

ENE is an alternative dispute resolution technique that emerged in USA in the late 1990s, being pioneered by a number of courts as a method intended to improve the process of thinking about a dispute/case by both clients and their lawyers. Although not intended as a settlement tool, it soon became a technique that was successfully used to settle disputes.

ENE is voluntary, confidential and conducted on a 'without prejudice' basis. The 'evaluation' is non-binding and aims to help clarify and define legal and factual issues in the dispute, identifying risks and likely outcomes before further significant resources are spent on the dispute. It does not of necessity eliminate other dispute resolution options, and can be used during other dispute resolution options too (for example during negotiations, or mediation), especially where the parties have reached a stalemate and differing opinion on a legal or technical point.

As the name suggests, there are 3 main components in ENE:

- i) it is intended to be used before any formal litigation or arbitration process is started, or at the beginning of such processes
- ii) the process involves a neutral (the 'evaluator') who is unconnected to the dispute or either party
- iii) the evaluator produces an evaluation or recommendation as to the likely outcomes if the dispute goes to court or to an arbitrator for a decision

ENE is directly and explicitly evaluative in its scope and approach, unlike mediation. By encouraging direct communication between the parties and their advisors at an early stage it can help parties come to a better understanding of their cases' strengths and weaknesses.

Given the nature of the process, a neutral with subject matter expertise, and who can command the respect of the parties, is often requested by parties. The evaluation need not be confined to the arguments and facts put forward by the disputants.

A neutral can be appointed by a nominating body at the request of parties in dispute, or directly by parties themselves. The parties may stipulate a particular ENE procedure that they wish to follow, or agree to follow a procedure laid down by a nominating body. The depth of the evaluation will be dictated by the time allocated to the process. Unless the parties agree otherwise, typically the neutral will conduct his/her own investigations, enquiries and research. The parties are free to agree matters such as whether the process will involve documentary evidence only or oral hearings; the scope of representation by advisers; and whether reasons will be provided by the evaluator. The neutral and the parties will customarily agree that a case summary and supporting documents will be provided to the neutral (and to each other), although the parties often agree to limit the number and scope of supporting documents so that the parties are not in essence preparing for a trial approximating to a litigation process.

In the UK, ENE is also being encouraged by certain courts e.g. the Technology and Construction Court (see 7.5 of the TCC Court Guide), and the Commercial Court (see G 2 of the Court Guide). Judges who act as evaluators under these schemes take no further part in a case.

Although as seen above ENE has advantages, some may feel it is a risky process insofar as once an evaluation is provided, one party may become more entrenched in their views.

Further reference

TCC Court Guide available at:
www.hmcourts-service.gov.uk/docs/tcc_guide.htm

The Admiralty & Commercial Court Guide available at:
www.hmcourtsservice.gov.uk/docs/admiralcomm/Commercial%20Court%20Guide%20final%20280509.pdf

RICS Dispute Resolution Service (DRS)

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The DRS offer a complete range of methods for resolving disputes including arbitration, expert determination, mediation, adjudication. They also appoint Single Joint Experts. Enable people to resolve property disputes quickly and effectively, without going to court. Application forms for a range of services are available on the RICS website.

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The DRS Scotland offers a range of methods for resolving disputes enabling people to resolve property disputes quickly and effectively in Scotland, without going to court. Application forms for a range of services are available via the RICS website.

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