



RICS Mediation

A facilitative and evaluative approach to mediation in the built environment

RICS Dispute Resolution Service

Introduction

- Globally, DRS makes 5,000 appointments per annum
- DRS appoints Arbitrators, Adjudicators, Mediators, Independent Experts, Dispute Board members and Expert Witnesses
- DRS celebrated its 45th anniversary this year
- DRS operates in 17 countries around the world on 4 continents
- DRS is the oldest and largest specialist Built Environment Dispute Resolution and Avoidance service provider in the world

Dispute Resolution Service

Global Dispute Resolution Panels

- DRS dispute resolvers become members of the Global RICS International Panel of Dispute Resolvers
- DRS trains, assesses, accredits, appoints and reassesses panel members.
- Panel members are matched to disputes and appointment by DRS to act as a dispute resolver anywhere in the world

RICS: Expert dispute
resolution in the built
environment by built
environment experts



Basic principles of mediation

Differences between Litigation/Arbitration and Mediation

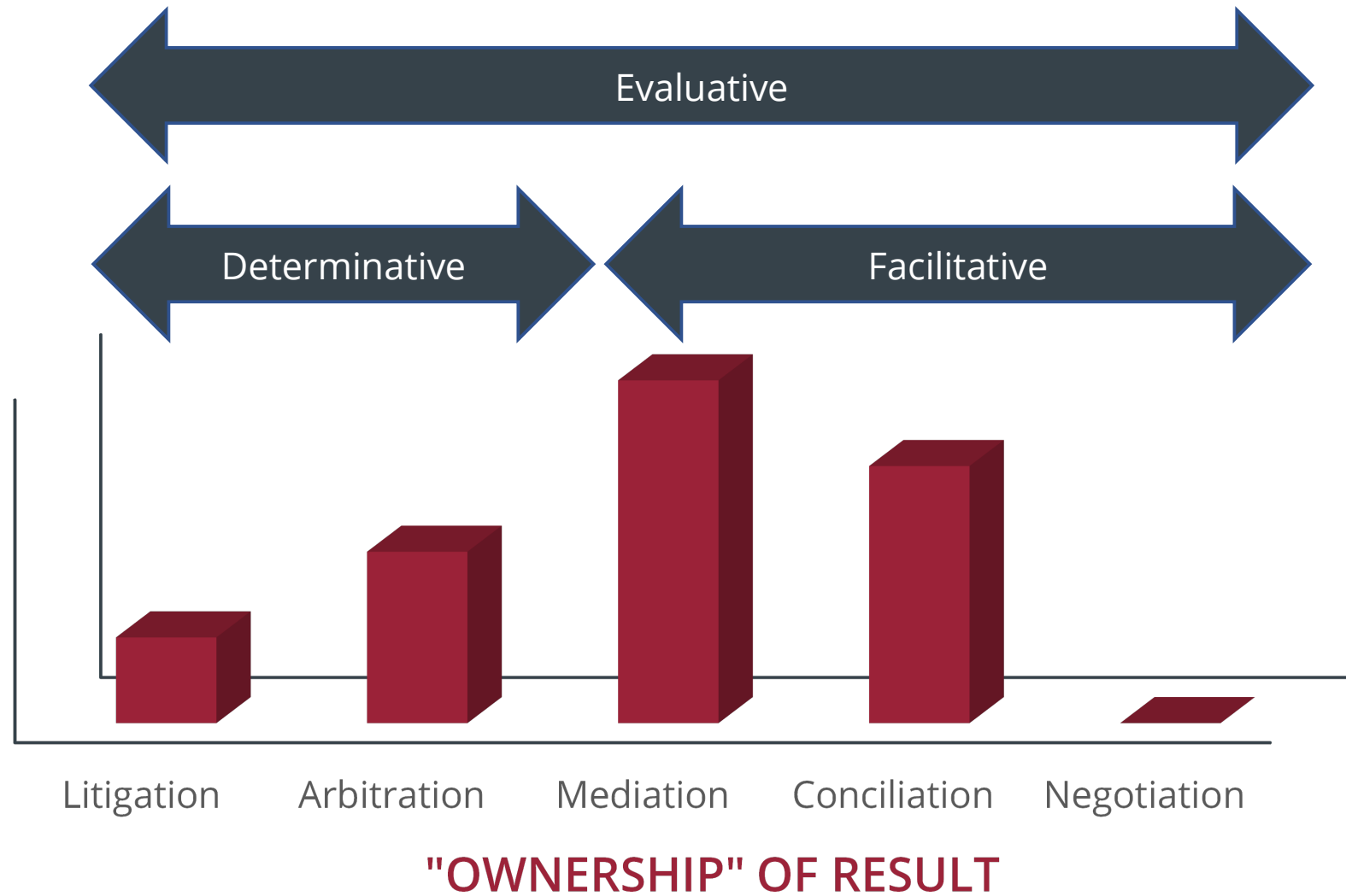
Litigation/Arbitration

- Historical, contract or tort, limited to evidence and pleadings, current commercial factors irrelevant
- Determinative process – outcome determined by the 'Determinator'

Mediation (Facilitative and Evaluative)

- Addresses wider commercial realities
- Self determination – outcome determined by the Parties.

Dispute Resolution Continuum



A voluntary process	24 Cr <small>Chromium</small>	25 Mn <small>Manganese</small>	26 Fe <small>Iron</small>	27 Co <small>Cobalt</small>	28 Ni <small>Nickel</small>	29 Cu <small>Copper</small>	30 Zn <small>Zinc</small>	31 Ga <small>Gallium</small>	32 Ge <small>Germanium</small>	33 As <small>Arsenic</small>	34 Se <small>Selenium</small>	35 Br <small>Bromine</small>
