



PRACTICE GUIDE ON EARLY NEUTRAL EVALUATION (ENE)

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PRACTICE GUIDE ON EARLY NEUTRAL EVALUATION (ENE)

A. PURPOSE OF THE GUIDE

1. The purpose of this Practice Guide is to provide a set of guidelines on the objectives, process and practice in the use of early neutral evaluation (ENE) as part of the Judicial Dispute Resolution (JDR) process.
2. These guidelines should be implemented and adapted in each jurisdiction as appropriate to promote the overarching objective of early, amicable, cost-effective and fair resolution of court disputes in full or in part so that judicial time is saved.
3. These guidelines are not intended to be exhaustive. The legal framework and court procedures of each jurisdiction are to be considered when applying these guidelines.

B. WHAT IS EARLY NEUTRAL EVALUATION (ENE)

4. Early Neutral Evaluation (ENE) is one of the Court Alternative Dispute Resolution (ADR) modalities optionally employed during the JDR process as a key case management tool. ENE is a process by which a judge or another neutral third party (Evaluator) provides an early and non-binding assessment of the strengths and weaknesses of each party's case, and gives a considered view on the likely outcome at the trial or hearing. The ENE gives a realistic indication of the merits of a party's case, which in turn helps to manage parties' expectations. The Evaluator's assessment is usually based on the submissions and documentary evidence tendered by parties. The ENE given by the Evaluator forms the basis for parties to commence settlement negotiations. The ENE process should be confidential and in the event parties proceed to trial, they should not refer to the submissions or the evaluation at trial, unless the ENE is binding.

C. FEATURES OF THE ENE PROCESS

5. The ENE process is ideally conducted in the early stage of the pre-trial case management process (including pre-registry stage in some jurisdictions like China) to facilitate parties' settlement negotiations before substantial costs and resources are expended in the litigation process. The judge who has conduct of the pre-trial process will be well-placed to conduct the ENE process as he will be familiar with the legal and factual issues in dispute, as well as the dynamics between parties. If that is not practicable, another judge or an external neutral third party can preside over the ENE process.

6. If a judge is the Evaluator, the same judge should not preside over the trial as there may be a perception of bias and lack of impartiality.
7. The ENE process generally comprises the following stages:
 - (i) A preliminary case conference between the Evaluator and the parties and/or their lawyers;
 - (ii) Tendering of written submissions and evidence by parties and serving the said documents to each other in preparation for the ENE hearing;
 - (iii) The ENE hearing before the Evaluator; and
 - (iv) The delivery of the evaluation by the Evaluator.
- (i) *Preliminary case conference*
8. At the preliminary case conference, the Evaluator will meet with the parties to plan the conduct of the ENE and to help them identify and craft the issues that they want the Evaluator to give an indication on for them.
9. Other matters that may be discussed and finalised at the preliminary case conference include:
 - (i) whether the parties want a binding or non-binding evaluation;
 - (ii) the nature of the evidence that parties will be relying on for the ENE (for example, whether the evidence would be in the form of documents, affidavits, witness statements or oral testimony, and whether expert evidence will be called or required);
 - (iii) whether the lawyers will be relying on written or oral submissions;
 - (iv) the timelines for the parties to prepare their evidence and submissions, and for filing any documents in court, as well as any other case management directions and issues to be dealt with; and
 - (v) the date to be fixed for the hearing of the ENE.
- (ii) *Tendering of written submissions*
10. The written submissions serve as a guide to the Evaluator in conducting the hearing and may include the following matters:
 - (i) The facts relating to the dispute;

- (ii) A summary of the parties' claims and defences;
- (iii) A summary of the factual and legal issues that are in dispute;
- (iv) The case theory and the essential documentary and oral evidence relied upon by parties in support of their positions;
- (v) A summary of the legal principles and authorities relied upon by each party; and
- (vi) The identities of the persons attending the ENE hearing.

