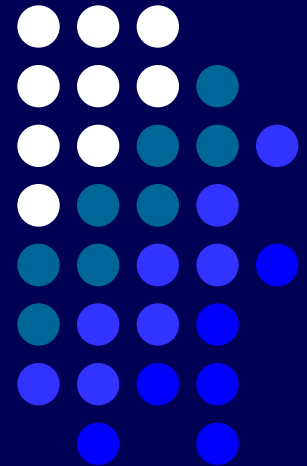


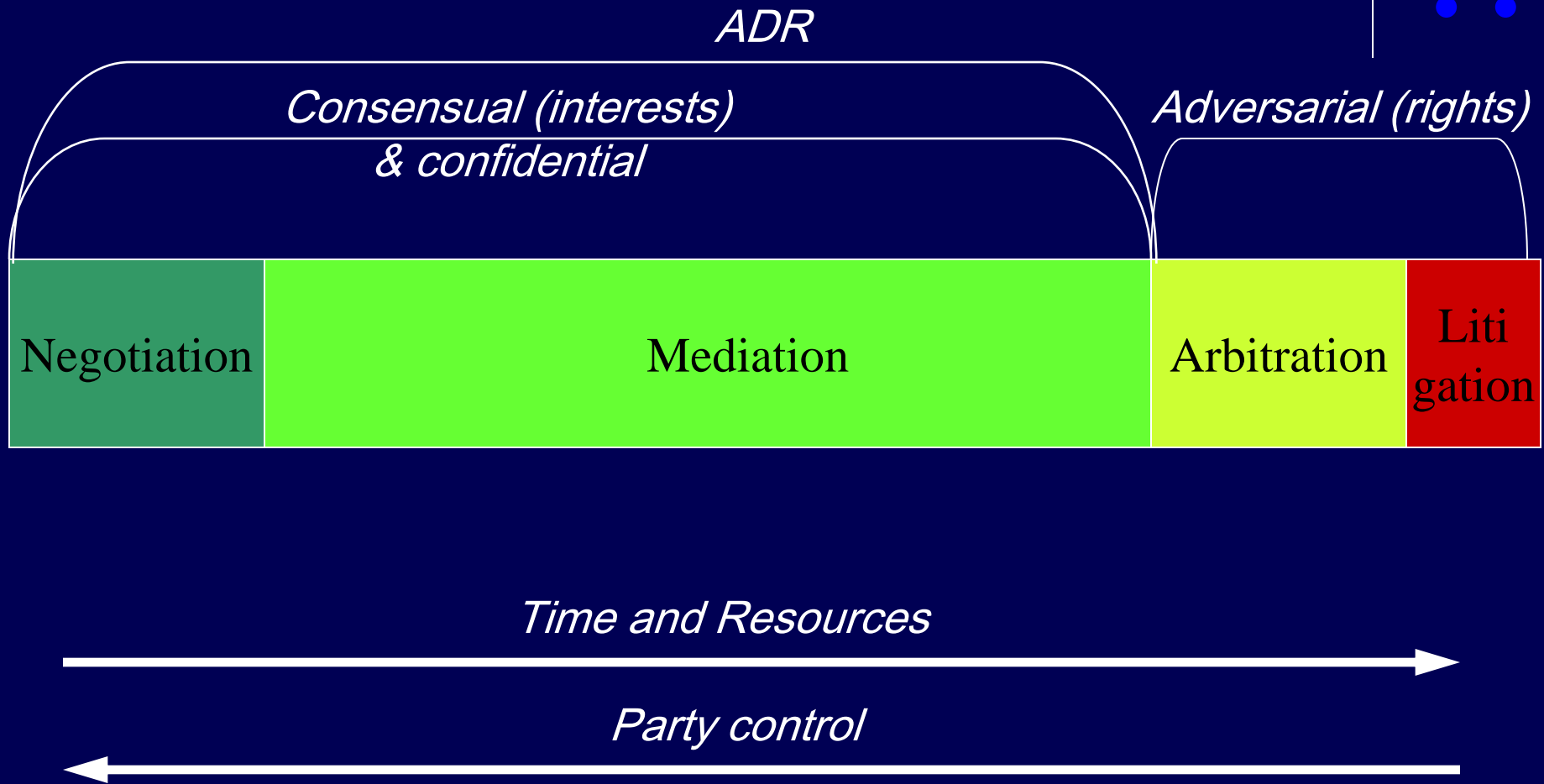
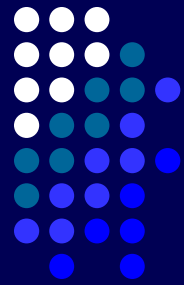
# **International Energy Disputes: *Use of Mediation and Conciliation v Arbitration***

