

# Using Appropriate Dispute Resolution (ADR)

## WHEN TO USE NEGOTIATION, LITIGATION, ARBITRATION, CONCILIATION AND/OR MEDIATION FOR COMMERCIAL DISPUTES?



**Jeremy LACK, Esq.**

ADR Neutral & Attorney-at-Law

Tel: +41 79 247 1519

E-mail: [jlack@lawtech.ch](mailto:jlack@lawtech.ch)

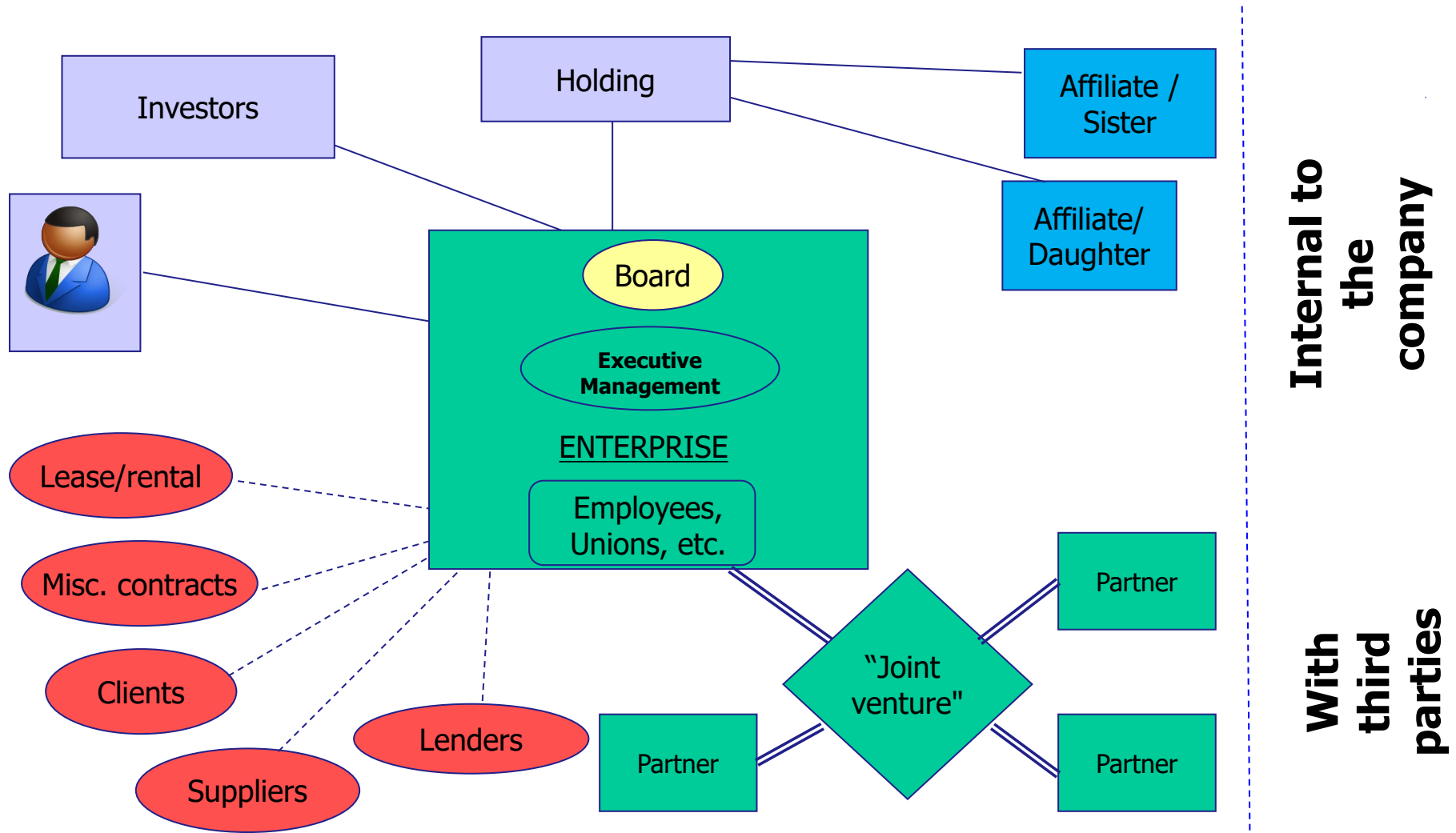


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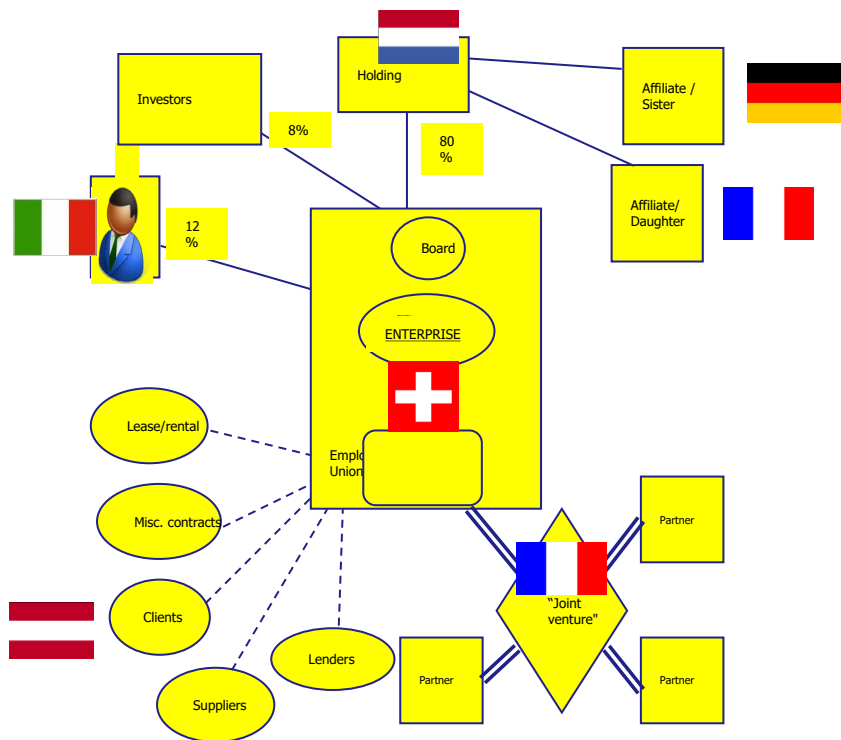