by which parties to a dispute	42 Mo <small>Molybdenum</small>	43 Tc <small>Technetium</small>	44 Ru <small>Ruthenium</small>	45 Rh <small>Rhodium</small>	46 Pd <small>Palladium</small>	47 Ag <small>Silver</small>	48 Cd <small>Cadmium</small>	49 In <small>Indium</small>	50 Sn <small>Tin</small>	51 Sb <small>Antimony</small>	52 Te <small>Tellurium</small>	53 I <small>Iodine</small>
are assisted	74 W <small>Tungsten</small>	75 Re <small>Rhenium</small>	76 Os <small>Osmium</small>	77 Ir <small>Iridium</small>	78 Pt <small>Platinum</small>	79 Au <small>Gold</small>	80 Hg <small>Mercury</small>	81 Tl <small>Thallium</small>	82 Pb <small>Lead</small>	83 Bi <small>Bismuth</small>	84 Po <small>Polonium</small>	85 At <small>Astatine</small>
by a neutral third party	106 Sg <small>Seaborgium</small>	107 Bh <small>Bohrium</small>	108 Hs <small>Hassium</small>	109 Mt <small>Mitnerium</small>	110 Ds <small>Darmstadtium</small>	111 Rg <small>Roentgenium</small>	112 UUb <small>Ununbium</small>	113 UUt <small>Ununtrium</small>	114 UUq <small>Ununquadium</small>	115 UUp <small>Ununpentium</small>	116 UUh <small>Ununhexium</small>	117 UUs <small>Ununseptium</small>

The elements of mediation

to negotiate	60 Nd <small>Nodymium</small>	61 Pm <small>Promethium</small>	62 Sm <small>Samarium</small>	63 Eu <small>Europium</small>	64 Gd <small>Gadolinium</small>	65 Tb <small>Terbium</small>	66 Dy <small>Dysprosium</small>	67 Ho <small>Holmium</small>	68 Er <small>Erbium</small>	69 Tm <small>Thulium</small>	70 Yb <small>Ytterbium</small>	71 Lu <small>Lutetium</small>
a settlement	92 U <small>Uranium</small>	93 Np <small>Nepthium</small>	94 Pu <small>Plutonium</small>	95 Am <small>Ameridium</small>	96 Cm <small>Curium</small>	97 Bk <small>Berkelium</small>	98 Cf <small>Californium</small>	99 Es <small>Einsteinium</small>	100 Fm <small>Fermium</small>	101 Md <small>Mendelevium</small>	102 No <small>Nobelium</small>	103 Lr <small>Lawrencium</small>

