

Early Neutral Evaluation (ENE)

What are the advantages of early neutral evaluation?

- ENE can be a quick and cheap process, which identifies and clarifies the central issues in dispute.
- It can provide a reality check for clients and their lawyers and help them to understand the risks in pursuing litigation, for instance, where direct negotiations have become deadlocked. This may be particularly effective where a judge carries out the ENE, for example, under one of the court schemes in the Chancery Division, Commercial Court or TCC.
- It will identify weaknesses in a party's case and gaps in evidence which, if properly addressed, can be used to improve their position before trial.
- It may be particularly suitable for claims which turn on an issue of construction or an issue of law where there are conflicting authorities.
- Even if the ENE does not result in settlement, the process itself may narrow the issues and focus attention on the more important aspects of the case.

What are the disadvantages of early neutral evaluation?

- One party may become more entrenched in its position if the evaluation is in its favour, hindering settlement.

- Depending on the size and complexity of the issues, the extent of preparation required might render the ENE disproportionately expensive, especially as the result is non-binding and may not lead to settlement.
- ENE may not be suitable where the dispute turns on issues of fact, as the evaluator may not hear all of the witness evidence that would be heard at a trial.
- ENE carries a certain level of risk. Once an evaluation has been made, it may be difficult for a losing party to recover from this, which may, in turn, compromise that party's negotiating position.
- ENE may not be suitable for large, complex disputes. If the issues cannot be dealt with separately, a consideration of the whole dispute may be time-consuming. The evaluation may be too long and with too many caveats to provide any real assistance.
- The losing party may simply ignore a decision it does not agree with, argue that the decision was not properly considered and that a trial judge, with the benefit of all the evidence, will reach a different conclusion. This may, in turn, lead a party to better prepare its case in litigation, making it more difficult for the winning party to capitalise on the successful evaluation.
- In the context of some courts, if a judge conducts the ENE, they are precluded from playing any future role in the conduct of the case unless the parties agree otherwise, meaning that ENE could be used to tactically "conflict out" a judge.

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