

ABA Section of
Dispute Resolution
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**Success indicators for the use of
ADR to make and sustain
international business deals in
Europe ... Excerpt**

Speakers

- Paola Cecchi Dimeglio, Ph.D.
- Peter Kamminga, Ph.D.
- Manon Schonewille, MA



Lawyers in ADR

Roles, Responsibilities and Opportunities of the Lawyers in Alternative Dispute Resolutions

Lawyers in ADR is the shared name of three connected EU funded projects to promote the knowledge and the use of *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.*





Blockings/impediments lawyers*

- ADR can mean *Alarming Drop in Revenues*.
- Process and its implications **unfamiliar**.
- **Uncertainty** about role in ADR, afraid to make mistakes.
- Scared to lose the client because of 'having given a **wrong advice**' in case the mediation does not lead to a solution.
- Fear the mediation may go on forever and will cause **additional costs and time**.





Blockings/impediments lawyers

- Difficult to **hand over process** to third party whose added value is unclear.
- Apprehension to **lose client** to lawyer-mediator (still: lawyers generally prefer lawyer-mediators).
- Uncertainty about **quality** mediator.
- If referral: sometimes feeling that referral means that the judge *'doesn't want to deal'* with this case.
- Anxious about **"strategic use"** of mediation (obtain information), uncertainty re. lack of right of refusal to testify as mediator & confidentiality issues.





Blockings/impediments lawyers

- Concerned **confidentiality** in mediation is **too strict** (f.e. introducing incriminating information in mediation to block potential use during subsequent legal procedure).
- Mediation (and esp. referral) can be perceived as **admission of weakness**/sign lawyer does not do good job.
- Lawyers tried to negotiate themselves without result and **added value of 3rd party unclear.**
- Mediation generally ok, but **not in this case/ these parties.**





Blockings/impediments lawyers

- The **common denominator** for all these impediments:
- **Unfamiliarity** with the process and its practical implications and use, combined with **fear to lose business.**





ADR Dimensions and Actions

(Next to training lawyers:)

- Main ways to promote use of ADR:

1. Putting it “on the legal map”

(F.e. DIRECTIVE 2008/52/EC of The European Parliament and of the Council of 21 May 2008)

2. Connecting mediation to the courts (“Court-Connected Mediation”)

3. Mediator certification, quality control (NMI, IMI)



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⁾,

(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.



The **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, published on the Official Journal of the European
Union L. 136/3 on May 24, 2008

“... 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**”.





The EU Directive on Mediation on Cross border Civil and Commercial matters

Facilitating regulation

- Mediator training to provide effective, impartial and competent delivery
- Confidentiality
- Impact of time limitations and prescription
- Member States to encourage development of mediation in own country



Factors of influence on what to expect when initiating ADR in the EU

- What is ADR?
- Administered vs. Self-administered
- What is seen as best mediation practices re. approach/style/process?