# Commercial disputes = a mix of stakeholders involved

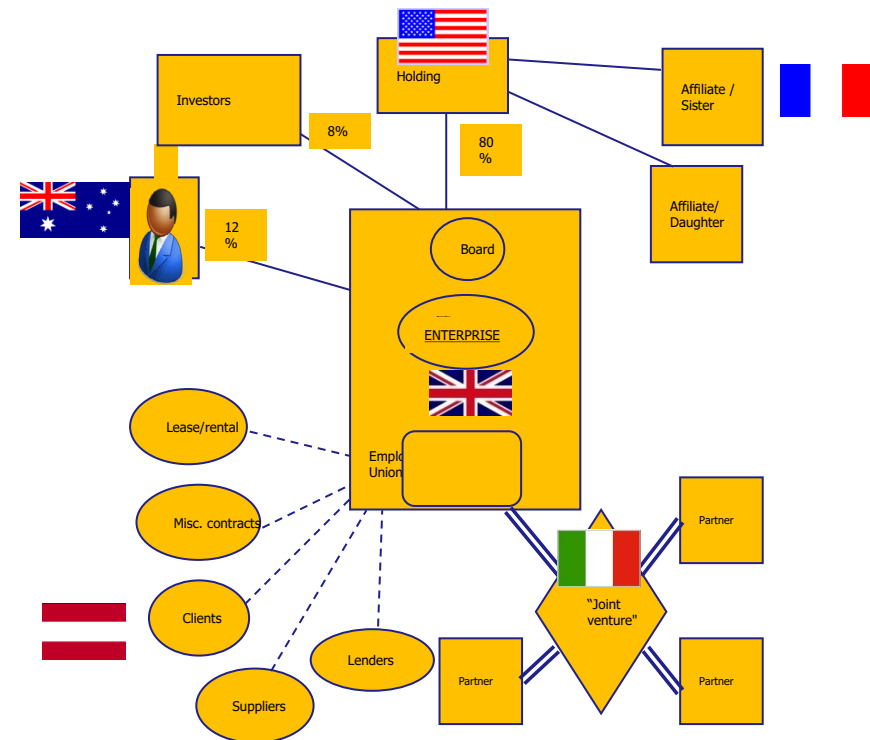


# International Commercial Disputes: The possible participants

**Now, bring in an every-day international dimension**



**VS.**



**Who should be involved in resolving this dispute? What norms apply?**

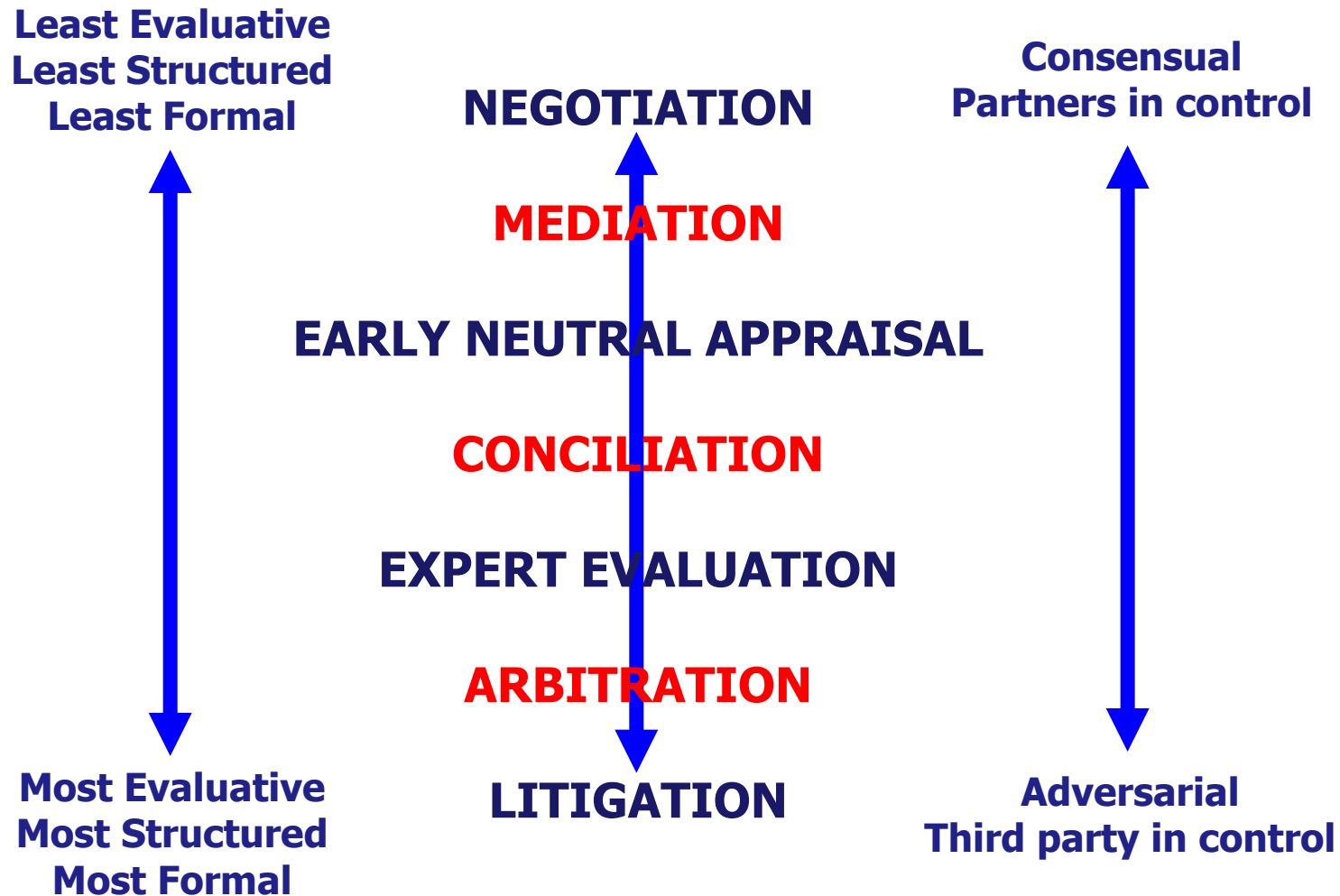
# **How to decide which type of ADR process to use?**

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

**David Plant  
Arbitrator & Mediator**

# The Options

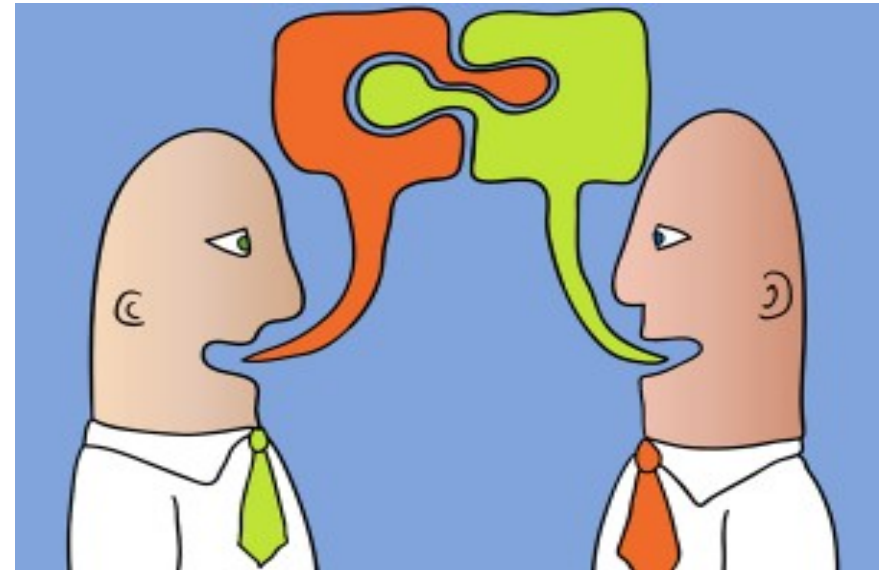
Source: J. Kalowski, JOK Consulting



# What type of negotiation process are the partners seeking?



**Two monologues**



**A dialogue**

# Adjudicative Processes (Arbitration/Litigation) ...

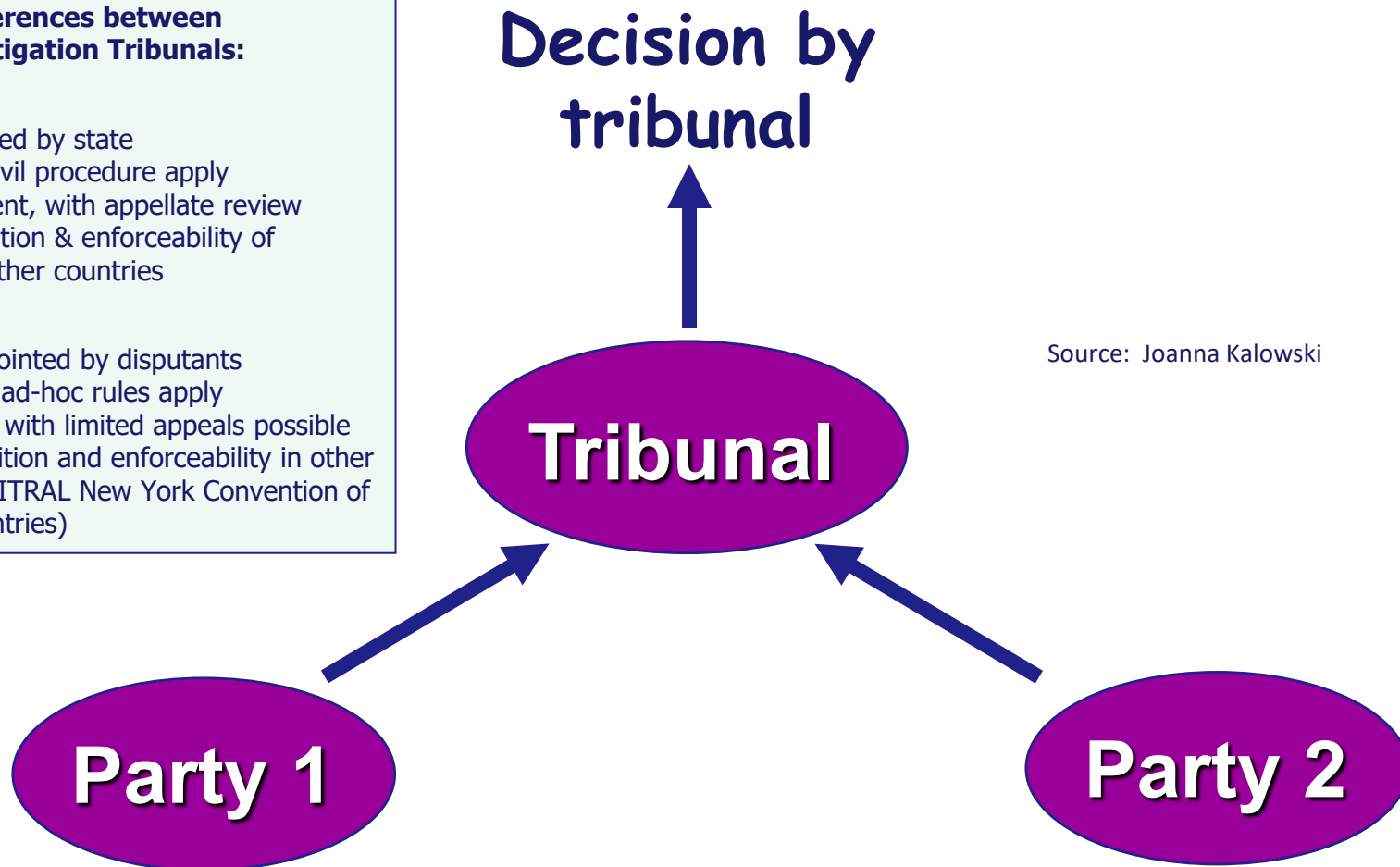
## The 4 main differences between Arbitration & Litigation Tribunals:

### Litigation:

1. Judges appointed by state
2. State laws of civil procedure apply
3. Binding judgment, with appellate review
4. Limited recognition & enforceability of judgments in other countries

### Arbitration:

1. Arbitrators appointed by disputants
2. Institutional or ad-hoc rules apply
3. Binding award, with limited appeals possible
4. Greater recognition and enforceability in other countries (UNCITRAL New York Convention of 1958 (156 countries))



