

*CIL WORKING CONFERENCE ON CONCILIATION*

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# What Conciliation can Learn from Early Neutral Evaluation

Assistant Professor Dorcas Quek  
Anderson  
Singapore Management University

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# The Early Neutral Evaluation (ENE) Process

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- ❖ Origin
  - ❖ Introduced in US Federal District Court of Northern District of California
- ❖ **Main purpose:** to deal with inefficiency and cost wastage in litigation by addressing barriers existing in early stage of litigation
- ❖ **How ENE was meant to meet this goal: early, realistic case analysis & sharing of information by:**
  - ❖ Identifying legal and evidentiary centre of case;
  - ❖ Developing as reliable an evaluation of the merits as circumstance permit;
  - ❖ Crafting efficient plan to develop information that parties need to make responsible judgments of likely litigation outcome; &
  - ❖ Offering parties opportunity to settle case, after evaluation is given
- ❖ **“Evaluation is the center of ENE.”** - Wayne Brazil, *Early Neutral Evaluation* (American Bar Association, 2012) at 43.



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# The Early Neutral Evaluation (ENE) Process

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- ❖ Other jurisdictions
  - ❖ Singapore State Courts (2011)
  - ❖ UK: Technology & Construction Court, Admiralty & Commercial Court



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# The Early Neutral Evaluation (ENE) Process

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Feature	ENE	Mediation
Principal Purpose	Rationality and Efficiency	Settlement
Principal focus	<b>Evidence and Law</b>	Interests and support for positions
Principal role of neutral	<b>Evaluation of merits</b>	Communication and searching for terms of settlement
Neutral having subject matter expertise	<b>Essential</b>	Not essential (more process skills)
Primary target of persuasion	Neutral	Opposing party / counsel
Format	Joint session throughout until evaluation	Use of joint session as well as private caucuses
Participation by parties	Variable, but mostly lawyers	Variable, but better chance of larger role by parties
Ex parte communication	None before evaluation given	Common

Adapted from Wayne Brazil, *Early Neutral Evaluation* (American Bar Association, 2012) at 41.



# The Early Neutral Evaluation (ENE) Process

## Pre-ENE Conference

- To discuss how ENE to be structured and evidence to be referred to
- Arrangement for ENE written statements to be exchanged

## ENE session

- Parties and lawyers attend
- Lawyers make structured but informal presentation of claim / defence
- No cross-examination; evaluator asks questions to clarify or elicit additional info
- Evaluator invites parties to make responsive presentations
- Evaluator asks questions to probe and clarify.
- Evaluator identifies areas of apparent agreement, and identifies key issues on which they disagree
- Evaluation is drafted and given orally to all parties simultaneously.

## Post Evaluation

- Settlement negotiations may occur after evaluation. Evaluator switches role to "mediator" to assist.
- If no settlement - Evaluator helps parties in crafting case development plan

Wayne Brazil, *Early Neutral Evaluation* (American Bar Association, 2012) at 73-144; Wayne Brazil, "Early Neutral Evaluation or Mediation: When Might ENE Deliver More Value" (2007-2008) 14 *Disp. Resol. Mag.* 10



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# Skills Required in ENE

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- ❖ Subject expertise in relevant area
- ❖ Knowledge of law
- ❖ Most evaluators have mediation training
- ❖ Litigation experience and ability to deal with evidence



# ENE & CONCILIATION

Feature	ENE	Conciliation
Principal Purpose	Rationality and Efficiency	Amicable settlement
Principal focus	Give evaluation based on evidence and Law	Investigate dispute according to evidence and Law; suggest terms of possible settlement
Principal role of neutral	Evaluation of merits	Either making an independent evaluation of merits & suggesting settlement corresponding to what they deserve OR Facilitate negotiation
Neutral having subject matter expertise?	Essential	Apart from competence, the reputation for neutrality is crucial
Format	A “hearing” of parties’ arguments and evidence; Written and orally delivered evaluation based on law / evidence	A “hearing” of parties’ arguments and evidence; Report takes form of set of proposals instead of opinion / evaluation.
Confidentiality	Confidential	Confidential
Binding on parties	Non-binding (in original version)	Non-binding



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# Applicability to international disputes

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- ❖ The clear emphasis on “evaluation” within ENE: a boon and a bane?
  - ❖ Disadvantages:
    - ❖ The connotation of “evaluation” -> possibly incompatible with need for diplomatic sensitivity in politically charged disputes. It is desirable in such circumstances to avoid perception of making a definitive “evaluation” and appraisal of each state’s legal positions.
    - ❖ A definitive “evaluation” may be a stumbling block to further negotiation. The party who is given the favourable evaluation may become more entrenched in position.



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# Applicability to international disputes

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- ❖ When the clear emphasis on evaluation is beneficial:
  - ❖ When dispute hinges principally on opposing views of legal positions, and there is uncertainty over the likely outcome at adjudication / arbitration
  - ❖ When parties are willing to treat evaluation seriously and continue to negotiate even after receiving evaluation



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# What conciliation can “learn” from ENE

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- ❖ Conciliation: a hybrid process combining elements from ENE and mediation.
- ❖ Its inherent flexibility and ambiguous nature is appropriate for inter-state disputes in which political sensitivity is especially needed.
- ❖ However, the ambivalence of the functions performed by the conciliation commission may result in:
  - ❖ a mismatch of expectations between commission and parties
  - ❖ lack of clarity of criteria used in recommendations (whether based on merits alone, or also taking into account likelihood of acceptance of proposals)
  - ❖ Ambivalence over the nature of conciliation commission’s work (to conduct a “hearing”, to evaluate evidence and law or to facilitate negotiation?)
  - ❖ This in turns leads lack of uniformity in conciliation procedure. Each commission may conceive its role differently and with varying emphasis on either the “evaluative” or “mediation” component.



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# What conciliation can “learn” from ENE

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- ❖ Within the conciliation commission, there could be clearer articulation of:
  - ❖ whether its primary goal is to assist the parties to amicably arrive at a settlement, or whether settlement is only a secondary goal
  - ❖ The goal will influence the form the report takes:
    - ❖ A report underpinned by an “evaluative” goal will focus on fact-finding and evaluation of evidence.
    - ❖ A report motivated by a desire to facilitate settlement will make proposals taking into account other factors apart from the merits of each party’s position. It is also likely to be complemented by additional efforts to facilitate negotiation and exchange of offers.



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# References

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