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ADR =

- Everything outside of the court, so including arbitration

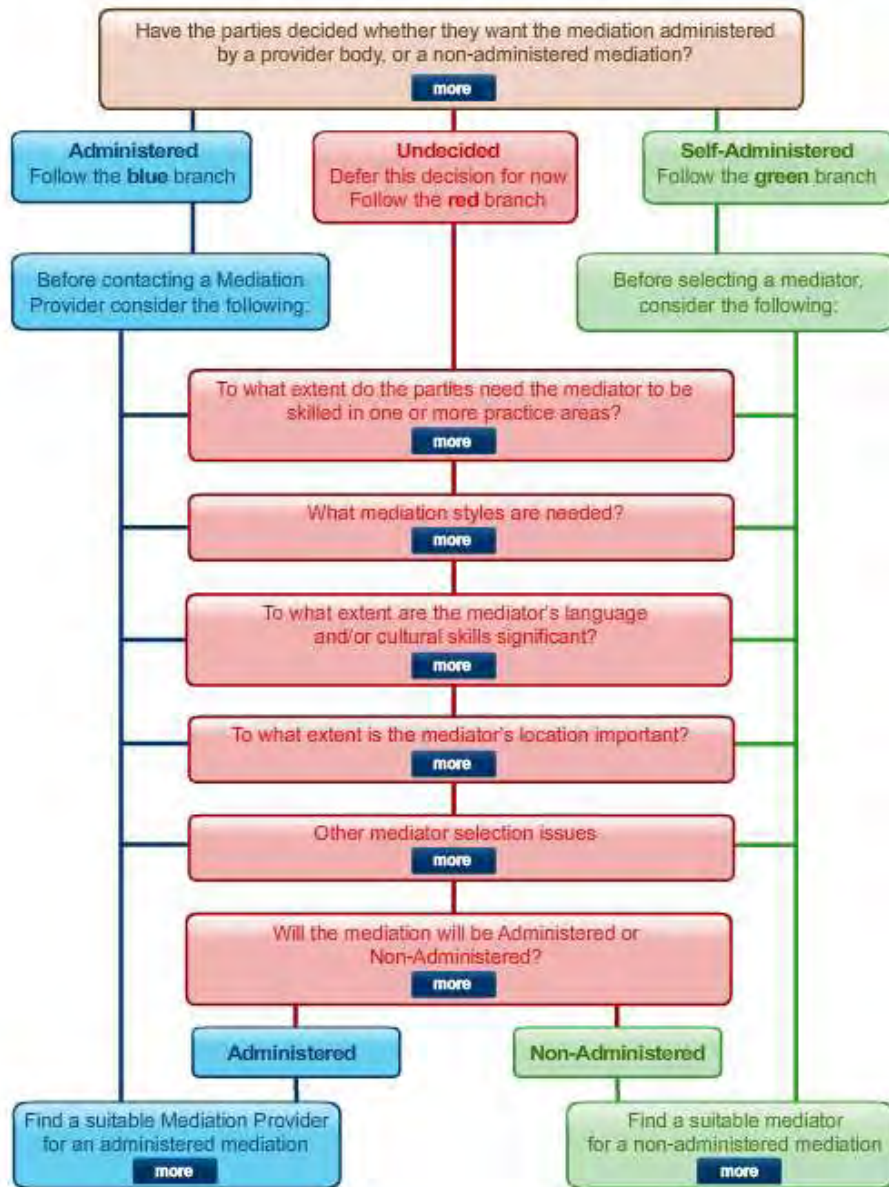
Vs.:

- Parties keep the process in their own hands / non adjudicative, so excluding arbitration



 **Finding the Right Mediator** Before you start...

Decision support administered or non-administered mediation, + important issues to find the right mediator for your case.



- Administered or self-administered?
 - Rules
 - Code of Conduct
 - Complaint/disciplinary rules?
- Specialisation in practice area or allround?
- Mediator style/approach
 - Facilitative
 - Evaluative
 - Transformative
 - Narrative ...
 - Emotions vs. content
 - Caucus, joint sessions or mix?
- Language skills?
- Culture/nationality/location?
- Availability/flexibility
- Fee