Source: Joanna Kalowski

**Based on a legal syllogism:  
facts + law/rules = outcome**

# ... Conciliation (an expert who guides the discussion) ...

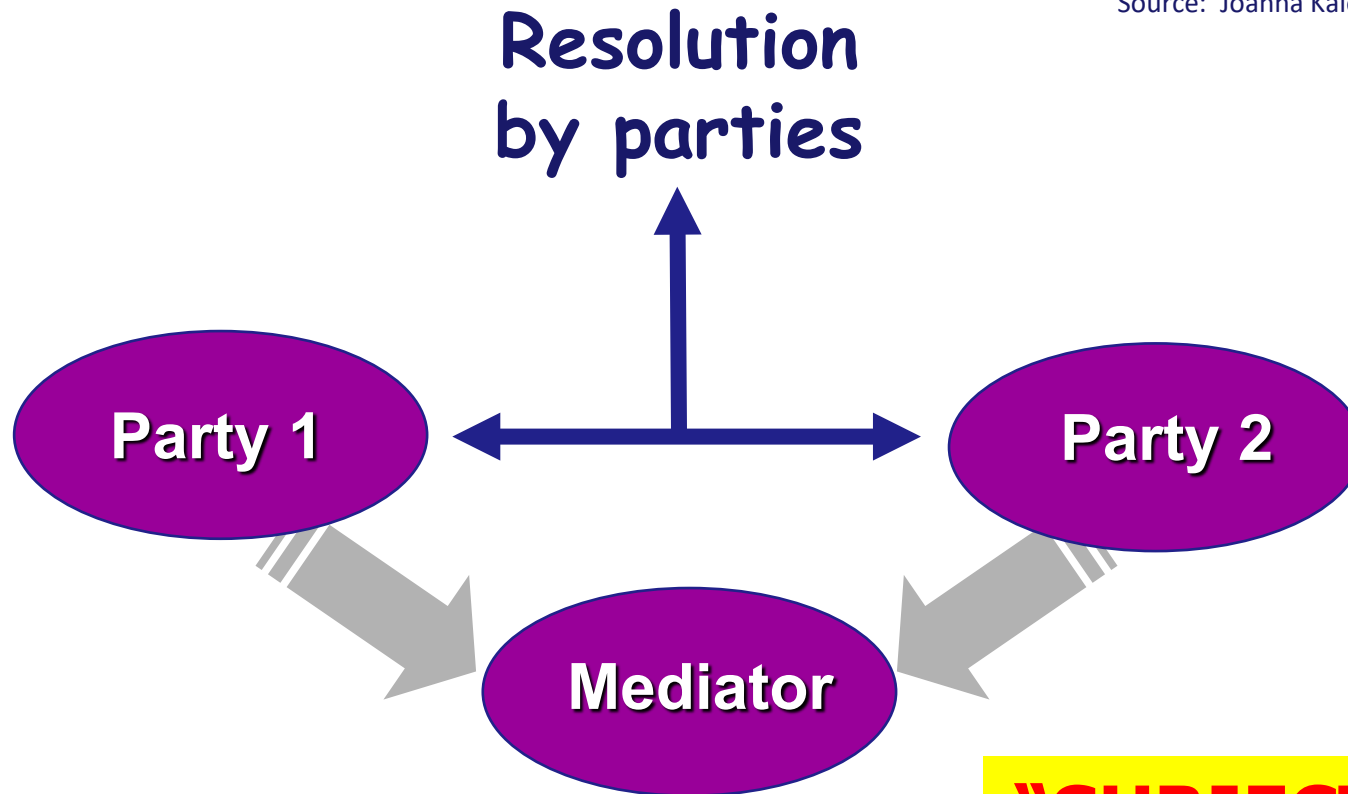


Source: Joanna Kalowski



# ... Mediation

Source: Joanna Kalowski

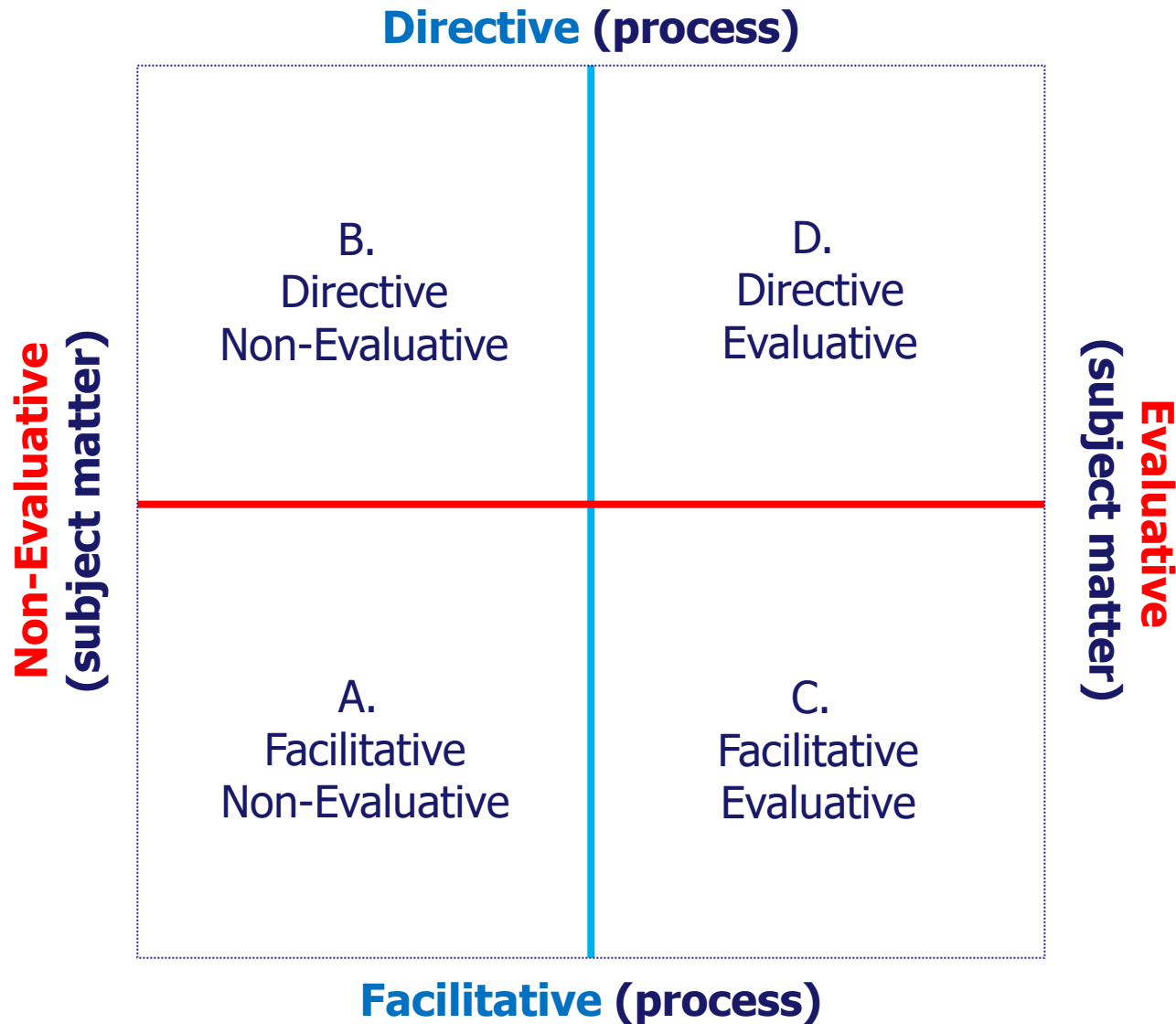


- No ZOPA
- No proposals
- Interests, not Positions
- No facts are irrelevant (emotions, relationships ...)
- Law is a benchmark, not a driver for outcomes

**"SUBJECTIVE"  
JUSTICE**

# Choice: 4 Different Types of ADR

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



# ADR: Process options under the Swiss CPC (2011)



C S M C Chambre Suisse de Médiation Commerciale  
S K W M Schweizer Kammer für Wirtschaftsmediation  
C S M C Camera Svizzera per la Mediazione Commerciale  
S C C M Swiss Chamber of Commercial Mediation

## Conciliation/Médiation/Arbitrage in the CPC

Schweizerische Eidgenossenschaft  
Confédération suisse  
Confederazione Svizzera  
Confederaziun svizra

Les autorités fédérales de la Confédération suisse

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### Partie 2 Dispositions spéciales

#### Titre 1 Conciliation

##### Chapitre 1 Champ d'application et autorité de conciliation

- [Art. 197 Principe](#)
- [Art. 198 Exceptions](#)
- [Art. 199 Renonciation à la procédure](#)
- [Art. 200 Autorités paritaires de conciliation](#)
- [Art. 201 Tâches de l'autorité paritaire de conciliation](#)

##### Chapitre 2 Procédure de conciliation

- [Art. 202 Introduction de la demande de conciliation](#)
- [Art. 203 Audition des parties](#)
- [Art. 204 Conciliation paritaire](#)
- [Art. 205 Conciliation paritaire en matière de droit de la famille](#)
- [Art. 206 Conciliation paritaire en matière de droit de la consommation](#)
- [Art. 207 Conciliation paritaire en matière de droit de la construction](#)
- [Art. 208 Conciliation paritaire en matière de droit de la santé](#)
- [Art. 209 Conciliation paritaire en matière de droit de la culture](#)

##### Chapitre 3 Conciliation et autorisation de procéder

- [Art. 208 Conciliation paritaire](#)
- [Art. 209 Autorisation de procéder](#)

##### Chapitre 4 Proposition de jugement et décision

- [Art. 210 Proposition de jugement](#)
- [Art. 211 Effets](#)
- [Art. 212 Décision](#)

Page d'accueil > Législation > Recueil Systématique > Droit interne > Page de garde > RS 272 Code de procédure civile

#### 272 Code de procédure civile (CPC)

du 19 décembre 2008 (Etat le 1<sup>er</sup> janvier 2012)  
L'Assemblée fédérale de la Confédération suisse,  
vu l'art. 122, al. 1, de la Constitution<sup>1</sup>, vu le message  
arrêté:

#### Titre 2

- [Art. 213 Conciliation et médiation](#)
- [Art. 214 Conciliation et médiation devant la procédure de conciliation](#)
- [Art. 215 Conciliation et médiation devant la procédure au fond](#)
- [Art. 215 Organisation et déroulement de la médiation](#)
- [Art. 216 Relation avec la procédure judiciaire](#)
- [Art. 217 Ratification de l'accord](#)
- [Art. 218 Frais de la médiation](#)

### Partie 3 Arbitrage

#### Titre 1 Dispositions générales

- [Art. 353 Champ d'application](#)
- [Art. 354 Objet de la convention d'arbitrage](#)
- [Art. 355 Règles d'arbitrage](#)
- [Art. 356 Autorités judiciaires compétentes](#)

#### Titre 2 Convention d'arbitrage

- [Art. 357 Contenu d'arbitrage](#)
- [Art. 358 Forme](#)
- [Art. 359 Convention de la compétence du tribunal arbitral](#)

#### Titre 3 Constitution du tribunal arbitral

- [Art. 360 Nombre des arbitres](#)
- [Art. 361 Nomination des arbitres par les parties](#)
- [Art. 362 Nomination par l'autorité judiciaire](#)
- [Art. 363 Désignation de l'arbitre](#)
- [Art. 364 Désignation du mandat](#)
- [Art. 365 Recusation](#)
- [Art. 366 Démission de la mission](#)

#### Titre 4 Récusation, révocation et démission des arbitres

- [Art. 367 Récusation d'un arbitre](#)
- [Art. 368 Révocation d'un arbitre](#)
- [Art. 369 Procédure de révocation](#)
- [Art. 370 Récusation](#)
- [Art. 371 Démission](#)

#### Titre 5 Procédure

- [Art. 372 Lieu](#)
- [Art. 373 Règles de procédure](#)
- [Art. 374 Règles de procédure en matière de droit de la consommation](#)
- [Art. 375 Règles de procédure en matière de droit de la construction](#)
- [Art. 376 Règles de procédure en matière de droit de la santé](#)
- [Art. 377 Règles de procédure en matière de droit de la culture](#)

#### Titre 6 Sentences et recours

- [Art. 378 Sentences arbitrales](#)
- [Art. 379 Recours contre la sentence](#)
- [Art. 380 Recours contre la sentence, renvoi additionnel](#)
- [Art. 381 Recours contre la sentence](#)
- [Art. 382 Recours au Tribunal fédéral](#)
- [Art. 383 Recours au tribunal cantonal](#)
- [Art. 384 Substitution](#)
- [Art. 385 Sentences arbitrales](#)
- [Art. 386 Recours de révision](#)
- [Art. 387 Recours pour complément ou restriction](#)
- [Art. 388 Procédure](#)

