

## **Background to Early Neutral Evaluation**

Early Neutral Evaluation ("ENE") is a form of Alternative Dispute Resolution ("ADR") which aims to provide Parties in Dispute with an early and frank evaluation by an objective observer of the merits of a case. The ENE is intended to facilitate settlement.

ENE was developed over fifteen years ago in response to a request by the Courts in the United States to look at ways of lowering the cost of litigation and reducing the burden on the average litigant in progressing a matter through the legal system. The Courts in the United Kingdom have welcomed the use of ADR techniques particularly following the implementation of the Civil Procedure Rules in April 1999.

The Commercial Court has its own neutral evaluation scheme whereby a judge will offer the Parties a non-binding assessment of their prospects. However, the take up has been very low and there are no current plans to extend this to other Courts.

ENE is not mediation. The Evaluator advises the Parties at the outset directly and unambiguously that their appointment is to act as an Evaluator and not a mediator.

The Evaluator will study all material provided in advance of the ENE, perform independent research into relevant caselaw as necessary, consider presentations carefully (written and/or oral presentations), clarify positions and facts through questioning, and then prepare a carefully worded, but direct, evaluation. This evaluation shall be unbinding and will in most cases be issued to the Parties in written form.

The ENE focuses specifically on the key issues raised by the facts of a case and the relevant law. It need not however be confined to the arguments raised by the Parties. The depth of analysis, subject matter expertise and comprehensive legal evaluation provided by the Evaluator sets ENE apart from other evaluative ADR methods, such as arbitration or evaluative mediation.

## **ADR Group ENE Panelists**

The ADR Group ENE's exclusive panel comprises former senior members of the Judiciary:

- **The Rt. Hon. Lord Griffiths of Gavilon.** Queen's Counsel, 1964; High Court Judge, Queen's Bench Division, 1971-1980; Lord Justice of Appeal, 1980-1985; Lord of Appeal in Ordinary 1985-1993; member of Mediation Panel - Maxwell Pensioners Trust, 1993-1994; Hon Fellow of American College of Trial Lawyers; Hon. Fellow American Institute of Judicial Administration; arbitrator since, 1993.
- **The Rt. Hon. Lord Lloyd of Berwick** Queen's Counsel 1967; High Court Judge, Queen's Bench Division 1978-1984; Lord Justice of Appeal, 1984-1993; Lord of Appeal in Ordinary 1993-1998; Chairman, Security Commission 1992-1999 (Vice-Chairman, 1985-1992); British Maritime Law Association.
- **The Rt. Hon. Lord Mustill** Queen's Counsel, 1968; Deputy Chairman, Quarter Sessions, 1971; Recorder, 1972-1978; High Court Judge, , 1978-1985; Lord Justice of Appeal, 1985-1990; Lord of Appeal in Ordinary, 1982-1994; Chairman Civil Service Arbitration Tribunal, 1997~-1978; Chairman DTI Departmental Committee on the Law of Arbitration, 1985-1990; President Chartered Institute of Arbitrators, British Maritime Law Association, Association of Average Adjusters, London Shipping Law Centre; joint author, Mustill & Boyd' Commercial Arbitration.
- **The Rt. Hon. Lord Nolan** Queen's Counsel 1968; High Court Judge, Queen's Bench Division, 1982-1995; Lord Justice of Appeal 1991-1993; Lord of Appeal in Ordinary 1994-1998; Member, Sandilands Committee on Inflation Accounting, 1973-1975; Governor, Combe Bank, Switzerland, 1974-1983; Chairman, Committee on Standards in Public Life, 1994-1997.
- **Sir John Vinelott** Queen's Counsel, 1968; High Court Judge, Chancery Division, 1978-1995; Chairman, Insolvency Rules Advisory Committee, 1984-1992; Trust Law Committee, 1995 -; President, L'association de Bousquetara, 1989.

## **ADR Group ENE Procedure**

### **ENE Agreement**

1. The Parties ("the Parties") to the Dispute in question ("the Dispute"), the Evaluator and ADR Group ENE will enter into and sign an agreement ("the ENE Agreement"). This procedure ("the ENE Procedure") will be incorporated into, and form part of, and may be varied by, the ENE Agreement.