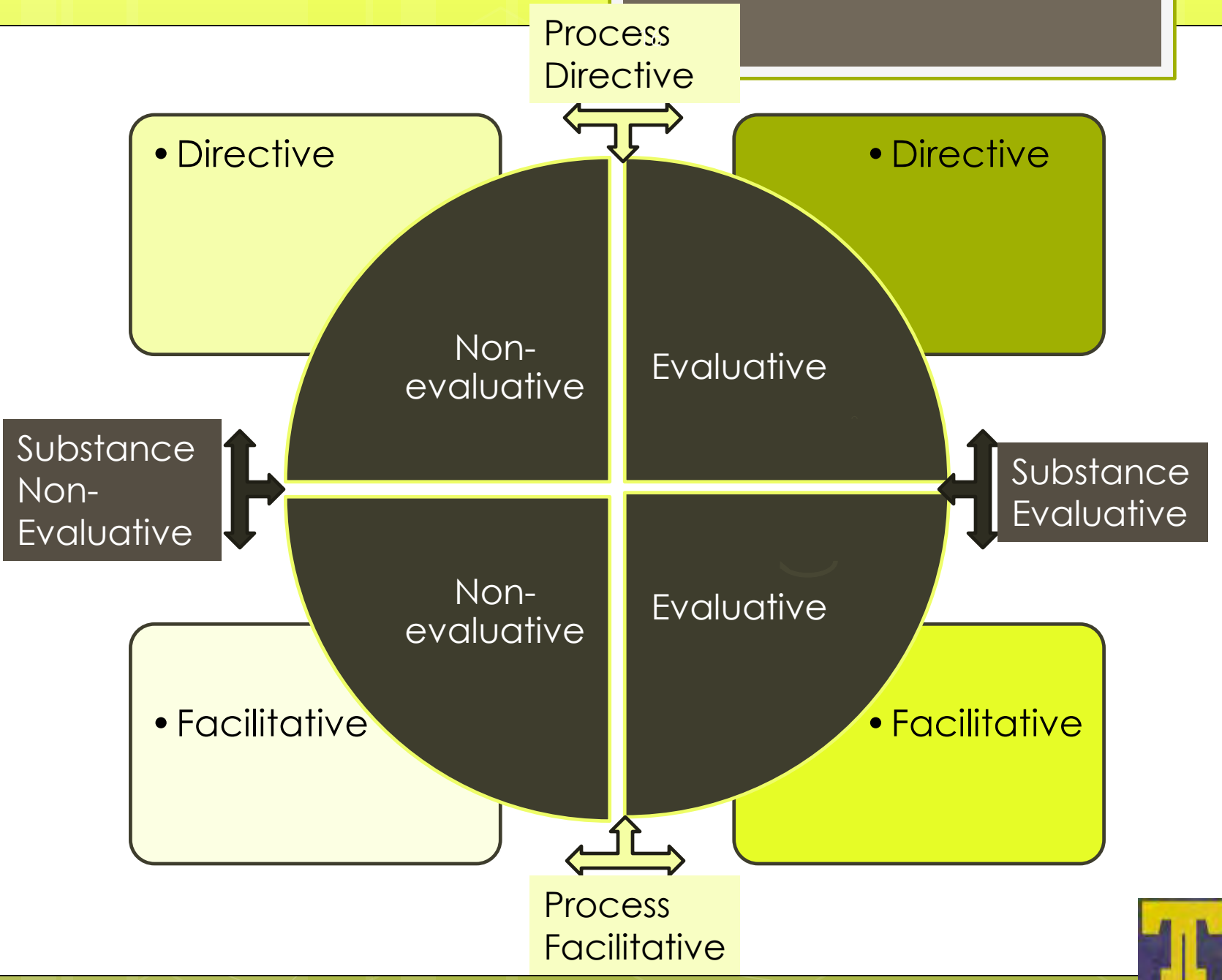
Continental European vs. Anglo-Saxon style

Caucus (only) or joint session?