#### Chapitre 2 Révision

- [Art. 389 Recours de révision](#)
- [Art. 390 Recours de révision](#)
- [Art. 391 Substitution](#)
- [Art. 392 Sentences arbitrales](#)
- [Art. 393 Recours de révision](#)
- [Art. 394 Recours pour complément ou restriction](#)
- [Art. 395 Procédure](#)
- [Art. 396 Recours de révision](#)

**Conciliation**  
Partie 2, Titre 1 CPC  
Arts. 197-212 (16 articles)

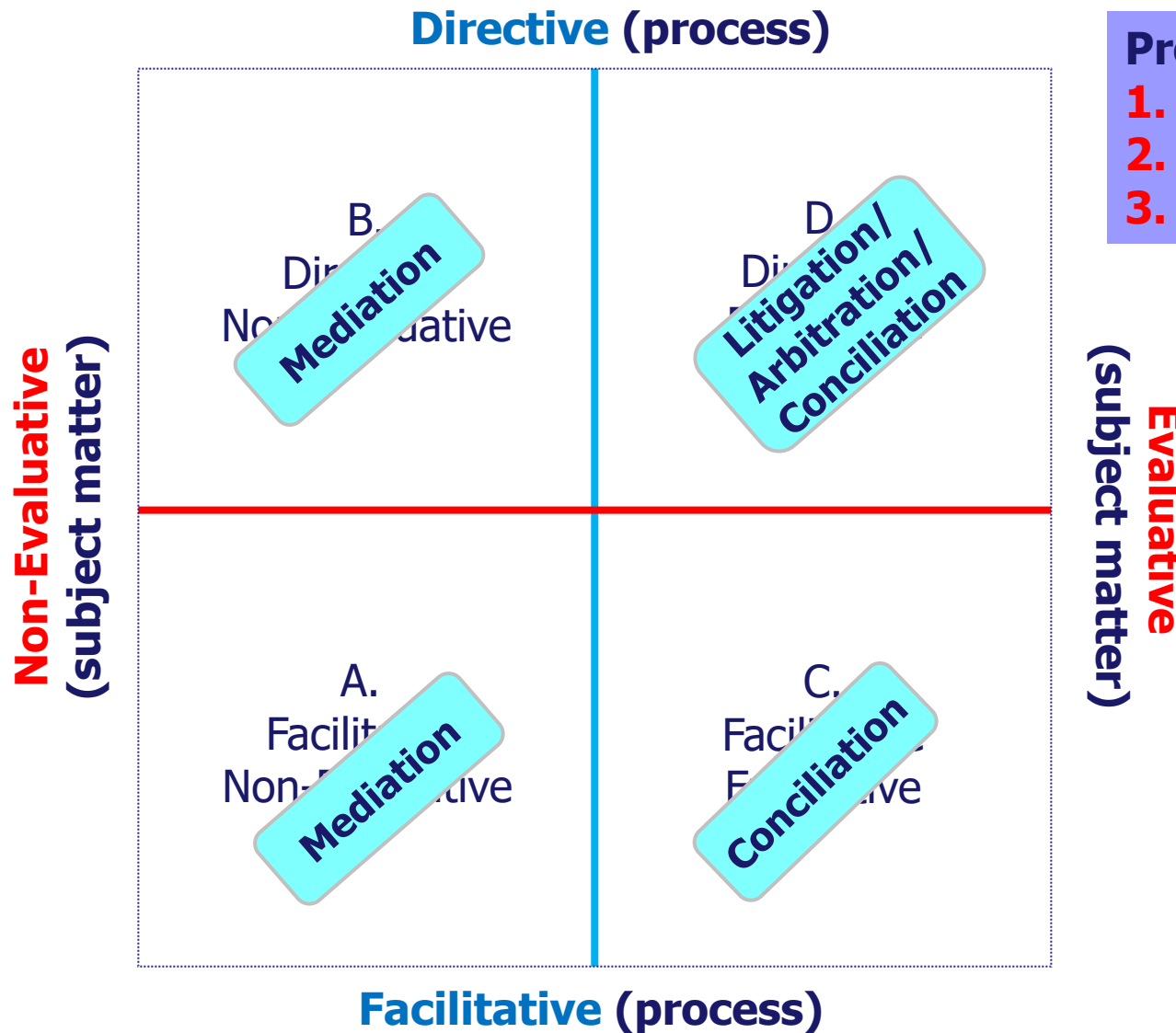
**Médiation**  
Partie 2, Titre 2 CPC  
Arts. 213-218 (6 articles)

**Arbitrage**  
Partie 3, Titre 1-7 CPC  
Arts. 353-399 (47 articles)

**What is the difference?**

# What type of process do the disputants want?

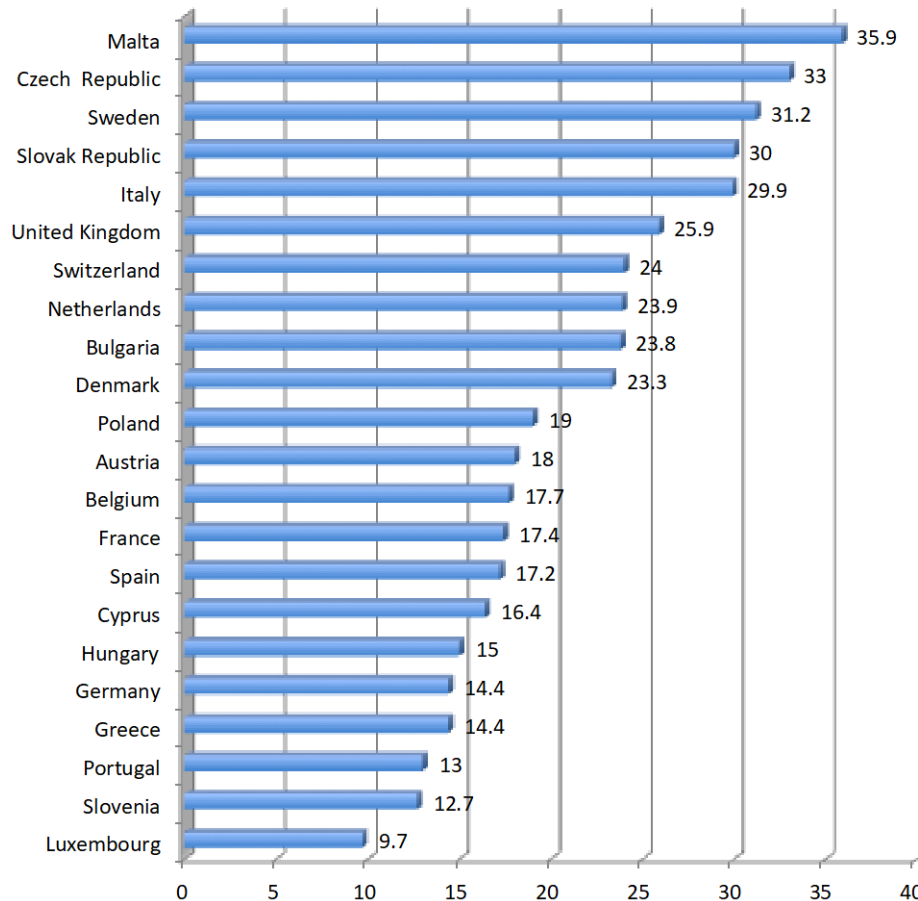
Source: Based on L. Riskin "The New Old & New New Grids"



- Proposals:**
- 1. Start at A?**
  - 2. Move around?**
  - 3. Combine?**

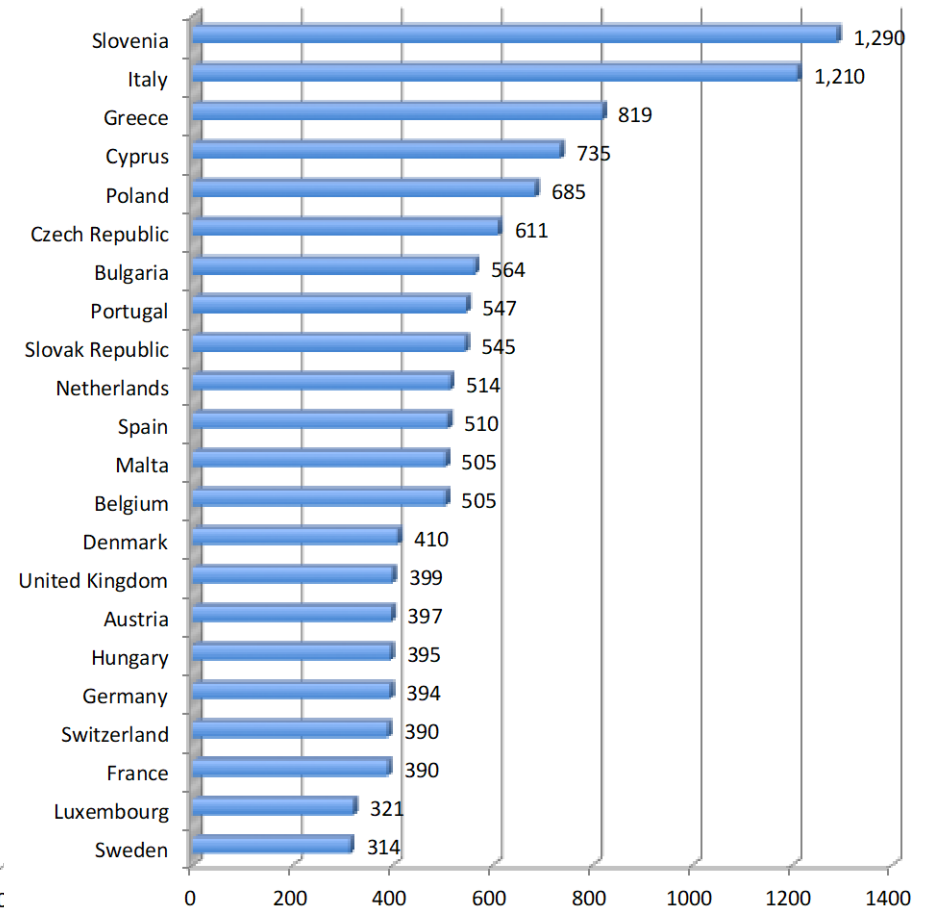
# Costs of EU Litigation for a € 200,000 Dispute

**Cost (% of claim)**



**Range of costs: € 20,000 – € 70,000**

**Time (days)**



**Range of time: <1 – 3 ½ years**

Source: Manon Schonewille & World Bank. Doing Business 2013: Smarter Regulations for Small and Medium-Size Enterprises. Washington, June 2012