The Classic Model of Mediation: 5 Stages

1. Preparation
2. Opening
3. Exploration
4. Negotiation
5. Closing

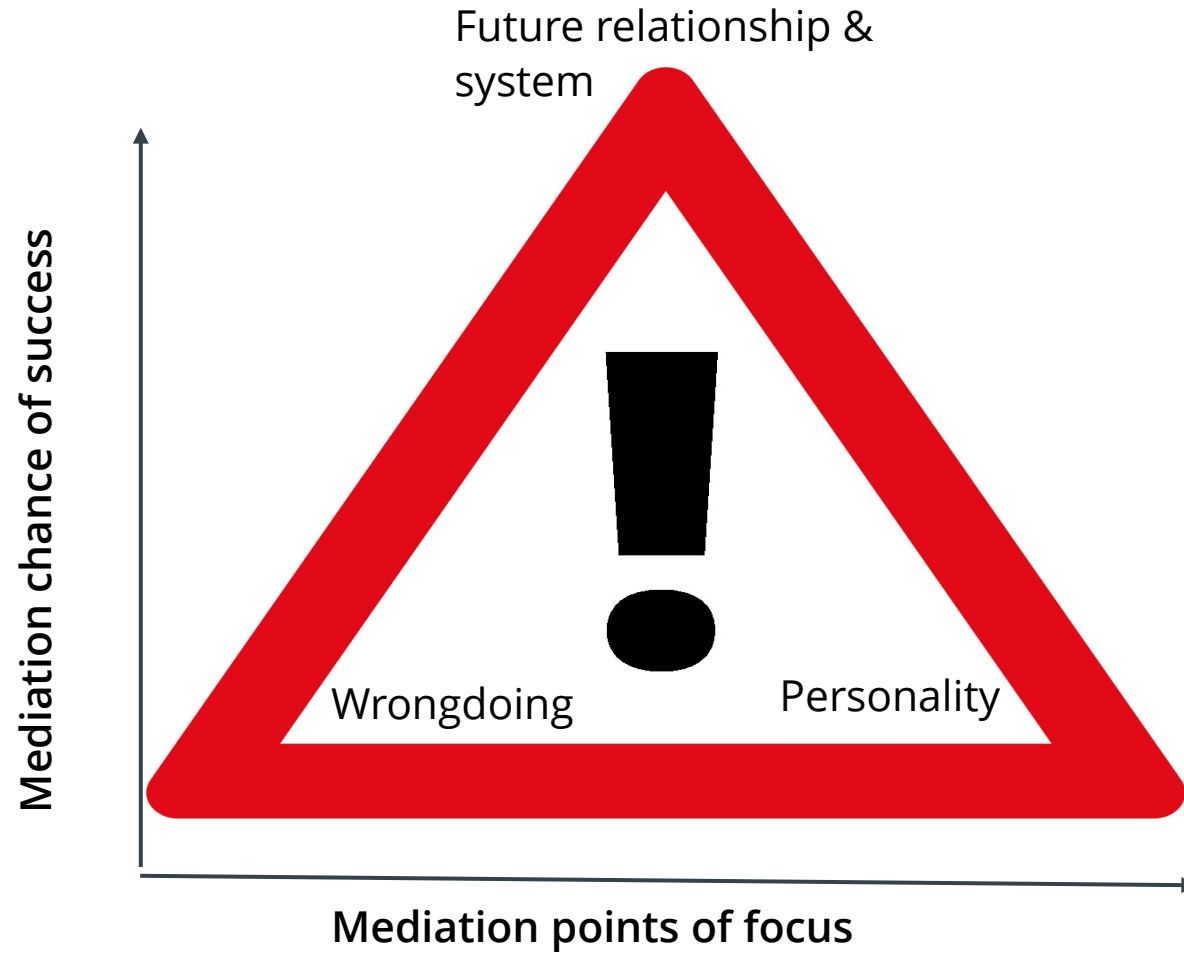
The Classic Model of Mediation: 4 Behaviours

1. Building rapport
2. Extracting a comprehensive narrative
3. Developing and exploring options
4. Robust reality testing

Mediation ground rules

- Confidentiality
- Without Prejudice
- Not binding to point of agreement
- Authority

Disputes – focus for success



Why evaluative
mediation has
been adopted
by RICS

Mediation's bad press

Classic facilitative mediation is used widely in labour and workplace mediation; family mediation; community mediation; transformational mediation.