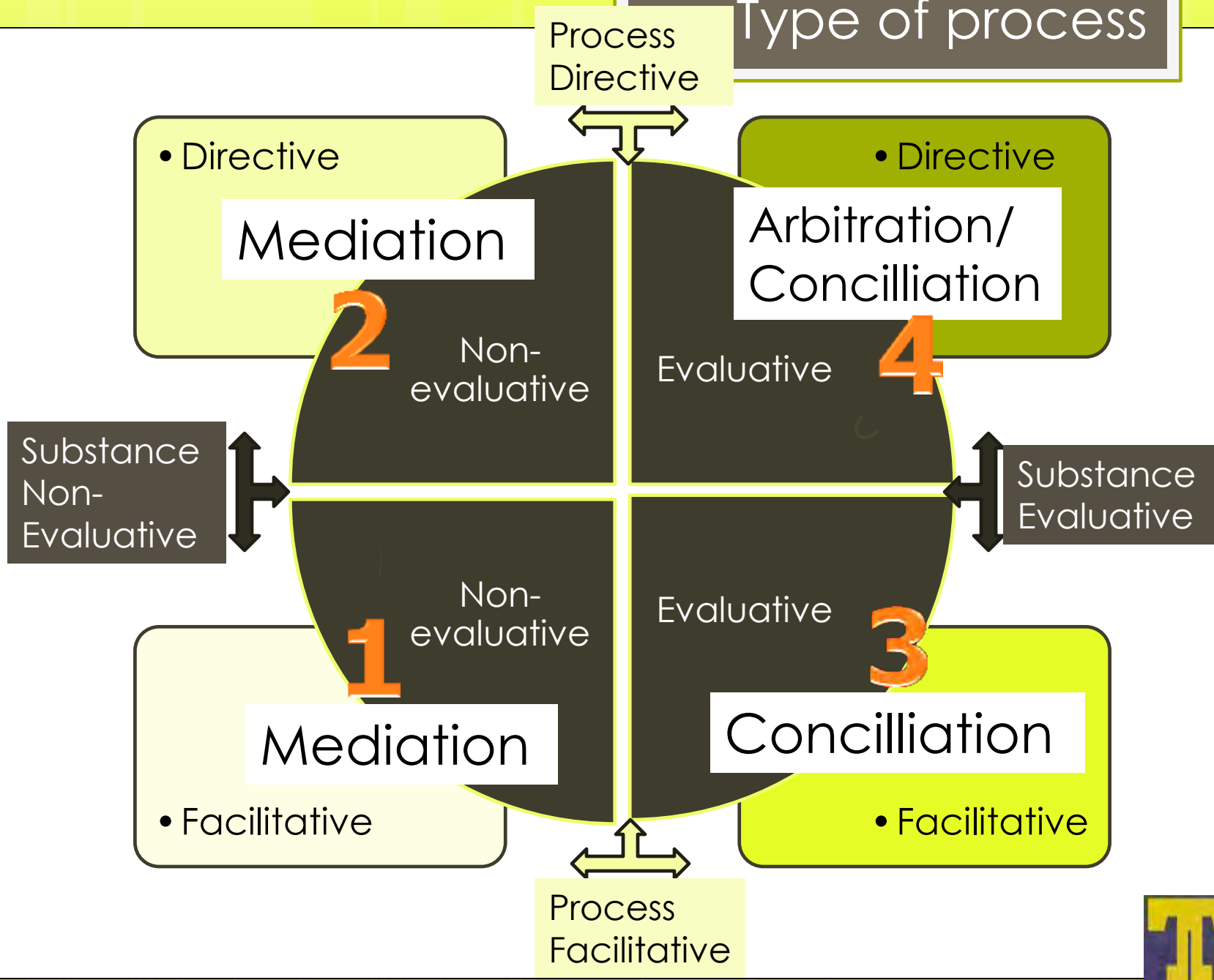
Directive or facilitative on **process**?

Evaluative or facilitative on **content**?