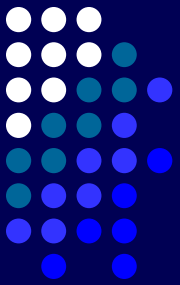
**Professor Loukas Mistelis**  
*School of International Arbitration*  
*Queen Mary University of London*

***5 November 2014***



# Dispute Resolution Continuum

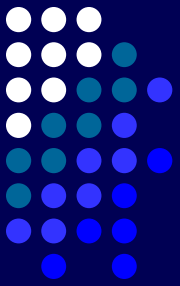




# What is arbitration?

- private and non-national system of dispute resolution
- the fair resolution of disputes by an impartial tribunal
- without unnecessary delay or expense
- parties are relatively free to agree how their disputes are resolved
- there should be minimal court intervention
- binding enforceable award

# Arbitration is (or should be) all about

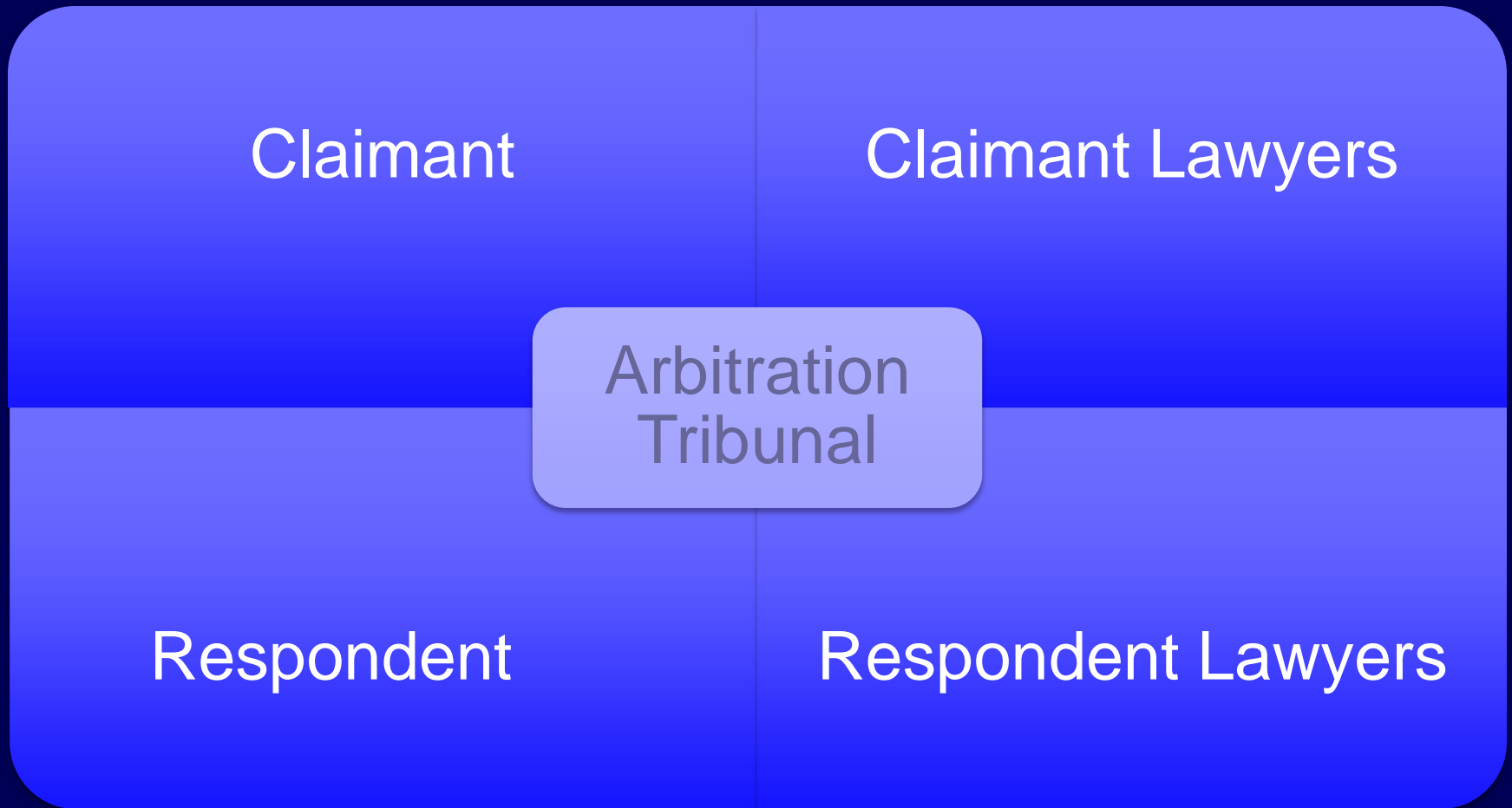
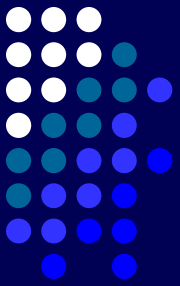