# Comparison: Litigation, Arbitration & Mediation

Value of the dispute € 200.000	Court			Arbitration			Mediation		
	Domestic dispute of € 200.000			Domestic dispute of € 200.000			Domestic dispute of € 200.000		
	Time	Cost	Cost as	Time	Cost	Cost as	Time	Cost	Cost as
	in Euro	% on disp.		in Euro	% on disp.		in Euro	% on disp.	
Austria	540	€ 14.660	7,3%	540	€ 46.480	23,2%	90	€ 14.790	7,4%
Belgium	525	€ 16.000	8,0%	630	€ 19.500	9,8%	45	€ 7.000	3,5%
Bulgaria	870	€ 17.885	8,9%	480	€ 15.372	7,7%	14	€ 4.676	2,3%
Cyprus	1445	€ 6.796	3,4%	732	€ 8.300	4,2%	45	€ 7.000	3,5%
Czech Rep	1280	€ 21.004	10,5%	289	€ 20.950	10,5%	75	€ 7.667	3,8%
Denmark	380	€ 46.600	23,3%	250	€ 66.000	33,0%	45	€ 7.000	3,5%
Estonia	291	€ 45.337	22,7%	205	€ 51.149	25,6%	45	€ 7.000	3,5%
Finland	800	€ 17.046	8,5%	713	€ 30.546	15,3%	368	€ 17.000	8,5%
France	330	€ 20.500	10,3%	345	€ 28.000	14,0%	60	€ 10.000	5,0%
Germany	246	€ 9.854	4,9%	200	€ 21.788	10,9%	45	€ 7.000	3,5%
Greece	970	€ 14.700	7,4%	250	€ 19.600	9,8%	60	€ 4.275	2,1%
Hungary	765	€ 11.312	5,7%	540	€ 21.038	10,5%	90	€ 14.000	7,0%
Ireland	515	€ 53.800	26,9%	357	€ 66.661	33,3%	45	€ 7.000	3,5%
Italy	2205	€ 19.527	9,8%	2935	€ 65.400	32,7%	47	€ 17.000	8,5%
Latvia	420	€ 6.900	3,5%	260	€ 9.780	4,9%	75	€ 3.500	1,8%
Lithuania	460	€ 21.410	10,7%	150	€ 29.000	14,5%	90	€ 15.400	7,7%
Luxemburg	321	€ 15.500	7,8%	113	€ 25.500	12,8%	98	€ 13.900	7,0%
Malta	1575	€ 8.100	4,1%	665	€ 5.100	2,6%	300	€ 3.600	1,8%
Netherlands	700	€ 32.000	16,0%	600	€ 33.500	16,8%	40	€ 6.000	3,0%
Poland	540	€ 47.000	23,5%	352	€ 51.000	25,5%	42	€ 10.000	5,0%
Portugal	450	€ 11.428	5,7%	480	€ 20.161	10,1%	90	€ 3.050	1,5%
Romania	342	€ 19.414	9,7%	398	€ 17.347	8,7%	32	€ 3.010	1,5%
Slovakia	570	€ 51.993	26,0%	730	€ 57.761	28,9%	125	€ 8.603	4,3%
Slovenia	600	€ 8.087	4,0%	290	€ 15.190	7,6%	180	€ 6.015	3,0%
Spain	730	€ 30.000	15,0%	320	€ 21.632	10,8%	74	€ 7.667	3,8%
Sweden	610	€ 65.710	32,9%	405	€ 94.990	47,5%	45	€ 7.000	3,5%
UK	333	€ 51.536	25,8%	357	€ 66.661	33,3%	85	€ 37.011	18,5%
<b>Average</b>	<b>697</b>	<b>€ 25.337</b>	<b>13%</b>	<b>503</b>	<b>€ 34.385</b>	<b>17,2%</b>	<b>87</b>	<b>€ 9.488</b>	<b>4,7%</b>

- These estimates are based on a hypothetical €200,000 claim for defective goods, with no appeal filed (using World Bank methodology).
- ADR Centres report a 70-80% settlement rate for commercial mediation, with another 50% settling in arbitration (Total ave. = 85-90%)
- Mediation = faster (<20% of time) & cheaper (savings >50%)

Source: The Cost of Non ADR: Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation, ADR Center Survey Report, June 2010, p.49

# Additional Statistics: Commercial Arbitration Costs

## *Cost Estimate - Civil-Law Arbitration*

	<b>Low</b>	<b>High</b>	<b>Mid-point</b>
3 Arbitrators(50%)	\$100,000	\$250,000	\$175,000
Arbitration Institution	\$12,000	\$25,000	\$18,500
Legal fees	\$150,000	\$500,000	\$325,000
Trib expert (50%)	\$10,000	\$50,000	\$30,000
Party direct costs	\$5,000	\$10,000	\$7,500
<b>TOTAL</b>	<b>\$277,000</b>	<b>\$835,000</b>	<b>\$556,500</b>

## *Cost Estimate - Common-Law Arbitration*

	<b>Low</b>	<b>High</b>	<b>Mid-point</b>
3 Arbitrators (50%)	\$200,000	\$500,000	\$350,000
Arbitration Institution	\$12,000	\$25,000	\$18,500
Legal fees	\$400,000	\$1,500,000	\$950,000
Party expert	\$30,000	\$180,000	\$95,000
Party direct costs	\$10,000	\$20,000	\$15,000
<b>TOTAL</b>	<b>\$652,000</b>	<b>\$2,225,000</b>	<b>\$1,428,500</b>

From McIlwraith & Savage, *International Arbitration & Mediation: A Practical Guide*  
 (Kluwer Law International - forthcoming)

Estimates based on:

- US\$ 6,000,000 claim
- US\$ 4,000,000 counterclaim
- Construction case
- Total value of hypothetical dispute: US\$10,000,000

**Ave. Cost Civil Law = 5.6% of value**

**Ave. Cost Common Law = 14.3% of value**

## More Statistics: Commercial Mediation (Costs & Time)

<b>Average duration of a commercial mediation</b>	4 x ½ day sessions
<b>Percentage of cases reaching a settlement</b>	79%
<b>Willingness of the parties to repeat mediation</b>	92%
<b>Average value of the dispute</b>	€ 5,000,000
<b>Average procedural cost</b>	€ 7,500 per party (€15,000 in total)
<b>Estimated legal costs (per party)</b>	€25,000
<b>Estimated total costs (all parties)</b>	€65,000
<b>Total cost as a % of value of dispute</b>	1.3%

Source: Based on Manon Schonewille, ACB Foundation (Netherlands) data (2009) & World Bank data



# Comparison of Arbitration & Mediation (US\$20M)

	Mediation	Arbitration
Value of Dispute	\$20,000,000	\$20,000,000
Time to Outcome	2-6 months	24-36 months
Management Time (per party)	100 hours	700 hours
Fees of neutral(s)	\$15,000	\$575,000
Legal Costs (per party)	\$70,000	\$600,000
Institutional Costs	\$5,500	\$38,500
Average Costs	\$160,500	\$1,813,500
Result as a % of the value	1%	9%

**“OR” v. “AND”:** Can the 2 processes be combined to benefit from both systems?

Source: J.T. McLaughlin, based on Nadja Alexander, “International Comparative Mediation: Legal Perspectives 337” (Kluwer Law International, 2009) pp. 49-50

# US AAA Data on Reasons for using ADR

## Reasons for Using Mediation and Arbitration

(Base: Use Mediation or Arbitration)

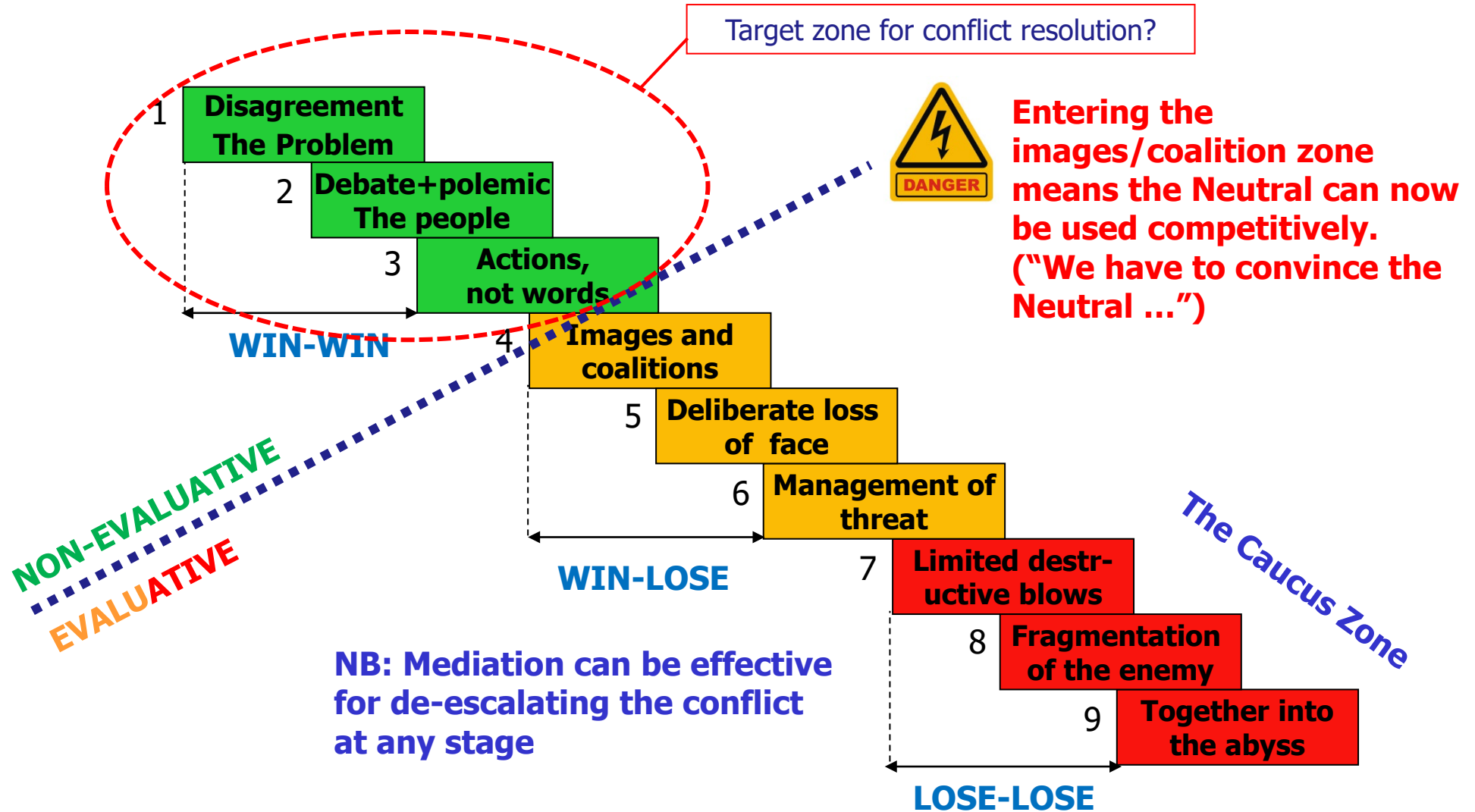
The primary reasons for using mediation or arbitration include saving money and saving time.