### **The Evaluator**

2. ADR Group ENE will nominate an independent third party (the "Evaluator") from their list of panel Evaluators. The Evaluator, after consultation with the Parties where appropriate, will:
  - Attend any meetings with any or all of the Parties preceding the ENE, if requested or if the Evaluator decides this is appropriate;
  - Read before the ENE each Parties' respective Bundle of Documents (see paragraphs 9 & 10 below);
  - Chair, and determine the procedure for the ENE;
  - Give an evaluation in writing;
  - Abide by the terms of the ENE Procedure and ENE Agreement.
3. The Evaluator will not have advised any of the Parties in connection with the Dispute or have judged any issues in connection with the Dispute, or have been involved in the Dispute in any other capacity. In relation to the Dispute, neither the Evaluator nor ADR Group ENE is an agent of, or acting in any capacity for, any of the Parties. The Evaluator is acting as an independent contractor and not as an agent or employee of ADR Group ENE.

### **ADR Group ENE**

4. ADR Group ENE, in conjunction with the Evaluator, will make the necessary arrangements for the ENE including:
  - Nominating, and obtaining the agreement of the Parties to, the Evaluator appointed;
  - Drafting and obtaining the agreement and signatures of the Parties to the ENE Agreement;
  - Organising a suitable venue and date(s) (if appropriate);
  - Co-ordinating the mutual exchange of the Summary and supporting documentation between the Parties and the Evaluator;
  - Financial and general administration in relation to the ENE.

### **The ENE**

5. The Evaluator shall be responsible for the conduct of the ENE.
6. If the Evaluator considers it may be helpful, a preliminary meeting may be held with the Parties to discuss the conduct and procedure of the ENE, to give directions and to deal with any other matters that may be relevant.

7. No recording or transcript of the ENE will be made.
8. The Parties are required to elect and inform ADR Group ENE, prior to the commencement of the ENE, which of the following two Options they wish to follow:

**Option One - written submission only**

9. Within a specified time scale (or at the earliest convenient date to all Parties), the Parties will exchange with each other and send directly to the Evaluator, sufficient copies of a concise summary ("the Summary") of its case in the Dispute. Additionally, the Parties will send to the Evaluator:
  - A chronology of events;
  - Copies of all Pleadings (if relevant);
  - Copies of any witness and/or expert reports (if relevant) to which the Summary refers;
  - Any other documents to which the Summary refers and/or which the Parties wish the Evaluator to consider;
  - References to applicable laws and full copies of any case law relied upon.
10. The above documents shall be paginated in bundle form ("the Bundle"), indexed and clearly marked.
11. Within a specified time scale, each Party will provide to the other side and the Evaluator a copy of any written response to the other Party's written submission.
12. Upon receipt of the response submissions, the Evaluator will seek any clarification required from the Parties in writing, again within a specified time limit.
13. The Evaluator will proceed to determine the ENE promptly, and issue the written evaluation within '5 working days or such other period as may be agreed with the Parties.

**Option Two - written and oral presentation**

14. Within a specified time scale (or at the earliest convenient date to all Parties), the Parties will exchange with each other and send directly to the Evaluator, sufficient copies of all documents referred to in paragraph 9 above.
15. Within a specified time scale, each Party will provide to the other side and the Evaluator a copy of any written response to the other Party's written submission.
16. Upon receipt of all the above, the Evaluator will, in conjunction with ADR Group ENE, schedule an ENE Conference ("the ENE Conference") at a time and location to be determined between the Evaluator and the Parties.
17. The Evaluator is to be notified in writing, no later than three (3) working days before the scheduled date for the ENE Conference, the full names of all persons (outlining in what capacity) including any witnesses and/or experts who will be attending the ENE Conference.

18. The ENE Conference will take place at the arranged venue and time as agreed between the Parties and the Evaluator. If the Dispute remains unresolved at the close of business that day, the ENE Conference may be adjourned to such time and place as the Evaluator and the Parties shall agree.
19. At the ENE Conference, each Party shall make a presentation to the Evaluator summarising its position and addressing any issues identified by the Evaluator. The Evaluator shall determine the duration of each presentation and response.
20. Other than the formal presentation and responses mentioned above, the Evaluator may structure the presentation of evidence and witness or expert presentations as considered appropriate. The Evaluator will retain the right to question the Parties together or separately, and to request any further written information or evidence.
21. The Evaluator will proceed to determine the ENE promptly, and issue the evaluation within 5 working days of the ENE Conference or such other period as may be agreed with the Parties.