- Choice
- Confidence / trust
- Autonomy and
- Quality

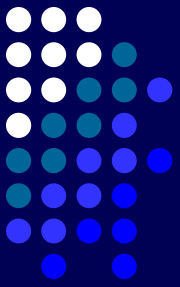
**Corporations prefer  
institutional arbitration  
to ad hoc arbitration.**



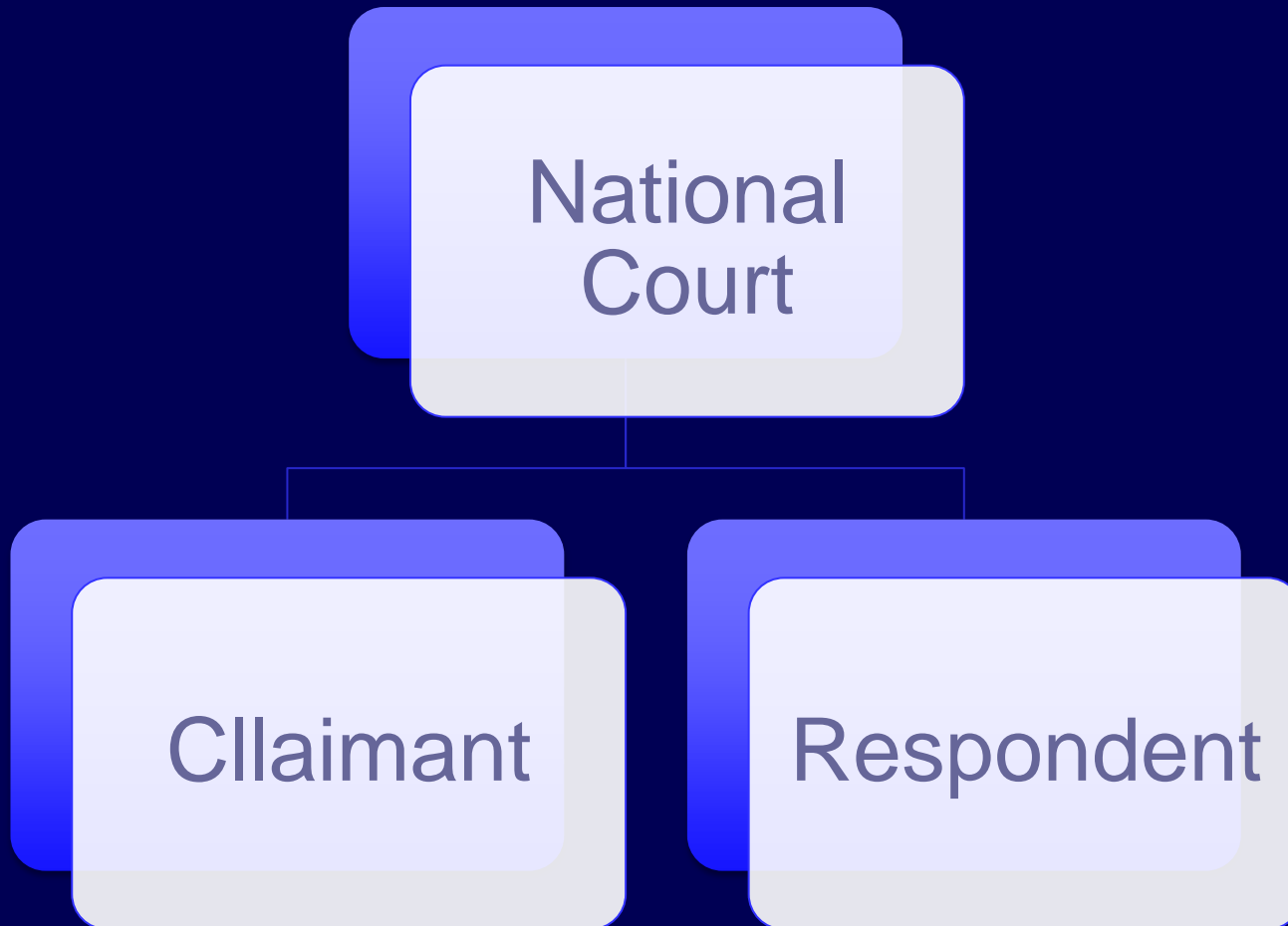
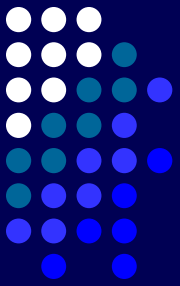
# Arbitration operates horizontally



