Just in time for Early Neutral Evaluation

Professor Suzanne Rab explains the pros & cons of Early Neutral Evaluation, & offers some practical advice

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IN BRIEF

- Gives practical advice on appointing an evaluator and other ENE matters.
- The author has witnessed an increase in ENE in the context of COVID-19, which can be arranged quickly and conducted remotely.

Early Neutral Evaluation (ENE) is a method of alternative dispute resolution (ADR). It is a flexible way to resolve disputes without the parties having to engage in full-scale litigation. Like other alternative dispute resolution (ADR) methods, including mediation, one of the main attractions of ENE is the flexibility it offers to resolve disputes at comparatively less cost and in a timely manner. It may also be conducted without a physical hearing. These factors have contributed to renewed interest in ENE as the social distancing and economic uncertainty connected with the pandemic continues to be felt.

What is ENE?

ENE has evolved to mean different things: first, a voluntary option and latterly a court-sanctioned process. It is generally understood to be an option whereby a neutral expert provides the parties with an independent and non-binding assessment made on a without-prejudice basis. The neutral independent expert or evaluator is likely to be a senior lawyer, usually a barrister or retired judge or a sector professional, with the appropriate knowledge of the subject matter at issue. The evaluator is appointed by both parties to provide a review of the case and an assessment of the merits of each party. The evaluator may indicate their opinion of the likely outcome in the event that the matter comes to trial and encourage further discussion between disputing parties. The evaluator will typically restrict comments to the areas specified by the parties at the beginning of the process. The evaluator's report will form the basis of a negotiation between parties to settle the dispute. The evaluator will not decide legal issues or advocate a way of resolving matters. Instead, there will be an indication of what each party may realistically be able to rely on if the matter went to trial. Unless the parties agree otherwise, the evaluator's decision is non-binding, unlike a binding court ruling or arbitrator's award. The evaluator will seek to provide incentives for the parties to find agreement.

Similar to mediation, ENE is carried out on a 'without prejudice' basis. Anything disclosed during the ENE cannot later be used as evidence in court without agreement. However, unlike other forms of ADR, (eg arbitration or adjudication), ENE does not result in a final decision. Notwithstanding, ENE has become increasingly popular and a useful way for parties in a dispute to obtain a practical view of the merits of their respective positions without spending large sums on and being involved in a lengthy litigation.

While the parties can privately appoint an evaluator, in more recent years it has developed to become part of the case management process. Since 2015 it has been possible for disputing parties to pursue ENE by applying formally under the Civil Procedure Rules (CPR). The power derives from CPR r3.1(3)(m) whereby the court 'may…take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties to settle the case'. The use of this power has recently been affirmed in *Lomax v Lomax* [2019] EWCA Civ 1467 where the Court of Appeal confirmed that there is no requirement under the CPR for the parties to consent before an ENE may be ordered. In such cases, the judge will usually act as the evaluator. It is worth noting that if a judge has acted in an ENE, the same judge cannot normally be involved in the proceedings if the matter still proceeds to trial.

Advantages of ENE

ENE is often employed at the early stages of a dispute. It may also be used to decide standalone issues where it is difficult to reach consensus and which are preventing the resolution of a larger ongoing dispute. As with many other forms of ADR, one of the key benefits of ENE is to avoid the time and expense of a trial thereby reducing cost, particularly as both parties would share the cost. ENE is particularly appropriate when the parties' positions are so far apart that litigating immediately would inevitably lead to a waste of resources, as numerous preliminary issues would have to be addressed. ENE can also be deployed when there is a significant disparity between the parties' views on their chances of success at trial. A neutral evaluator could highlight weaknesses in a case that would be fully exposed were the matter to be litigated.

ENE is commonly used in the commercial arena but can also be used in private disputes. In *Seals & Anor v Williams* [2015] EWHC 1829 (Ch), ENE was used in a family dispute over inheritance where mediation had stalled and the parties had differing perceptions of the issues in dispute, the strength of the respective arguments, and an inadequate understanding of the risks of litigation. ENE allowed the judge to evaluate the respective parties' cases in a direct way. This provided an authoritative, albeit provisional, view of the essential legal issues of the case.

Conducting ENE in practice

ENE is flexible and consensual. If it is not developed with the agreement of both parties the chances of a successful evaluation will be reduced. While there are no hard and fast rules about how to run an ENE, once the parties have agreed on and appointed an impartial evaluator the following steps are likely to be present in a particular case.

Parties involved in a contractual or other disagreement who wish to use the ENE process must first agree on the evaluator. While parties are free to choose the evaluator, this is a critical decision. Choosing an evaluator without the right mix of technical expertise and practical judgement and credibility could potentially undermine any view arrived at and possibly render the whole process fruitless. In commercial cases, evaluators can also be appointed through specialist industry bodies such as the Chartered Institute of Arbitrators. Individual barristers and solicitors may also offer evaluation services and can be contacted directly.