### **Legal Advisers**

22. Each Party may appoint one or more representatives to assist, advise and/or attend.

### **Termination**

23. Any of the Parties may withdraw from the ENE at any time and shall immediately inform the Evaluator, ADR Group ENE and all other Parties in writing. The Evaluator reserves the right to terminate if he considers any Party is acting in bad faith.

### **Confidentiality**

24. By taking part in the ENE the Parties undertake to each other and agree that:
  - (i) the written Evaluation is confidential and will not be disclosed without the prior written consent of the other Parties, or save as may be ordered by a Court of competent jurisdiction;
  - (ii) the entire process of the ENE shall be treated as privileged and will be conducted on the same basis as without prejudice negotiations. All documents, submissions and statements made or produced for the purposes of the ENE whether oral or written shall be inadmissible and not subject to disclosure in any arbitration, legal, or other similar proceeding, except that evidence which is otherwise admissible or discloseable shall not become inadmissible or non-discloseable by reason of its use in connection with the ENE.
25. The Evaluator shall not act for any Party in any capacity with regard to the subject matter of the Dispute, and the Parties acknowledge that in acting under this procedure, the Evaluator is not representing or giving legal advice to, nor assessing, upholding or protecting (or attempting to assess, uphold or protect), any rights of any Party.

- 26.** The Parties may not have access to the Evaluator's notes or call the Evaluator as a witness in any proceedings relating to any of the issues between them, and any opinion which the Evaluator has issued will be inadmissible in any subsequent proceedings which may take place between the Parties concerning the subject matter of the Dispute.

**Exclusion of Liability**

- 27.** Neither the Evaluator nor ADR Group ENE shall be liable to the Parties or any of them for any act or omission in connection with the services to be provided by the Evaluator or ADR Group ENE.

**Fees and Expenses**

- 28.** Unless the Parties otherwise agree, the fees and expenses of ADR Group ENE which shall include the Evaluator's fees, as well as any other expenses relating to the ENE, will be borne by the Parties in equal shares. Payment of these fees and expenses will be made to ADR Group ENE in accordance with its fee schedule and terms and conditions of business. All invoices are to be settled in full within 2 days of the date of issue of the invoice.
- 29.** Each Party will bear its own costs and expenses of its participation in the ENE.

## **Principal Features of ADR Group ENE**

1. The Evaluation is not binding;
2. The Evaluation is without prejudice to existing rights, claims or defences of any actual or future Party to a Dispute;
3. Two options are available to the Parties:

Option One The Parties elect to proceed by way of written submission only. No oral presentations are undertaken. The Evaluator will issue an evaluation on the written submissions presented.

Option Two The Parties elect to proceed by way of both written and oral presentations. The Evaluator will, in consultation with the Parties, allow each Party a limited period of time to make their presentation. No cross-examination is permitted. The Evaluator will issue an evaluation on the written and oral evidence presented.

Irrespective of which Option is chosen, the Evaluator will focus specifically on key issues raised by the facts of a case (as presented) and the relevant law. The Evaluator may choose not to be confined to the arguments raised by the parties. The Evaluator will identify the key factual issues, whether or not identified by the Parties;

4. In the event Option Two is chosen, a discussion may be led by the Evaluator at the presentation stage, looking at ways to reduce the scope of the Dispute and to identify areas of agreement;
5. A candid, non-binding written evaluation will be issued by the Evaluator of the strengths and weaknesses of the arguments and evidence presented, including detailing the Evaluator's opinion of likely outcomes and financial range of potential damages;
6. The Evaluator may, after consultation with the Parties and with their consent, agree to adjourn the ENE in order that mediation (through the appointment of a new intermediary) can take place.

## **Administration Procedure**

Identification that case may be suitable for ENE

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Referral of case to ADR Group ENE for administration and co-ordination

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Consideration of Evaluator(s)

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Election of appropriate ENE Option.

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Parties agree to appointment of Evaluator

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ADR Group ENE co-ordinate between Parties and Evaluator as to procedure, preparation, date, venue, costs etc.