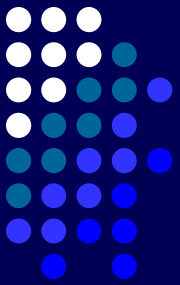
# The tension: Arbitrator - Judge or Service Provider?



# Litigation operates vertically

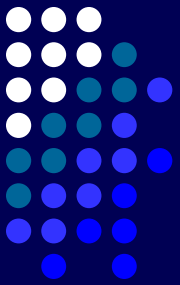






# Why ADR?

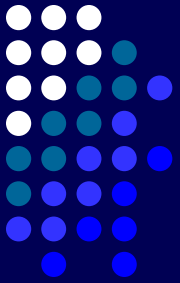
- Disputes inevitable especially in international commercial context
- Resolution of disputes is essential
- Arguments in favour and against ADR

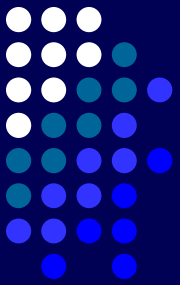


# Characteristics of ADR

- Co-operative
- Voluntary
- Use of independent third party to assist resolving dispute
- Flexible procedure
- Not binding
- In some system ADR proceedings do not interrupt the running of time limits

# Advantages of ADR

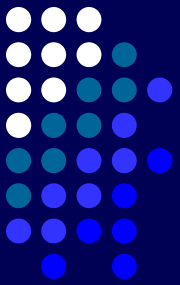


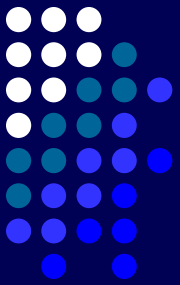


# Advantages of ADR

- Cost
- Speed
- Control
- ADR gives parties control to decide procedures
- ADR is not adversarial
- Confidentiality

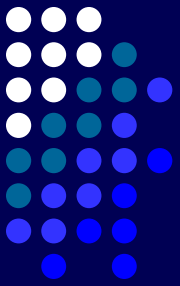
# Disadvantages of ADR





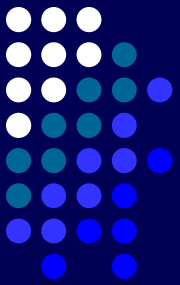
# Disadvantages of ADR

- Uncertain standards
- Fear of early (pre-litigation / pre-arbitration) disclosure of arguments
- Cost savings not necessarily achieved
- Requires reasonably good relationship between the parties
- Not binding



# Dispute Resolution Objectives

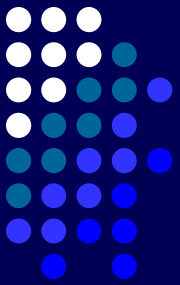
- Determination of parties' rights and obligations
- Ideally:
  - final,
  - binding and
  - enforceable
- Maintaining good relations: “not losing face”