	Mediation	Arbitration
Saves money	91%	71%
Saves time	84%	73%
Provides a more satisfactory process	83%	66%
Allows parties to resolve disputes themselves	81%	60%
Has limited discovery	68%	66%
Is court mandated	63%	45%
Uses expertise of mediators/arbitrators	61%	49%
Gives more satisfactory settlements	61%	41%
Preserves good relationships between disputing parties	56%	38%
Is required by contract	54%	87%
Is desired by senior management	48%	37%
Preserves confidentiality	47%	54%
Is a managerial or technically complex dispute	36%	37%
Avoids establishing legal precedents	36%	32%
Provides more durable resolution compared to litigation	31%	25%
Is an international dispute	16%	25%
Became standard practice in industry	14%	21%

Addressing the effectiveness of ADR procedures, a substantial majority of respondents said that they believed that both mediation and arbitration reduced the time needed to resolve disputes (see Figure 10) and lowered the costs of the dispute resolution process itself (i.e., it reduced all costs involved exclusive of judgment or award costs) (see Figure 11).

Source: AAA (2003). Dispute-Wise Business Management. New York, American Arbitration Association.

# The Possible Impact of Process on Conflict Escalation

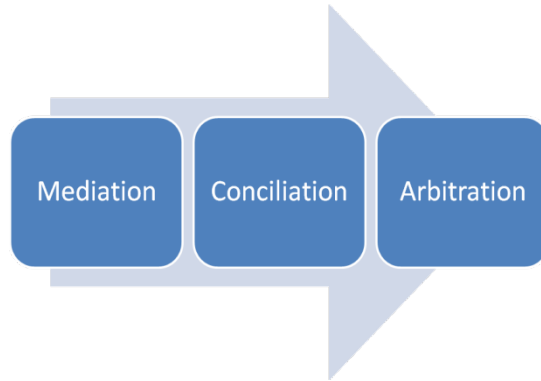


Inspired by: Tina Monberg  
Source: F. Glasl's "Confronting Conflict"

# Questions for Setting Up a Mediation

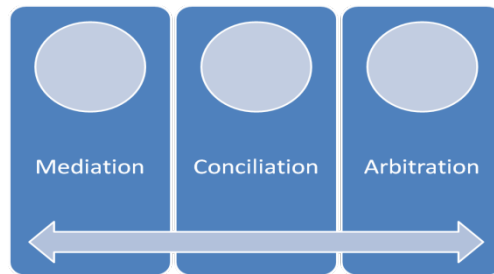
Topics	Approach
Who would you like to have participate from your organization (and why)?	Interest-based or positional players: Business execs, trusted advisors, representative negotiators?
Who would you like to have participate from your partner's organisation (and why)?	Possible future allies or nemeses: Future-oriented or past-focused players (interests v. positions)?
Language of proceedings?	Language of key participants and/or of neutral? If interpretation: simultaneous or consecutive?
Venue?	"Off site" setting or office setting for efficiency?
Food?	Joint sit-down meals v. sandwiches?
Social Events?	Introductory dinner/drinks/events/puzzles etc.
Prior submissions?	Position vs. Interest statements/OLE forms
Possible Set Agenda?	Creates certainty: e.g., Values, interests, brainstorming, options etc.
Opening presentations?	Opening a conversation vs. positional statements
Time & time management issues?	Rest, relations-oriented; decision fatigue

# Process Design & Combining Processes



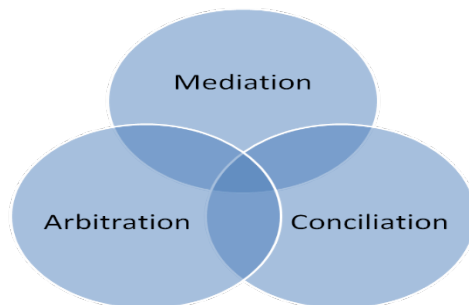
## Sequential

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



## Parallel

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



## Integrated

- MEDALOA
- Dispute Boards
- Combined Neutrals
- ??? (3 question marks)

## 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

## Can the same neutral switch hats? Two reactions:



**It can sometimes be done,  
with proper precautions in place.**

# Some Users' Perspectives

## PROS

- Neutral sees the whole picture
- More flexible
- Less time
- Less money
- Better outcomes?
- Greater freedom to innovate
- Greater control over process by users



## CONS

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

***"The truth begins in pairs" (Michael Lukas Moeller)***  
**Is combining 2 neutrals possibly a better solution?**

# E.g., SCAI: Flexible international ADR Rules

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INTERNATIONAL ARBITRATION

COMMERCIAL MEDIATION

## Swiss Rules of International Arbitration

In 2004, several Swiss Chambers of Commerce jointly adopted the Swiss Rules of International Arbitration, which replaced their individual arbitration rules. In 2012, the Swiss Rules were slightly revised for the first time so as to increase their efficiency and cost effectiveness.

Arbitration is generally more expeditious than proceedings before State courts. Arbitrators are independent practitioners specialized in the field of dispute resolution. Contrary to State court judgments, arbitral awards remain confidential. Pursuant to certain international conventions, they are enforceable in almost all countries.

## Swiss Rules of Commercial Mediation

In addition to arbitration, the Swiss Chambers' Arbitration Institution has adopted rules for commercial mediation. These rules are particularly suitable if the parties are willing to make a joint effort to find an amicable solution to their dispute, and if they require the assistance of a neutral to do so.

If successful, mediation proceedings are much faster and considerably less costly than litigious procedures. The Mediation Rules suggest ways of combining arbitration and mediation. The Swiss Rules of International Arbitration themselves allow the arbitral tribunal, with the agreement of the parties, to take steps to facilitate the settlement of the dispute.

[www.swissarbitration.org](http://www.swissarbitration.org)

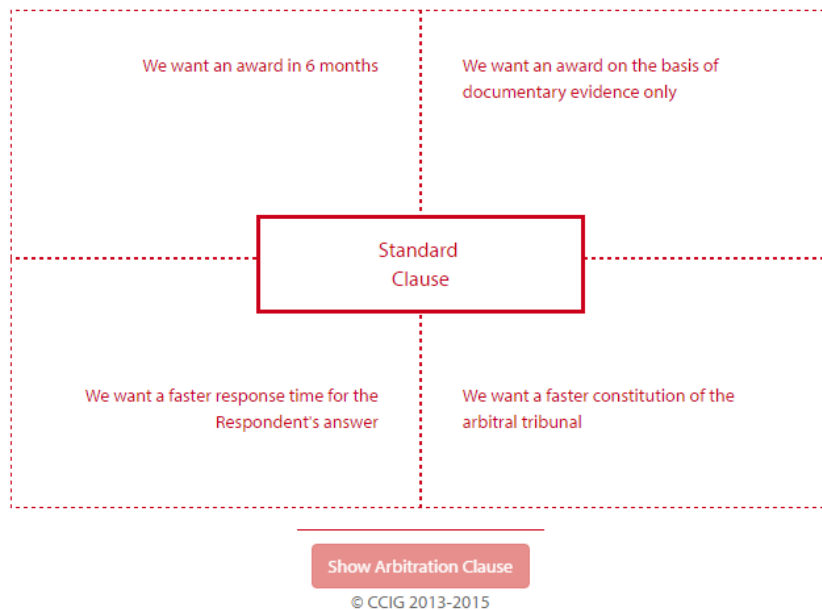


# Customized ADR Clauses (including Med-Arb, Arb-Med-Arb, etc.)

## Customize Your Arbitration Clause

The customized arbitration clause allows the parties, where appropriate, to reduce the time and cost of an arbitration. This is especially useful for commodity traders, for instance, whose demands are always very immediate.

The Standard Clause, which is the foundation for each customized clause, provides for arbitration under the Swiss Rules of International Arbitration with the option to initiate mediation under the Swiss Rules of Commercial Mediation at any time before or during the arbitral proceedings. You can select the Standard Clause alone. You can also customize the Standard Clause by adding any, or all, of the four options. Scroll over each option to learn more. When you have made your selections, click Show Arbitration Clause.



## Model clauses in other languages

شرط التحكيم النموذجي (Arabic)  
 示范仲裁条款 (Chinese)  
 VZOROVÁ ROZHODČÍ DOLOŽKA (Czech)  
 CLAUSE COMPROMISSOIRE TYPE (French)  
 MUSTERSCHIEDSKLAUSEL (German)  
 Τυποποιημένη Πήτρα Διαίτησης (Greek)  
 VÁLASZTOTTBÍRÓSÁGI MINTAKLAUZULA (Hungarian)  
 CLAUSOLA ARBITRALE TIPO (Italian)  
 نمونه شرط یا موافقتنامه داری (Persian)  
 WZÓR KLAUZULI ARBITRAŻOWEJ (Polish)  
 MODELO DE CLÁUSULA ARBITRAL (Portuguese)  
 ТИПОВАЯ АРБИТРАЖНАЯ ОГОВОРКА (Russian)  
 MODEL ARBITRAŽNE KLAUZULE (Serbian)  
 MODELO DE CONVENIO ARBITRAL (Spanish)  
 MODEL TAHKİM ŞARTI (Turkish)

- Choice of language(s)
- Choice of location
- Choice of speed
- Cost control
- Ability to mix modes as appropriate (e.g., MEDALOA)
- Access to leading practitioners in international arbitration and mediation (civil law & common law)

For more customized choices from other providers, see website.

<https://www.swissarbitration.org/Arbitration/Arbitration-clauses>

**Tip** : The seat of arbitration is left open and needs to be filled in. Moreover, even though each customized clause automatically provides for one arbitrator and English as the language, the parties are free to modify the language of the proceedings, and the number of arbitrators to "three" or "one or three".

## Two Definitions of Mediation

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“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***

“Mediation is a method of dispute resolution whereby the parties attempt to reach an **amicable settlement** of their dispute or avoid future conflicts with the **assistance of a neutral third party**, the mediator. The mediator **facilitates the exchange of information and perspectives** between the parties and encourages them to **explore solutions** that meet their **needs and interests**. Unless specifically requested by the parties, the mediator **does not** give his or her **own views** (as would an **expert**), and **abstains from making proposals** (as would a **conciliator**).”