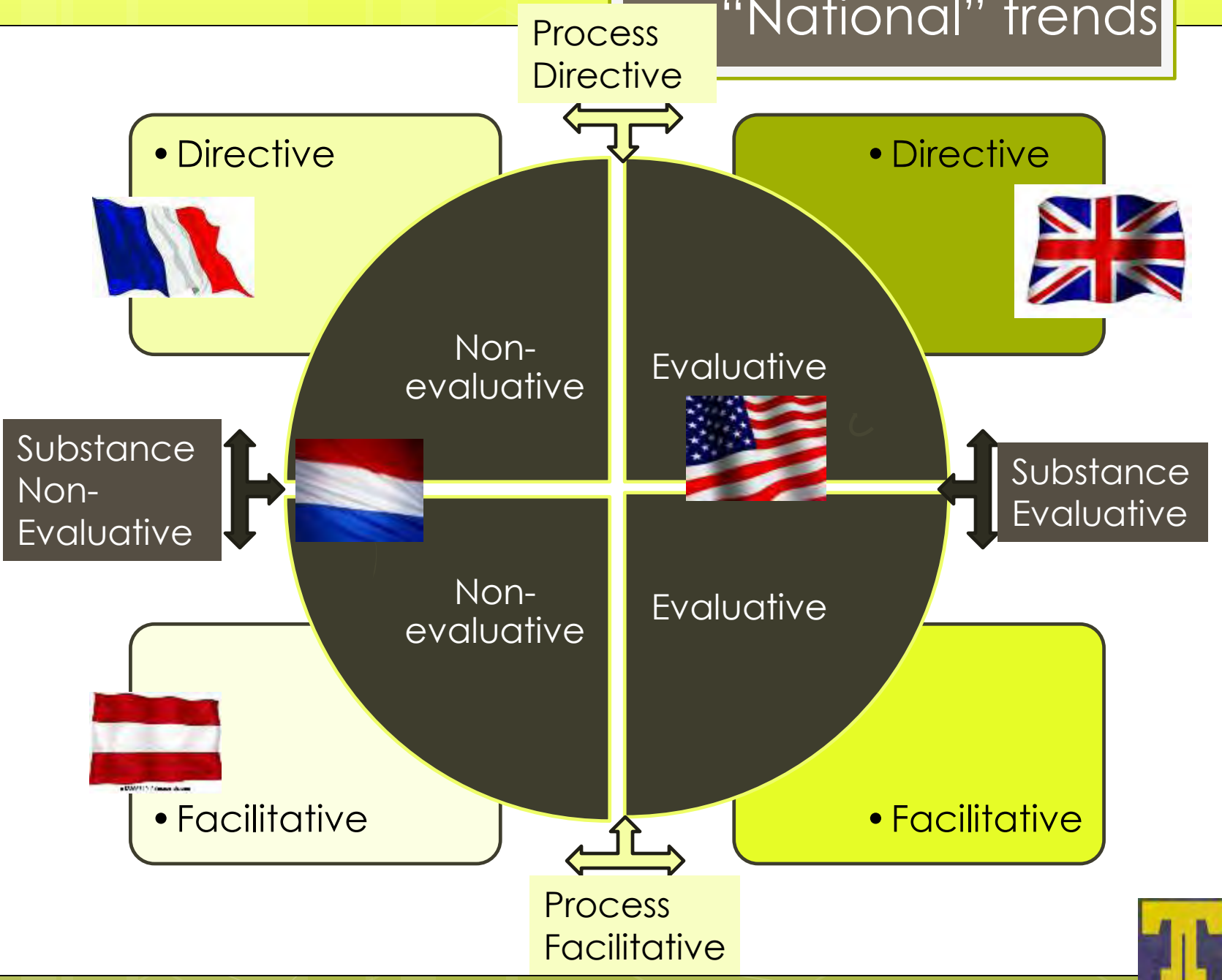


Type of process



"National" trends

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"National" trends

Process Directive

- Directive

Non-evaluative

Anglo-Saxon:
time pressure, short process, much caucus being used

Substance Non-

Evaluative

Continental Europe:
less time pressure, short process, less caucus, more joint session (only) being used

Evaluative

- Facilitative

Process Facilitative



Rules of thumb for making successful use of ADR in Europe

- Explore the climate in both countries: legal, economic and cultural to predict whether it may 'work' at all and what conditions need to be provided
- Agreeing on kinds of ADR to use and agree on their definition
- Making it clear part of the legal framework
- Agreeing on nature of conflicts that can be solved with it kinds of ADR
- Invest in training of dealing with conflict