# ADR Clauses

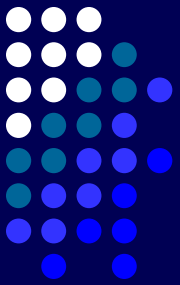
- Multi-step procedures
  - Renegotiation
  - Mediation
  - Arbitration
  - Litigation
- ADR procedures
  - Which one
  - Fall-back arrangements





# Mediation

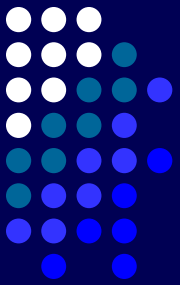
- An environment in which the parties speak directly to each other with the assistance of a neutral third party, the mediator
- Parties exercise complete control over the resolution
- Parties maintain privacy and avoid publicity
- Achieve remedies that may be outside the scope of judicial process
- Preserve or minimise damage to relationships.



# Mediation and Arbitration

- Is mediation/ADR stage, a condition precedent for arbitration to start?
- Can arbitrators use mediation techniques in arbitration?
- How does med/arb or arb/med works?
- Confidentiality/privileged information?

# Mediation – what is it?



**Objectives**

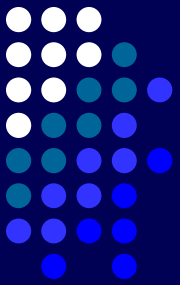
**Improve  
Settle  
Resolve**

**Focus**

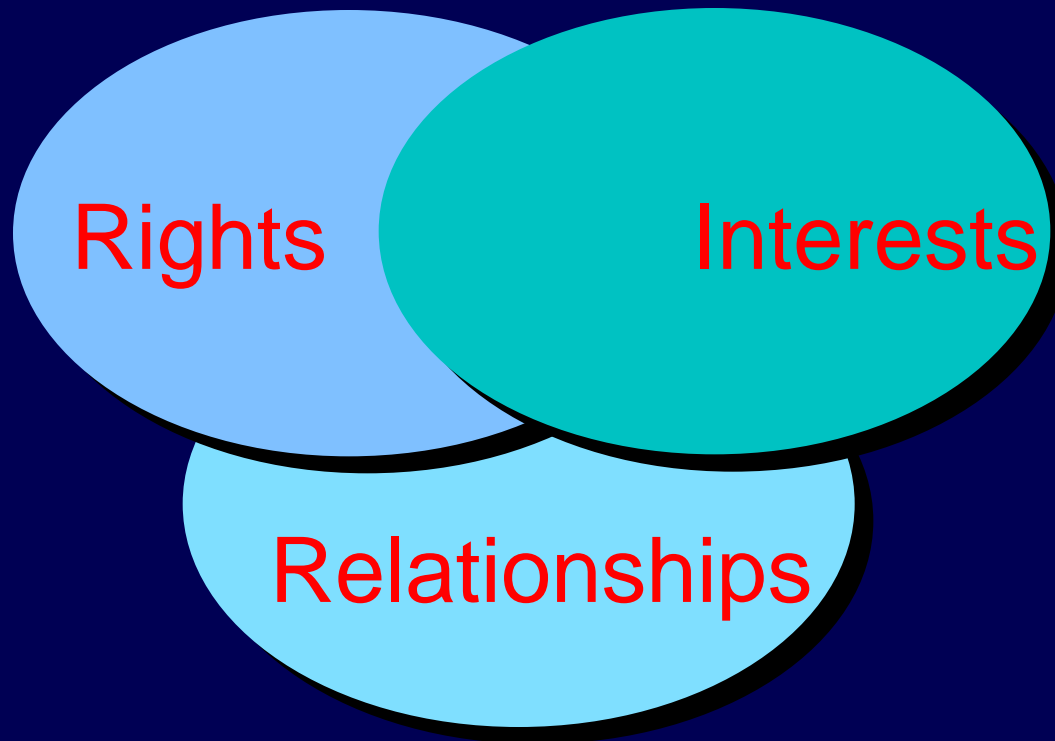
**Issues, Facts, Perceptions,  
Feelings**