**Swiss Rules of Mediation of SCAI (the Swiss Chambers of Commerce Association for Arbitration and Mediation) (2019)**

# The Mediation Process (7 phases)

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## 1. Preparation Phase

- Process design: selecting the rules and the type(s)/role(s) of the mediator(s)
- Ensuring a common understanding as to procedural matters (“contracting”, attendance, etc.)
- Coordination between the negotiation partners (written submissions, opening presentations, timing, etc.)

## 2. Opening Phase: Mediator’s statement & Opening Presentations

## 3. Exploration Phase: Identifying topics for discussion

- Identification of needs, interests, points of agreement/disagreement, BATNAs/WATNAs/PATNAs
- Exchanges of information: joint sessions and separate meetings/caucuses
- Dealing with impasses and possible reality testing (re-evaluation of interests v. positions)

## 4. Option Generation Phase: Generating options and possible new solutions

- Brainstorming (without evaluation)
- Analysis (with evaluation)

## 5. Negotiation Phase: (Interest-Based v. Positional)

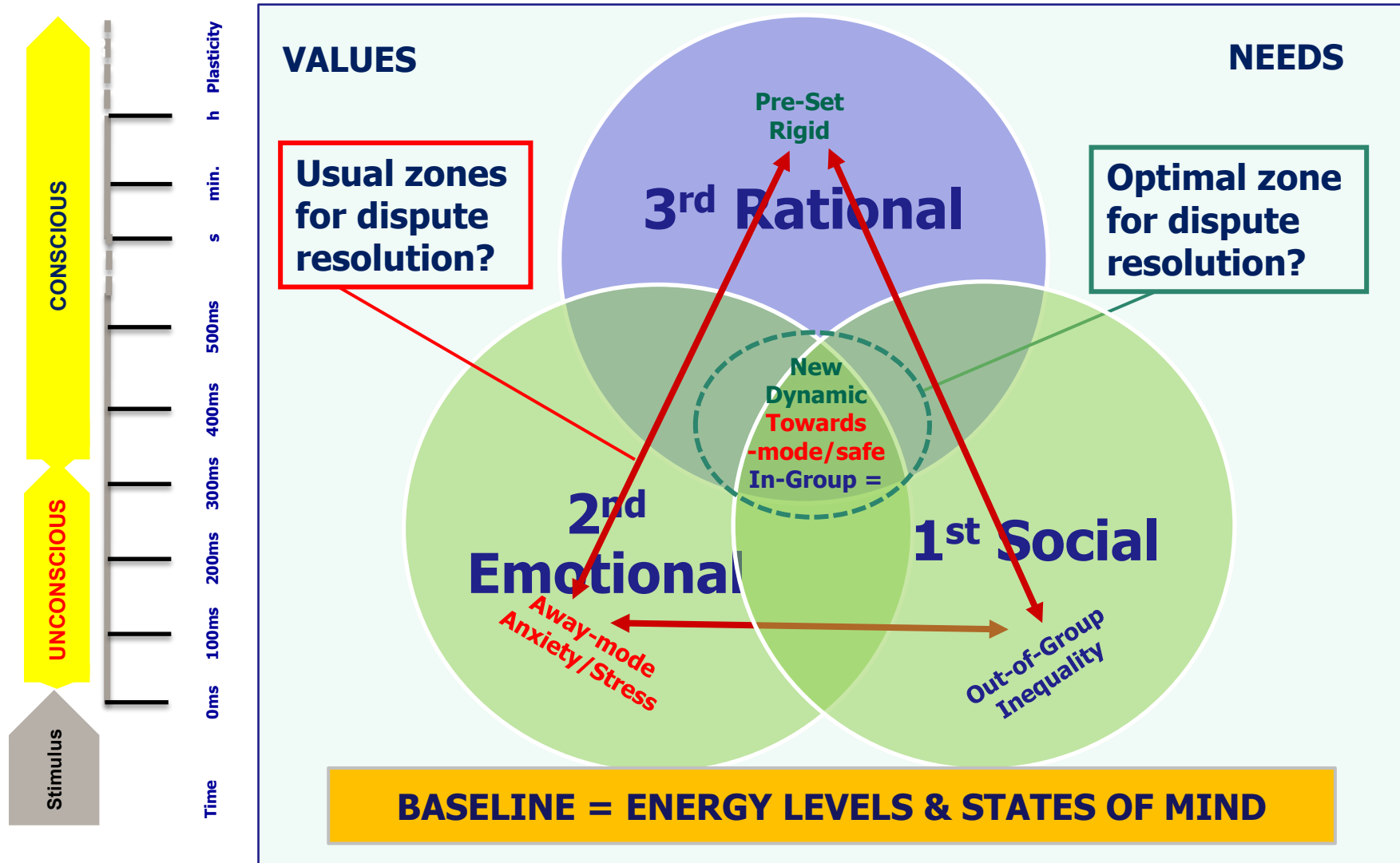
- Selection

## 6. Closing Phase

- Drafting and reviewing a Heads of Agreement or Settlement Agreement
- What to do in case of partial agreement only?

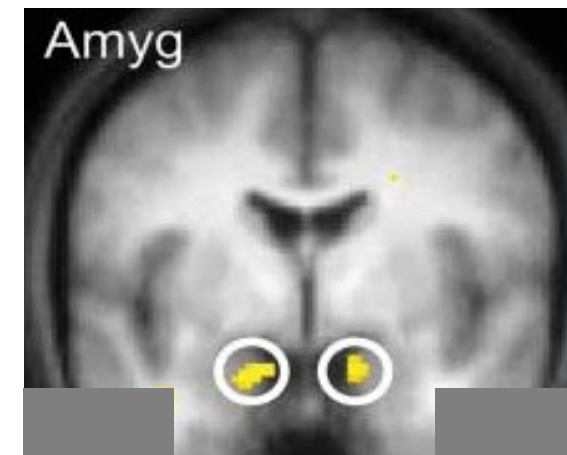
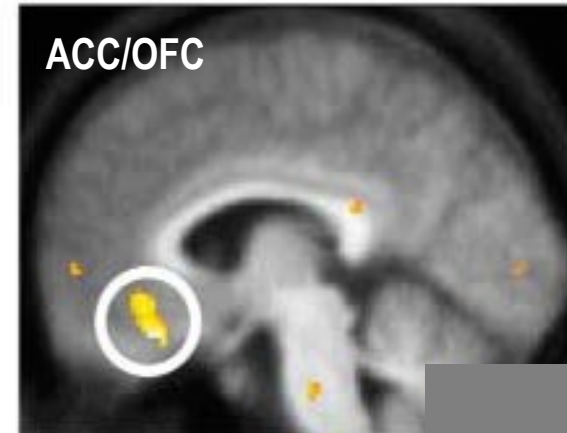
## 7. Compliance Phase: Exequatur/homologation and implementation/enforceability

# Using the TRI-O/S Neuro-Model



# Implications: 7 Phases = 7 critical junctures

1. Preparation phase
2. Opening phase
3. Exploration phase
4. Option generation phase
5. Negotiation phase
6. Closing phase
7. Compliance phase (enforcement, homologation, etc.)



# Cross-cultural situations

<b>UNIQUE</b>	<p>preferences adjustment self-image          lifestyle relationships values          taste finances motivation</p>	<b>INDIVIDUAL</b>
<b>DIFFERENT</b>	<p><b>We tend to instinctively start off at this level.</b></p> <p>clothes languages religions foods          family patterns status symbols          attitudes to money respect patterns          work patterns</p>	<b>CULTURAL</b>
<b>SAME</b>	<p><b>We can (re-)build bridges at this level.</b></p> <p>food shelter security identity          purpose in life covering belonging          self respect self fulfilment (Maslow)</p>	<b>HUMAN</b>

Source: J. Kalowski -- Developed by Denise Gubbay & Sheila Coghill

# Model Arb-Med Clause

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## Mediation followed by international arbitration

“Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be submitted to **mediation** in accordance with the Swiss Rules of Commercial Mediation of the Swiss Chambers' Arbitration Institution in force on the date when the request for mediation was submitted in accordance with these Rules. The seat of the mediation shall be ... [name of city in Switzerland]. The mediation proceedings shall be conducted in... [specify desired language]. **If such dispute, controversy or claim has not been fully resolved by mediation within sixty (60) days** from the date when the mediator(s) has (have) been confirmed or appointed, it shall be settled by **arbitration in accordance with the Swiss Rules of International Arbitration** of the Swiss Chambers' Arbitration Institution in force on the date when the Notice of Arbitration was submitted in accordance with those Rules. The number of arbitrators shall be ... "one" or "three"; The seat of the arbitration shall be in ... [name of city in Switzerland]; The arbitral proceedings shall be conducted in ...[specify desired language]. [The arbitration shall be conducted in accordance with the provisions for **Expedited Procedure.**]”

(<https://www.swissarbitration.org/Mediation/Mediation-clauses>)

# The impact of clauses: “Clause & Effect” Principle

Storebaelt, DK



Oresund, DK & SE



The same Conflict Management System (“CMS”) was proposed in 2 cases:

## PROPOSAL OF PETER LUNDHUS

### Musketeer bonus + Steering group

1. Negotiation
2. Dispute Resolution Board
3. Mediation
4. Arbitration

LUNDHUS PROPOSAL **REFUSED**

## LUNDHUS PROPOSAL **ACCEPTED**

- Opened 9 months early
- Within budget
- No company lost any money
- No negative press of politics
- Positive relationships
- Less accidents and no deaths

**The impact of clauses: Affects social behavior and outcomes.**



# Search Tools for finding a mediator

C S M C **Chambre Suisse de Médiation Commerciale**  
 S K W M **Schweizer Kammer für Wirtschaftsmediation**  
 C S M C **Camera Svizzera per la Mediazione Commerciale**  
 S C C M **Swiss Chamber of Commercial Mediation**

Langues: [EN](#) [LI](#) [DE](#)  
[Page d'accueil](#) | [Plan du site](#)  
[Version imprimable](#) | [Contact](#)

Médiation **Trouver un médiateur** Qui sommes-nous?

**Trouver un médiateur/une médiatrice**

**Consultation**  
 Désirez-vous une consultation? Contactez-nous avec le [formulaire de contact](#), nous vous contactons en l'espace d'un jour.