(iii) *The ENE hearing*

11. The ENE hearing will usually be attended by the lawyers representing each party, and where necessary, by the parties themselves.
12. At the ENE hearing, the parties will present their respective case theories and supporting evidence. As the ENE hearing is generally more informal than a trial, the formal rules of evidence and procedure applicable to a trial will not need to be adhered to in the presentation of evidence (such as oral testimony).
13. Where the case involves expert or technical evidence and each party has its own expert witness, the expert evidence can be presented in writing, with the experts being present to address any questions from the Evaluator or the other party.
14. After all the witnesses have given their evidence, closing arguments will be made by each party either orally or in writing.
15. Parties may also choose to dispense with the ENE hearing and oral testimony. They may instead opt for an asynchronous, "documents only" ENE process, and present their case theories, supporting evidence and arguments in writing.

(iv) *Delivery of the evaluation*

16. The Evaluator may either deliver the evaluation in the same session after hearing the parties' submissions at the ENE hearing or adjourn the matter and render the evaluation (either orally or in writing) at the next session. The evaluation is not a judgment in that the Evaluator does not pronounce one party the victor and the other the loser. Instead, the evaluation sets out the Evaluator's opinion as to the likely outcome of the matter at trial, the strengths and weaknesses of each party's case, which party's evidence and submissions are more persuasive, and how the trial judge or adjudicator is likely to rule on each of the issues in the circumstances. The evaluation should usually be accompanied by the Evaluator's reasons for his findings so that parties can take them into consideration when they negotiate a settlement.

17. The evaluation may be given orally or in writing or in such other form as the Evaluator decides or as agreed at the preliminary conference.

(v) *ENE process can be binding or non-binding*

18. Unlike in a trial where the trial judge will make a binding and enforceable judgment on the parties, the parties to an ENE may, by agreement, elect whether or not they are to be bound by the evaluation.

19. If the parties elect a binding ENE process, or if, during the evaluation process or after the Evaluator has made an evaluation, the parties agree to accept the evaluation process as binding, the delivery of the evaluation by the Evaluator will (subject to the civil procedure law of the forum) effectively put an end to the case (much like a judgment at the end of a trial) and the parties will proceed to implement the evaluation (which is usually done by recording a settlement agreement or recording a consent judgment) in accordance with the terms of the evaluation.

20. If the parties elect a non-binding ENE process, the evaluation will serve as a facilitative tool and provide a useful point of reference for negotiations between the parties to arrive at an amicable resolution of the case without trial. It will also assist parties in narrowing the legal and factual issues in dispute.

D. BENEFITS OF THE ENE PROCESS

21. The benefits of the ENE process include the following:

- (i) Helping parties identify the core legal and factual issues in dispute;
- (ii) Encouraging the parties to analyse their respective cases critically, objectively and realistically;
- (iii) Providing the parties with an early opportunity to hear and understand each other's viewpoints on the issues in a more amiable and less adversarial setting;
- (iv) Giving the parties an early, objective, realistic assessment of the merits of their respective positions and the possible outcome should the matter proceed to trial;
- (v) Providing the parties with an objective and realistic reference point to embark on negotiations towards an amicable resolution of the case; and
- (vi) Confidentiality of the ENE process.

E. SUITABILITY OF ENE IN THE AMICABLE RESOLUTION OF COURT DISPUTES

22. The ENE process is a useful Court ADR modality that facilitates the amicable resolution of disputes in a wide range of matters, from high-value commercial claims to small-value contractual disputes to personal injury claims. It is particularly effective in cases where:
- (i) There is substantial documentary evidence involved (as opposed to purely oral testimony);
 - (ii) There is a difference of opinion between the parties as to the construction of any document or the interpretation of the law, or where the parties are relying on conflicting expert opinions to support their positions;
 - (iii) All the parties believe that they each have a very strong case and are reluctant to make compromises through negotiation or mediation; and
 - (iv) The parties prefer to resolve their dispute in accordance with their respective legal rights and obligations.
23. The ENE process may not be suitable for cases where there is a conflict between parties' versions of events or factual accounts for which there is no supporting documentary or other independent evidence to support parties' positions.