**Role**

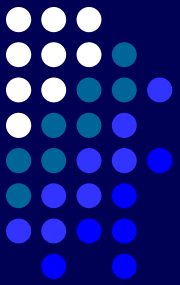
**Scene setter, Process  
orchestrator, Deal maker  
Persuader, Adviser**



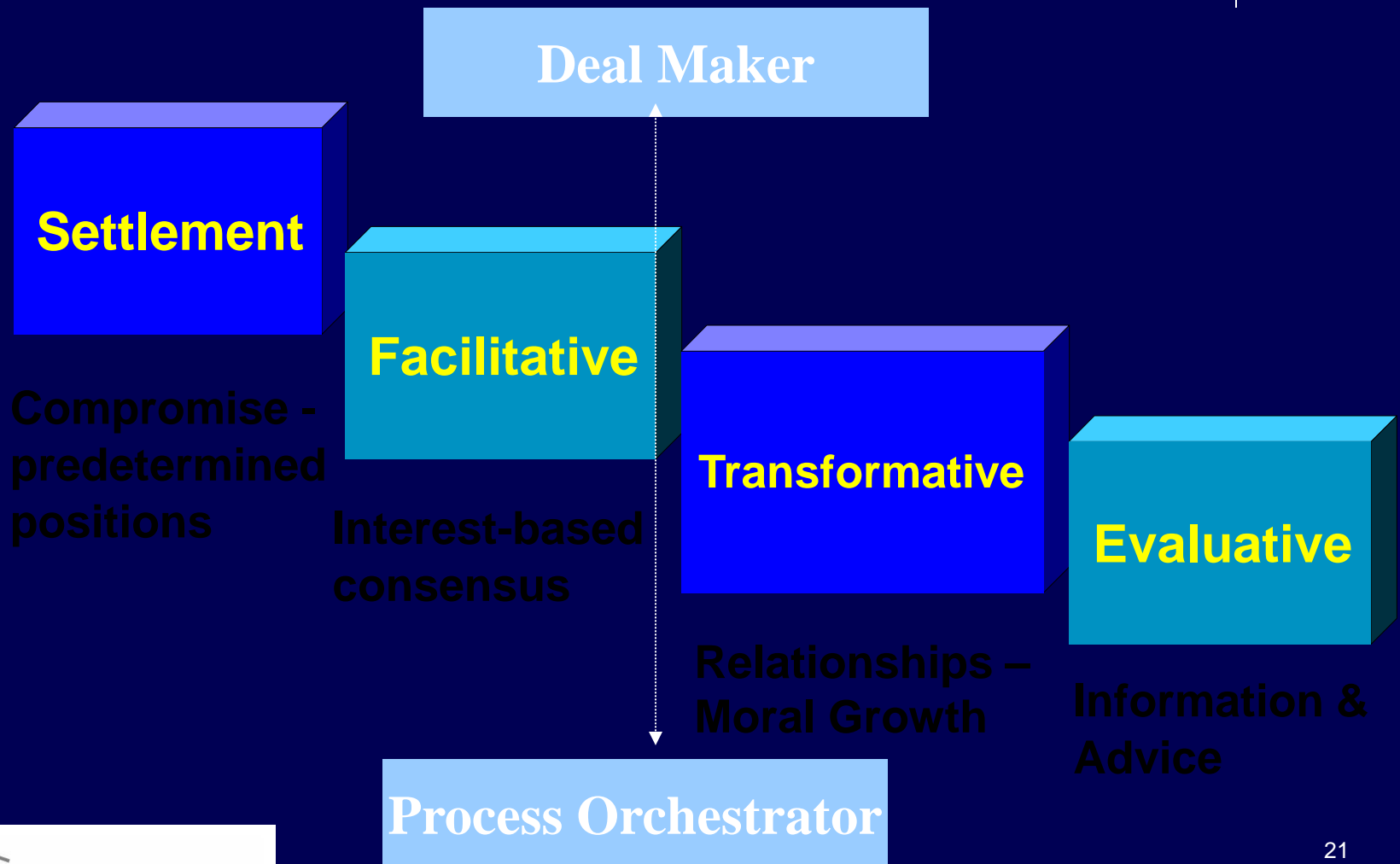
# Three Perspectives

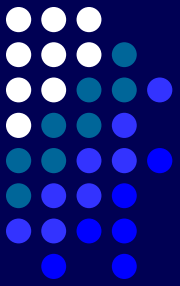


- Rights without interests may ignore the real issues
- Focusing on interests or relationships uninformed by rights ( & obligations) may breach the law