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All parties sign ENE Agreement as prepared by ADR Group ENE

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Evaluator acts in consultation with Parties and in accordance with ENE Procedure

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Evaluator issues non-binding written evaluation

**Option One:** Written Submissions Only

**Option Two:** Written and Oral Presentations

**Draft ENE Agreement**

THIS AGREEMENT is made and entered into

This.....day of.....between:

PARTIES:

ABC (represented by)

GHI (represented by)

MNL (represented by)

jointly "the Parties"

ADR Group ENE, Grove House, Grove Road, Redland, Bristol, BS6 6UN "ADR Group ENE"

1. The Parties have agreed to the appointment of as Evaluator in a Dispute between (summary of Dispute/Parties) ("the Dispute")

2. The Parties will attempt to settle the Dispute by Early Neutral Evaluation ("ENE"). The attached ADR Group ENE Procedure ("the ENE Procedure") (as varied by this agreement) will determine the conduct of the ENE and is incorporated into and forms part of this agreement.

3. The Parties agree to the terms of the Evaluator's appointment as contained in this agreement ("the Agreement to Evaluate") and to the ENE Procedure.

4. Unless the Parties otherwise agree, ADR Group ENE's fees ("the Fee"), including that of the Evaluator, as well as any other expenses associated with the ENE, will be borne by the Parties in equal shares. As the Parties have agreed to proceed in accordance with

**Option One, the Fee payable shall be £ (no oral submissions)**

**(or for Option Two it shall be £ (written and oral presentations)**

per case (plus VAT if applicable). All Fees are to be dealt with in accordance with ADR Group ENE's Terms and Conditions of Business.

Signatures: .....

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## **Benefits of ADR Group ENE**

With over a decade of experience in resolving complex commercial and civil Disputes, ADR Group launched ADR Group ENE to offer disputants a more comprehensive alternative dispute resolution package.

- ADR Group are one of the leading specialist mediation providers in the United Kingdom
- ADR Group's network consists of over 80 law firms, individual lawyers and barristers chambers throughout the UK
- The ENE panel comprises former senior members of the Judiciary
- Fast-track, non-binding judicial evaluation
- Assists in preserving on-going commercial relationships
- Damage limitation - provides you with guidance on possible outcomes at Court proceedings

### **Is subject specialism a necessity?**

The primary objective of ENE is settlement. One question that may be raised within certain sectors, are that Evaluators need to be completely familiar in the subject area of the Dispute to achieve settlement. This is not necessarily true. Subject specialism is only one aspect of a Dispute. ENE offers a comprehensive overview of the entire case. It provides an indication of the likely outcome should the matter go to trial.

It is important to realise that a judicial evaluation will provide disputing Parties with a legal perspective on the issues involved.

*How many cases that go to Court have a choice of a Judge with a particular specialism?*

### **Evaluation and Mediation**

In specific circumstances, there may be a need to have an Evaluator on-hand with a mediator. The Evaluator's role will be to advise Parties during the mediation, if required, on the possible judicial outcome and merits of the Dispute. This may indeed enhance the settlement process and allow Parties to actively attempt to resolve the Dispute without recourse to litigation.

## **Why is ENE different from Mediation?**

### **ENE is not mediation:**

(i) ENE is explicitly evaluative. In a mediation the mediator's function is usually facilitative and evaluation is not a principal objective of the process. In mediation, any evaluation - if communicated at all - tends to be oblique and may be based on information learned in confidence which cannot be communicated to the other Party (ies).

In ENE, evaluation is direct and explicit, and is only based on information the Parties have communicated to the Evaluator (and which would be shared between the Parties).

(ii) The principal purpose of mediation is settlement. Although settlement is the primary objective of ENE, the non-binding evaluation should provide greater clarity as to the issues in Dispute, and a clear indication as to the likely outcome should the case not settle and progress to trial.

(iii) In mediation, the neutral intermediary primarily needs process expertise not necessarily subject matter expertise. In ENE, the neutral usually has subject matter and legal expertise.

(iv) The presentations and submissions are directed to different targets:

In mediation, the presentations are directed to the other side. The mediator merely acts as a communicator or facilitator of information.

In ENE, the presentations (either written or oral) are directed to the Evaluator.

(v) The principal focus is different:

In mediation, the focus is on interests (rather than positions), with each side trying to identify and explain (through the Mediator) its situation, needs and perspective.

In ENE, the focus is on evidence and law.

### **ENE is not a settlement meeting.**

(i) Unless otherwise agreed, the Parties are under no duty to discuss or negotiate settlement at or following the ENE. The Evaluator does not have the authority to compel settlement negotiations.