Both parties and the appointed evaluator should set out in writing their respective roles and responsibilities within an ENE agreement. The agreement should be as detailed as possible to provide the necessary clarity. As a minimum, provision should be made for:

- the confidential and without prejudice nature of the process;
- the impartiality of the evaluator;
- the evaluator's remit and instructions relating to what elements of the dispute are to be considered;
- the scope of documents each side will be required to disclose;
- whether and to what extent the evaluator is required to explain their reasoning behind the evaluation;
- the binding nature of the evaluation or otherwise;
- the timetable for running the ENE; and
- responsibility for fees.

The parties have substantial control over the process and can decide whether the evaluator should hold a hearing, or whether the evaluation should be carried out solely with reference to the documentation submitted by the parties. This has naturally allowed for ENE to be convened at relatively short notice using remote facilities such as video-conferencing or telephone.

Practical points

The goal of ENE is to find a cost-effective solution to a dispute. If run efficiently the ENE process should be considerably cheaper than court action and many other forms of ADR. Where the independent evaluator is appointed privately, the costs would be met by both parties. If ENE is carried out through the courts, court fees will normally be split between the parties. The legal fees for the process will again be shouldered by each respective party. Where the ENE is related to a part of a wider dispute that goes to trial, the cost of the ENE will be borne by the party that ultimately loses the related, wider case.

The length of time it takes to finalise an ENE will depend on the facts of the particular case and the issues put to ENE. It is designed to be a quick process that isolates strengths and weaknesses in each side's case so that an early settlement can be facilitated. That said, and depending on the issues put to ENE the preparatory work can take up a considerable amount of time and there is a risk that time spent on an ENE will not yield results because there is simply an inability to reach agreement. There is always the chance that a party that obtains a favourable evaluation will be more inclined to stand their ground more firmly in any negotiation, making agreement harder to find.

Usually the sides will meet following the decision to establish whether there is a possibility of a breakthrough in the dispute in light of the evaluator's findings. If one party does not agree to settle on the evaluator's indications the other may consider making a Part 36 offer. Part 36 of the CPR is a self-contained procedural code that encourages parties to settle disputes being litigated (or about to be litigated) in the English courts. It does this by modifying the normal costs rules in significant ways to give parties a strong incentive both to make and to accept reasonable settlement offers. There will be a negative cost consequence for the party refusing to accept the Part 36 offer if the case is pursued and lost or they do not achieve a better result at trial. This along with the cost of litigation could persuade that party into settling.

Weighing up pros & cons

Advantages of ENE include:

- Flexible and can be a short process, it will focus the parties' minds on the key issues at stake.
- A wide range of disputes can be covered, from construction and general commercial cases to family and financial disputes.
- The evaluator will give a realistic assessment of prospects of success of each side and the process, including exposing weaknesses in a case enabling a party to negotiate more realistically. When parties understand their legal position from the perspective of a neutral expert, they may be more prepared to come to the table and negotiate.
- The parties may give more credence to the views of an independent lawyer or expert than the indications of a mediator who is constrained by their role in terms of what they can say on the merits.
- ENE may be useful where the parties are seeking an indication on how a discretion might be exercised.
- ENE tends to be useful to address disputes over matters of legal interpretation such as construction of a contract or terms of a will.

Disadvantages of ENE:

- Not always appropriate when there are significant issues of fact in dispute.
- Depending on the ENE agreement, the process can potentially become lengthy.
- The evaluator does not have the same opportunity to hear from witnesses as in other forms of dispute resolution such as litigation and arbitration.
- The position favoured by the evaluator in a decision may lead a party to become emboldened to seek a more favourable outcome. A party whose position is not favoured may not accept the evaluator's view and decide to proceed with litigation.
- If a judge decided the ENE, they will not be able to hear any related litigation. In some cases, this could be used tactically to ensure a particular judge does not hear the case.

ENE may be regarded as a step in a series of attempts at ADR and it should not necessarily be considered as an alternative to one form over another. It may follow mediation which allows the parties to refine their preferences and areas of contention thereby allowing for some issues to be put to ENE. ENE could prove expensive as ultimately the evaluator's decision is not binding. Unless the parties have agreed to be bound by the evaluator's decision ENE could be a prelude to further negotiation and discussion. This is so even if the ENE was carried out under the court's case management powers. The decision reached by a judge is only an assessment of each side's strength and a prediction of what could happen if the case went to trial.

In practice and as the effects of the pandemic continue to be felt, the writer has seen an increase in ENE and other forms of ADR such as mediation that may be conducted remotely. It can be arranged in relatively short order and cost-effectively. It is a practical way to keep the matter moving against the costs, physical constraints and uncertainties of a conventional adversarial process. The time has now come for such methods to be more actively considered as a *genuine* alternative to litigation in appropriate cases. NLJ

Professor Suzanne Rab is a barrister and accredited mediator at Serle Court Chambers (*www.serlecourt.co.uk/*). She has extensive experience of ADR including ENE, mediation, adjudication and arbitration. She is also an accredited CEDR/CMC mediator and trainer with Phoenix Dispute Solutions which offers mediation and mediation training (*https://phoenixdisputesolutions.com/mediation-training/virtual-mediation-training-programme*).