# Common Mediation Models

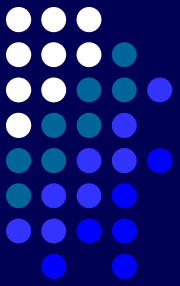




# Private Justice vs Power

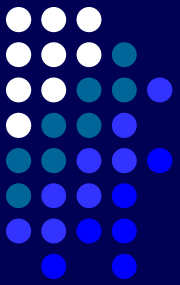
- Risks for the less powerful... *But*
- Skilled mediators can alleviate the imbalance
- Feedback loops in organisation to identify the unacceptable
- Keep the process voluntary
- Ensure parties understand the process, their rights to withdraw or to take alternative action
- Limits on confidentiality

# Capacity and Willingness to Participate



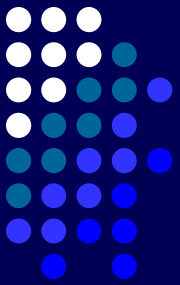
- Capable of understanding the issues
- Psychological capacity to commit to agreement
- ‘Good faith’ can be overstated
- Uncertainty or a zealous intention to point score are OK
- Stress voluntary participation
- You may need to:
  - Have 2 mediators
  - Include observers
  - Double efforts to reality check in joint & separate sessions

# Neutrality



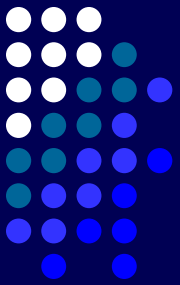
- Neutrality describes the mediator's state of being:
  - no direct interest in the parties or the outcome
  - No prior knowledge of the dispute
  - No prior association with the parties
  - .... And, highly unlikely, especially in the workplace
- But, avoid imposing a specific outcome on the mediator
- Choose a mediator whose only vested interest is in helping the parties to find a workable solution





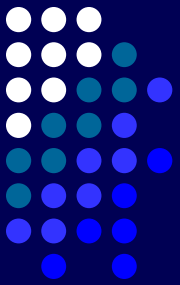
# Impartiality

- Impartiality describes the mediator's behaviour
  - *no judgement of the parties*
  - *No bias towards any party*
  - *No use of substantive expertise to influence decisions*
- You can expect impartiality
- Clarify and monitor expectations



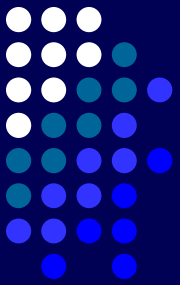
# Managing Confidentiality

- Offer limited confidentiality
- Clarify criteria for disclosure
- Give parties responsibility for deciding what is confidential
- Commitment to give parties prior notice of disclosure
- Help parties to determine who needs to know
- Reinforce others' obligation to respect privacy



# Multi-tier clause - Example

- (1) If any dispute or differences shall arise between the Employer and the Contractor during the progress of the Works ... , then ... such dispute or difference shall at the instance of either the Employer or the Contractor in the first place be referred in writing to and be settled by a Panel of three persons (acting as independent experts but not as arbitrators) who shall unless otherwise agreed by both the Employer and the Contractor within a period of 90 days after being requested in writing by either party to do so, and after such investigation as the Panel think fit, state their decision in writing and give notice of the same to the Employer and the Contractor. ...
- (2) The Contractor shall in any every case continue to proceed with the Works with all due diligence and the Contractor and the Employer shall both give effect forthwith to every such decision of the Panel ... unless and until the same shall be revised by arbitration as hereinafter provided. ... (Excerpts from Clause 67 of the Channel Tunnel contract, *Channel Tunnel Group v Balfour Beatty Ltd* [1993] 1 All ER 664 at 672 a-e)



# Mediation Clause - Example

## CPR mediation clause

If the dispute has not been resolved by negotiation within [45] days of the disputing party's notice, or if the parties failed to meet within [20] days, the parties shall endeavor to settle the dispute by mediation under the [then current] CPR Mediation Procedure [in effect on the date of this agreement]. Unless otherwise agreed, the parties will select a mediator from the CPR Panels of Distinguished Neutrals.