- Touchy feely
- Non-specialist
- Under-prepared
- Insufficiently rigorous

Analytical – RICS mediators help the parties analyse the circumstances, law, evidence, strengths and weaknesses to empower them to make pragmatic commercial settlement decisions

Commercial – RICS mediation encompasses wide commercial as well as narrow legal realities and so can provide a flexible settlement that courts or arbitration cannot

Restorative – RICS mediation focuses on restoring the business relationship between parties and is completely confidential to limit further damage

Expert – RICS mediators have many years' experience and expertise in the field of the dispute. They help parties reach a settlement, or narrow the issues in dispute, reducing court or arbitration costs.

RICS ACRE™ Mediation

Mediation for the land, property,
construction and built environment



Introduction of an Evaluative Approach



- Demand from applicants for sector expertise and experience
- Feedback from RICS mediators
- Realisation that our training and communications were not reflecting reality
- Risk of appointing mediators on one basis, knowing that they would be required to act in a way that we had not trained them to manage

Evaluative mediation

All mediations are evaluative to some extent

- You will draw conclusions when reading the papers
- You will evaluate which process will work best
- When deciding what questions to ask when
- When developing/exploring options
- When reality testing

Leonard Riskin's grid – Mediator Techniques – Role of Mediator

Evaluative	
Problem Definition NARROW	<div> Urges/pushes parties to accept narrow (position-based) settlement</div> <div>Proposes narrow (position-based) agreement</div> <div>Predicts court or other outcomes</div> <div>Assesses strengths and weaknesses of each sides case</div>
	<div> Urges/pushes parties to accept broad (interest-based) settlement</div> <div>Develops and proposes broad (interest-based) agreement</div> <div>Predicts impact (on interests) of not settling</div> <div>Educates self about parties' interests</div>
Facilitative	
Problem Definition BROAD	<div>Helps parties evaluate proposals</div> <div>Helps parties develop & exchange narrow (position-based) proposals</div> <div>Asks about consequences of not settling</div> <div>Asks about likely court or other outcomes</div> <div>Asks about strengths and weaknesses of each side's case</div>
	<div>Helps parties evaluate proposals</div> <div>Helps parties develop & exchange broad (interest-based) proposals</div> <div>Helps parties develop options that respond to interests</div> <div>Helps parties understand interests</div>

Evaluative Mediator

The 4 roles of the mediator:

1. Determining and controlling the process
2. Setting limits on his/her participation
3. Assist the parties with assessing their respective positions and offers
4. Reality checking the merits of the parties' claim/defence

The Golden Rule: The principle of self-determination

- You **always** express an opinion to grow the parties' understanding of the issues - to increase the amount they consider the case - to empower them to settle it.
- You **never** express an opinion which reduces the amount the parties consider the case – by simply adopting your understanding of the issues rather than developing their own - and by so doing, disempowers them



The RICS Model

By applying the Golden Rule, your approach to mediation is evaluative, not determinative:

you are empowering the parties to make a sound decision

NOT

telling them what to do

Where evaluative
mediation is
heading in practice

RICS DRS

Dispute Avoidance Services

- **Transport for London** DRS CAP written into £7bn of contracts between TfL and major contractors - £400m disputes dealt with in last year.
- DRS is currently assisting **HS2** and **Network Rail** deliver ADR
- DRS is also working with **Ministry of Housing, Communities & Local Government** on planning; **Dept of Health** on valuation of GP practices; **Welsh Assembly** on EU agricultural valuation; **Northern Ireland Assembly** etc
- RICS DRS has created a bespoke service including elements of evaluative mediation leading to the production of an expert, fully reasoned, non-binding written recommendation.

Conflict Avoidance Coalition



Six of the leading professional and institutional bodies in the construction and infrastructure industry have joined together to help reduce conflict costs, and deliver infrastructure and property development projects on time and on budget.





Conflict Avoidance Pledge

The infrastructure bodies have signed up to an industry pledge and to encourage clients, contractors, lawyers and other stakeholders in the industry to do so too. It promotes:

- Collaborative working
- Use of conflict avoidance and early intervention techniques
- Support for development of a “mutual trust and co-operation” culture
- The use of industry expertise via leading organisations and their professional members to avoid and resolve disputes

Pledge supporters so far...

