the Arbitral Tribunal*" if a draft or unsigned version of the settlement agreement existed beforehand?

# Should swapping hats depend on the process?

NEW CONSIDERATIONS  
FOR THE FUTURE

## Combining ADR methods and examples

Med-Arb: Using the best of both worlds Critical question: Using the same Neutral?	Arb-Med: Helping the parties out of the arbitration dilemma. Again critical: Same Neutral?	Shadow Mediation: Useful for complex disputes. Separate neutrals, but can they confer?
MEDALOA or Baseball Arbitration: Exotic and less used alternative? Same neutral required.		Mediation Window: Leave some issues for mediation in the course of arbitration. Result: Consent Award?
Court-annexed mediation: Upcoming issue in several European countries	European Directive on Mediation: Door-opener for new mediation processes in the EU?	Dispute Resolution Panels or Dispute Resolution Boards. How many hats?

Source: R. Dendorfer

# The ICC's Starting Point on "Switching Hats"

ICC ADR Rules

produce them in the judicial, arbitration or similar proceedings;

- b) any views expressed or suggestions made by any party within the ADR proceedings with regard to the possible settlement of the dispute;
- c) any admissions made by another party within the ADR proceedings;
- d) any views or proposals put forward by the Neutral; or
- e) the fact that any party had indicated within the ADR proceedings that it was ready to accept a proposal for a settlement.

3

Unless all of the parties agree otherwise in writing, a Neutral shall not act nor shall have acted in any judicial, arbitration or similar proceedings relating to the dispute which is or was the subject of the ADR proceedings, whether as a judge, as an arbitrator, as an expert or as a representative or advisor of a party.

4

The Neutral, unless required by applicable law or unless all of the parties agree otherwise in writing, shall not give testimony in any judicial, arbitration or similar proceedings concerning any aspect of the ADR proceedings.

5

Neither the Neutral, nor ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the ADR proceedings.

13

## Article 7.3: General Provisions

"Unless all of the parties agree otherwise in writing, **a Neutral shall not act nor shall have acted in any judicial, arbitration or similar proceedings relating to the dispute** which is or was the subject of the ADR proceedings, whether as a judge, as an arbitrator, as an expert or as a representative or advisor of a party."

Guide to ICC ADR, Part 2: Analysis of the Rules: Article 7(3) deals with whether the Neutral may act as a judge, arbitrator, expert or representative of a party in other proceedings related to the dispute submitted to the ICC ADR proceedings. It provides that **it is entirely permissible for a Neutral to act in such capacities if all of the parties to the ICC ADR proceedings agree thereto in writing.** However, it is not permissible without such an agreement.



## The Lawyers & Institutions' Perspective

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## The Neutral's Perspective

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- “We already do it!” (i.e., conciliation)
- But Conciliation  $\neq$  Mediation
- Danger of overconfidence
- Need to think it through
  - What knowledge can be used/shared as arbitrator?
  - Avoid caucusing?
  - Use written waivers to demarcate clear sequential steps (= sounding the horn)?
  - Need to avoid worst case scenarios and retain the parties' trust in the process



## The User's Perspective

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### PROS

- Neutral(s) sees the whole picture
- Less time
- Less money
- Better outcomes?
- Greater freedom to innovate
- Greater control over process?



### CONS

- Confusion of roles
- Can I trust the neutrals not to use this information in case of arbitration?
- Can this slip off track?
- Less certainty of enforceability?
- Do we all know what we're doing?

**Co-Medarbiters? “*The truth begins in pairs*” (Michael Lukas Moeller)**

## **IMI: Forging a global mediation profession ... a 1<sup>st</sup> step**

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**New processes will require new international skills.  
Please log on and become involved!**