**Trouver un médiateur**  
 Cherchez une personne compétente pour votre prochaine médiation.

Masque de recherche

Recherche en plein texte

Langues:

Canton:

Domaine:

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Location For Mediation:

Languages in mediations:  
 Any Language  
 Afrikaans  
 Arabic  
 Cantonese  
 Catalan  
 Chinese  
 Croatian

Intercultural Competency  
 Intercultural Competency

Mediation Styles:  
 Any Style  
 Evaluative  
 Facilitative  
 Transformative

Mediation Practice Areas:  
 Any Practice Area  
 Agriculture  
 Arts/Entertainment/Media  
 Business To Community  
 Commercial, general

Name contains:






Keywords contain:

**My shortlist** Your shortlist is empty

Most Recent Feedback Digest Update

**IMI Certified Mediators**

Your search returned 5 Mediators:

 <b>Mr. Jeremy Lack</b> Switzerland and 5 others English and 3 others <a href="#">View full profile</a> <a href="#">Add to shortlist</a>	 <b>Mrs Jane Player</b> United Kingdom English and 3 others <a href="#">View full profile</a> <a href="#">Add to shortlist</a>	 <b>Fernanda Levy</b> Brazil, Argentina English and 3 others <a href="#">View full profile</a> <a href="#">Add to shortlist</a>	 <b>Ms TERESA MORAIS LEITAO</b> Portugal and 3 others English and 3 others <a href="#">View full profile</a> <a href="#">Add to shortlist</a>
 <b>Mr Hein Westersouren van Meeteren</b> Netherlands Dutch and 4 others <a href="#">View full profile</a> <a href="#">Add to shortlist</a>			



## Find an Arbitrator / Counsel

To find an arbitrator or counsel on your own, you may find it useful to consult the [ASA database](#).



Should you need our assistance to appoint an arbitrator, we will gladly do so, either in accordance with the [Swiss Rules of International Arbitration](#) or as per the [Rules of the Swiss Chambers Arbitration Institution \("SCAI"\)](#) as Appointing Authority in UNCITRAL or other Ad Hoc Arbitration Proceedings.

## For Disputes in Commodity Trading, Shipping, and/or Trade Finance

A list of arbitrators and mediators who are highly specialized in the commodity trading, shipping, and/or trade finance field, as well as in specific commodities (e.g. oil, steel, iron ore, grain), has been produced by the selecting committee of ACT (Alternative Dispute Resolution for Commodity Trading, Shipping and Finance). The selecting committee is composed of leading members of the arbitration, mediators and trading community, members of the STSA (Swiss Trading and Shipping Association), of the CCG (Geneva Chamber of Commerce) and of SCAI (Swiss Chambers' Arbitration Institution).

The list which continues to grow as new applications are received and approved, is available below.

Arbitrations and mediations will be conducted as usual under the appropriate [Swiss Rules](#). In order to benefit from this service, we recommend all actors of the trading community to insert our model arbitration clause in all their contracts.

For more information on ACT, please visit [STSA's](#) website.

## List of Arbitrators/Mediators Specialized in Dispute Resolution for Commodity Trading, Shipping and Finance

Arbitrators on the list can be recommended:

- Either as Sole Arbitrator, Chairman, or Co-Arbitrator (all recommended highly specialized arbitrators who completed a legal education) (LIST A), or
- Or as Co-Arbitrator or expert (highly specialized arbitrators who are not lawyers) (LIST B)



## Search for mediator

To find on your own a qualified mediator based in Switzerland you may find it useful to refer to the database of the members of the Swiss Chamber of Commercial Mediation (SCCM). The SCCM mediator search tool is available below at the bottom of this page.

Profiles of Swiss and International certified Mediators can also be found on [http://imimediation.org](#).

Should you need our assistance to appoint a mediator, we will gladly do so in accordance with the [Swiss Rules of Commercial Mediation](#).

## For Disputes in Commodity Trading, Shipping, and/or Trade Finance

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## List of Arbitrators/Mediators Specialized in Dispute Resolution for Commodity Trading, Shipping and Finance

## Swiss Chamber of Commercial Mediation (SCCM) search tool for Swiss based mediators:

[Find a certified mediator based in Switzerland](#)

## Some more sites:

1. [www.imimediation.org](http://www.imimediation.org)
2. [www.csmc.ch](http://www.csmc.ch)
3. <http://ge.ch/justice/mediation>
4. [www.mediation.sav-fsa.ch](http://www.mediation.sav-fsa.ch)
5. <http://www.infomediation.ch/cms/>
6. [www.arbitration-ch.org](http://www.arbitration-ch.org)
7. [www.cpradr.org](http://www.cpradr.org)
8. [www.jamsinternational.com](http://www.jamsinternational.com)
9. [www.adr.org](http://www.adr.org)
10. <http://www.permanence-info-mediation.ch/>
11. [www.whoswholegal.com](http://www.whoswholegal.com)

**Attention-focus: This dispute = a crisis or an opportunity?**

**Crisis**

危机

**Danger + Opportunity**

Source: Michael Leathes

# A commercial perspective of dispute resolution

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## WHY NOT INCLUDE MEDIATION?

“Turn your dispute from a business threat into a business opportunity”

*Cees J.A. van Lede, Chairman of the Board of Management  
Akzo Nobel NV*



Source: <http://www.mediation-bedrijfsleven.nl/english.shtml#quote4>

## When to include mediation?

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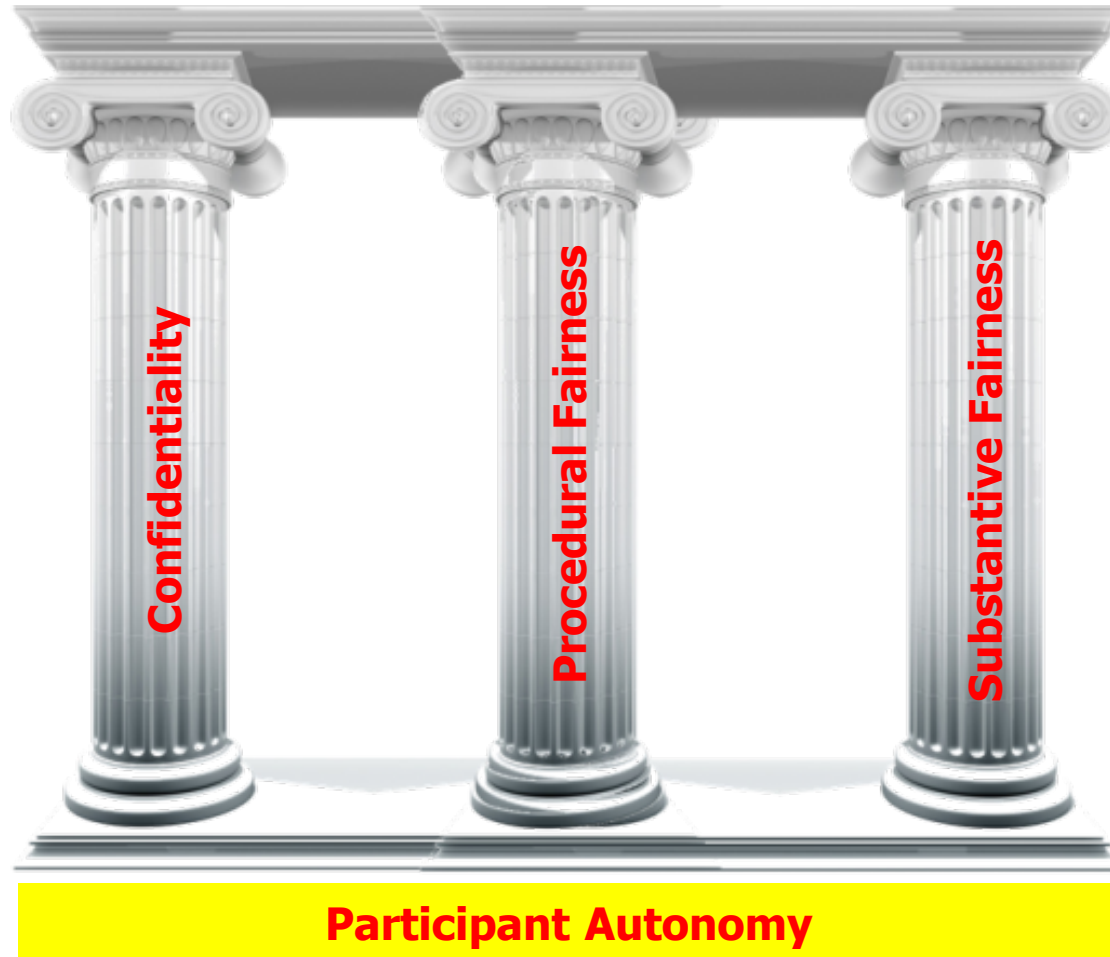
# THE EARLIER THE BETTER?

“Early Dispute Resolution – the earlier ADR processes are implemented in the conflict cycle, the less risk there is of the dispute escalating out of control.”

*Hans Peter Frick, Group General Counsel, Nestlé SA*



# The Base + 3 Pillars of Mediation



# Mediator's Concerns

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## 1. Partner Autonomy:

1. Self Determination
2. Informed Consent

## 2. Confidentiality

1. Facilitates trust within the group
2. Legally and morally binding

## 3. Procedural Fairness:

1. Power Balanced
2. Neutrality
3. Impartiality v. Multi-partiality
4. Understanding biases
5. Understanding emotions

## 4. Substantive Fairness:

1. Vulnerability?
2. Target BATNAs
3. Outcome is no worse than PATNAs

### **Mediator's Status:**

- In or Out of Group(s)
- Follower?
- Leader?
- Norms Generator?
- Norms Educator?
- Norms Advisor?
- Simple conduit of information?
- To elicit interests?

Source: Ellen Waldman

# Thank you!



## Jeremy LACK, MA (Oxon)

- Barrister (UK), Attorney-at-Law (US), Avocat (CH)
- Door Tenant, QUADRANT CHAMBERS (GB)
- Of Counsel to HELVETICA AVOCATS (CH)
- General Counsel & Ombudsperson to SMEs and NGOs
- Accredited mediator: IMI, AAA, CEDR, CMAP, CPR, CSMC, ICC, ICDR, INTA, JAMS, SIMC, WIPO, etc.
- Member, Section of Foreign Lawyers, Geneva Bar (OdAGE)
- Member of the State Council Commission on Mediation, GE
- Vice-President, Independent Standards Commission of the International Mediation Institute (IMI)
- President, Swiss Chamber of Commercial Mediation (Romandie)
- Advisor on Mediation to the Geneva Chamber of Commerce
- Coordinator of the Global Pound Conference Series 2016-17
- Part-time faculty UNIGE & EPFL

## Jeremy LACK, Esq.

ADR Neutral & Attorney-at-Law

Tel: +41 79 247 1519

E-mail: [jlack@lawtech.ch](mailto:jlack@lawtech.ch)