



## New year, new LMAA Early Neutral Evaluation Scheme

The LMAA's introduction of the Early Neutral Evaluation scheme is a welcome addition to the range of alternative dispute resolution (ADR) mechanisms available for shipping and commodities disputes. [Cecilie Rezutka](#), Associate in CJC's London office, explains what litigants can expect from the new scheme and highlights issues parties should consider before opting for it.

### What is the Early Neutral Evaluation scheme?

With the commencement of the new year, the LMAA has unveiled its Early Neutral Evaluation (ENE) scheme. While ENE is used in other industries, it is a relatively new but welcome dispute resolution tool in the shipping and commodities field. ENE is also referenced in the newly announced BIMCO Mediation/Alternative Dispute Resolution Clause 2021<sup>1</sup> which recognises the range of ADR options available and which parties may choose to include in their contracts.

### What the parties can expect from ENE

A neutral and impartial evaluator (the “**Evaluator**”) reviews the parties’ positions in the dispute on documents alone and issues its non-binding evaluation of the dispute. Depending on the instructions given to the Evaluator this may include an assessment of the strengths and weaknesses of the case, an estimate of the likely outcome and any suggestions for resolution. The Evaluator may also put forward a figure or range for settlement if appropriate.

ENE does not oblige the parties to follow the evaluation but can in certain cases help provide the parties with an independent external assessment of the dispute and set the ground for future negotiations which can lead to a cost-efficient resolution of the dispute. ENE is usually best used relatively early into the dispute.

ENE is private and confidential and is conducted “without prejudice” so statements made in and documents created for the purposes of ENE as well as the evaluation itself cannot later be adduced and relied upon in Court or arbitration (unless required by local governing law and procedure). The Evaluator is “conflicted out” and may not be involved in any related or concurrent proceedings unless the parties agree so in writing.

Parties should keep in mind that ENE does not interrupt time for taking legal action which continues running while ENE is ongoing.



<sup>1</sup> <https://lmaa.london/wp-content/uploads/2021/12/BIMCO-Mediation-and-ADR-clause-2021.pdf>

## The process

The standard procedure is as follows, although (i) the parties can modify it by agreement e.g. for use in a dispute involving a contractual chain and (ii) the Evaluator has overriding powers to modify it if it considers the standard procedure to be inadequate.

1. Once the parties have agreed on ENE they appoint an Evaluator and sign the ENE Agreement<sup>2</sup>. If the parties cannot agree on the identity of the Evaluator they may jointly ask the President of the LMAA to make an appointment – in this case an administration fee is payable.
2. Unless the parties and the Evaluator agree a fixed fee for the evaluation, the Evaluator provides the parties with a fee estimate at the time of the appointment.
3. Within 14 days of (i) the appointment of the Evaluator or (ii) the signing of the ENE Agreement, whichever is later, the parties send to the Evaluator written case summaries setting out their positions in the dispute and documents in support.

Case summaries should include:	Documents should include:
<ul style="list-style-type: none"><li>- factual summary and background</li><li>- chronology of relevant events</li><li>- factual issues in the dispute</li><li>- common ground and differences</li><li>- list of issues which the parties want the Evaluator to determine</li></ul>	<ul style="list-style-type: none"><li>- contractual documents</li><li>- relevant correspondence</li><li>- extracts from witness statements</li><li>- extracts from expert reports</li><li>- extracts from relevant legal authorities</li></ul>

4. The Evaluator may ask the parties for further evidence or information. There is no right to an oral hearing but the Evaluator may “in exceptional circumstances” call for one if it considers it beneficial.
5. Once the evaluation is ready (normally within 1 month after the parties have provided their input) and the parties have paid the Evaluator’s outstanding fees, the Evaluator releases the evaluation of the dispute to the parties which includes the Evaluator’s reasons for the decision.

ENE is voluntary and dependent on cooperation from all involved. In circumstances where the Evaluator considers that the evaluation cannot usefully proceed or the parties decide not to proceed with ENE, ENE is terminated and the Evaluator retains fees to cover time spent on the dispute – the remainder is returned to the parties.

## Costs

The parties are jointly and severally responsible for payment of the Evaluator’s fees.

The ENE Agreement offers two mutually exclusive ways of allocating the costs of the evaluation:

- Under **option 1** (clause 6(b)(i)) which applies by default, each party bears its own costs which are not recoverable, whether as part of ENE or in any ongoing or subsequent proceedings.
- Under **option 2** (clause 6(b)(ii)) the parties leave it to the Evaluator to make directions as to liability for the costs of the evaluation, including the costs of the Evaluator and the other party’s costs.

## CJC Perspective

1. A wide range of efficient dispute resolution options is available (e.g. mediation, early intervention mediation, expert determination, QC opinion, trial of a preliminary issue etc) which ENE complements. Every dispute is unique and the choice of one or more ADR method/s is highly case specific. What may work in one dispute may be a waste of resources in another. An experienced litigator can advise on the best strategy to facilitate settlement. We routinely assist parties engaged in international trade in exploring ways to resolve their disputes at an early stage to save costs, minimise impact on business operations and preserve their commercial relationships.

<sup>2</sup> <https://lmaa.london/wp-content/uploads/2022/01/LMAA-Early-Neutral-Evaluation-Agreement.pdf>

2. Drawing on the LMAA's pool of experienced arbitrators many of whom accept appointments as evaluators and the support of the LMAA in appointing a suitable Evaluator, ENE can be a useful way of providing parties with a relatively quick early reality check of what the outcome of the dispute could be if it were to be formally determined in legal proceedings and identify strengths and weaknesses/gaps in evidence.
3. However ENE also carries a certain level of risk. ENE may entrench the party in whose favour the evaluation goes in its position early into the dispute whilst compromising the negotiation position of the other and thus complicate settlement. ENE may also not be suitable where the parties are unwilling to cooperate or for complex or fact specific disputes which are better settled in mediation or determined in formal proceedings. We therefore recommend that the parties discuss ENE on a case by case basis with their legal advisors. A careful costs benefit analysis should also be undertaken as the evaluation may be time consuming, is not binding and may not result in settlement.
4. The Evaluator issues its decision on the basis of the parties' input thus proper preparation is key to achieve the best results from ENE. Under the standard ENE Agreement parties only have 14 days to prepare their case summaries and collate supporting information. Parties therefore may wish to seek legal advice on their input to ensure that it adequately sets out their position which is supported by solid arguments both on the law and evidence. While the evaluation is not binding, if the dispute is to be settled ENE's potential to influence the negotiations should not be underestimated.

**For further information, please contact:**



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