(ii) However, as the primary objective of ENE is settlement, the Evaluator may encourage Parties to enter into settlement discussions.

### **ENE is not Arbitration**

(i) ENE does not involve the giving of evidence under oath and does not usually allow for cross-examination, resulting in less disclosure of trial strategy and preventing the ENE from being dragged out to unnecessary lengths.

(ii) The Parties are required to elect in advance of the ENE, whether they wish to proceed by written submission only (Option One) or by both written and oral

presentations (Option Two). In either case, the Evaluator will issue a non-binding written evaluation.

(iii) ENE involves no imposed decision or judgement.

(iv) ENE is generally used earlier than arbitration (thereby saving substantial legal costs) although it can be used at any stage in the life of a Dispute.

(v) In ENE, the Evaluator not only issues a non-binding written evaluation but may assist with settlement negotiations and case management planning, if requested to do so.

**What does ENE have in common with mediation?**

(i) Both processes are confidential and without prejudice.

(ii) Parties retain an element of control in the settlement of the Dispute.

(iii) Both allow for the early settlement of a Dispute thus avoiding the often expensive route of having the matter tried in Court.

## **Schedule of Fees**

1. The fees of the ENE ("the Fees") shall include the fees of the Evaluator and the administrative charges of ADR Group ENE.
2. Pursuant to paragraph 8 of the ENE Procedure, the Parties are required to elect in advance of the ENE whether Option One or Two is to be followed. The Fees will be quoted on a case by case basis according to the following factors: number of Parties, complexity, amount in dispute, weight of documentation, anticipated duration of any oral presentation and generally subject to the following minimums:

Option One (written submission only)	£7,500
Option Two (written and oral presentations)	£10,000

3. All Fees are exclusive of VAT (if applicable).
4. All Fees are inclusive of all reading time, preparation time and ENE time incurred by the Evaluator. Any expenses (if appropriate) incurred by the Evaluator will be charged at cost.
5. If Option Two is selected, ADR Group ENE will arrange for the ENE to take place at a neutral venue but reserve the right to pass on any venue charge (at cost) to the Parties.
6. ADR Group ENE will (if appropriate) issue a balance invoice at the conclusion of the ENE to cover any additional Fees or expenses incurred.
7. If the ENE is cancelled, ADR Group ENE will reimburse to the Parties any balance owing on the Fees, subject to Clause 5 of the Terms and Conditions of Business.
8. Any other costs incurred by the Parties, whether in regard to legal fees, experts' fees or expenses of any other nature will not be part of the Fees for the purposes of the ENE Procedure.

## **Terms & Conditions of Business**

1. Unless agreement is reached to the contrary, ADR Group ENE's fees (which include the Evaluator's fees) together with any other expenses of the ENE, will be borne equally between the Parties.
2. In most ENE instructions, two invoices will be issued:
  - (i) Deposit invoice: Full ENE Option (one or two);
  - (ii) Balance invoice: any additional ENE fees and expenses (including venue, refreshment, travel costs etc).
3. ADR Group ENE's Deposit invoice is payable, in full, no later than five working days in advance of the ENE, as a precondition to the ENE taking place. All other invoices (including the Balance invoice referred to in 2 (ii) above) are payable in full within 21 days of the date of issue. We reserve the right to charge interest compounded quarterly from the date of the invoice to the date of payment accrued daily at the rate of 2% above TSB Lloyds Bank Plc Base Rate.
4. All fees are exclusive of VAT (if applicable).
5. In the event of any Party electing to cancel the ENE, such cancellation shall be in writing to ADR Group ENE and if received:
  - (i) more than 10 working days before the ENE was due to take place, no Option Fee shall be payable other than any irrecoverable expenses (such as venue costs etc) incurred;
  - (ii) less than ten working days but no more than five working days before the ENE was due to take place, ADR Group ENE reserve the right to charge
    - 15% of the Option Fee; and
    - all expenses incurred by the Evaluator or ADR Group ENE
  - (iii) less than 5 working days but no more than 48 hours before the ENE was due to take place, ADR Group ENE reserve the right to charge
    - 25% of the Option Fee; and
    - all expenses incurred by the Evaluator or ADR Group ENE
  - (iv) less than 48 hours before the ENE was due to take place, ADR Group ENE reserve the right to charge
    - 50% of the Option Fee; and
    - all expenses incurred by the Evaluator or ADR Group ENE

## **Notes**