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WHAT IS THE VALUE AND IMPACT OF EARLY DISPUTE EVALUATION IN THE UK AND INTERNATIONALLY?

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ABSTRACT: Early neutral evaluation (ENE) is a fairly recent form of alternative dispute resolution procedure used in t he construction industry. In the UK, ENE is usually carried out on an entirely without prejudice basis, however the partie s may agree that any or part of it may be referred to at trial or any subsequent hearing. The early neutral evaluation consists of a preliminary assessment of the issues in dispute for use as a basis for negotiations which may result in a settlement of the dispute. An independent person is appointed by the parties who reviews the case and provides an opinion, in written form and in some detail, with reasons on the merits of the matters in dispute. The opinion is non-binding but provides the parties with what in the opinion of the independent person a formal tribunal may decide whether a court or an arbitrator, if the dispute is not resolved.
However, ENE has yet to take off in the construction industry in the UK. This paper will explain this procedure and explore the use of it in the UK and internationally, considering the benefits and drawbacks of its use. It will consider whether or not it is more effective than other early resolution forms such as mediation and adjudication. It will argue and conclude that it is a very useful cost effective procedure, particularly in the resolution of complex disputes, whether local or international.

Keywords: Dispute Resolution; Early Neutral Evaluation; Mediation; Adjudication; Construction Industry

1. INTRODUCTION

1.1 The international setting

The extent of the use of particular dispute resolution methods, and preferences for it over litigation, concerning construction disputes, varies in different parts of the world. For example, the level of construction related litigation in the US and Europe is not increasing, however dispute resolution methods are, especially the use of adjudication in the UK, and arbitration in mainland Europe and the US. Analysts predict a rise in dispute resolution in 2011 in these countries. [1] It may be argued that the general rise in the use of dispute resolution methods in these countries is because of cash flow constraints among construction companies. Mediation is still in favour in these countries and widely prescribed by courts, though, as I argue in this paper more emphasis needs to be placed on early dispute resolution in contracts and dispute bodies, through the advocacy of early neutral evaluation.

In the Middle East, where large scale complex projects dominate the horizon, recent projects are modest compared to those prior to the financial crisis. There is an accompanying increase in litigation involving international contractors, as ways are sought to claim more time and expenses. The main conflicts concern non-payments, de-scoping of projects and the termination and extension of projects resulting in additional costs. [2] In the Middle East and Asia, arbitration is still the preferred forum with an exponential increase in 2009 in the Middle East. In Dubai this is possibly influenced by the recent founding by the Dubai International Financial Centre (DIFC) of its own arbitration centre in co-operation with the London Court of International Arbitration (LCIA). As in other Gulf countries and similar civil law jurisdictions, in the UAE, arbitration rears is a section in of the Civil Procedure Code, and more readily referred to, as it not as an independent and distinct set of legislation as it is in the UK and Australia for example.[3] Often arbitration is preceded by negotiation, conciliation, expert determination or adjudication. [4]

Although disputes are also increasing in China, in contrast to Singapore, for example, early dispute resolution methods have not taken hold, and arbitration seems the favoured dispute resolution alternative to litigation.[5] By comparison, Australia has seen a reduction in construction litigation in the last few years, and similarly to the UK, an increase in the use of adjudication.[6] As I will argue in this paper, all construction parties could benefit financially from emphasising nipping disputes in the bud at an early stage with the use of early neutral evaluation (ENE).

The parties to a legal dispute are encouraged by the courts to look at alternative ways of resolving their disputes, however, traditional early stage methods of dispute resolution in the construction industry, such as mediation, have not been popular, for various reasons, e.g., suggestion of its use by one party has been taken to indicate a weak position. ENE is a form of dispute resolution which has been used to identify and to resolve

disputes in many areas of law. This paper considers features of the main forms of dispute resolution and compares them with ENE. It discusses the procedure and benefits of the use of ENE as well as possible drawbacks.

2. METHODS OF DISPUTE RESOLUTUION

The likely common methods of dispute resolution methods are, as I have mentioned, mediation, and expert determination, conciliation, and especially adjudication. Arbitration is also a method of dispute resolution, but it approaches a legal process, and can be appealed to if other methods of dispute resolution fail. However, it is possible that the use of ENE may at some point eliminate the need to resort to any of these methods, as shall be explained later in the paper. It therefore may be helpful to briefly explain and compare the main features of these methods of dispute resolution. (The following discussion mainly concerns how these methods are used in the UK, The main features are generally the same as in other countries, but there are some procedural differences in other countries, and some reference is made to this.)

2.1 Mediation

Mediation is probably still the most well known used form of ADR. Mediation is still widely recommended by judges to parties in various countries. However, in the UK, it is used less frequently, because of the advent of adjudication, and now, additionally, the emergence of ENE.

Mediation is a process which involves the parties to the dispute to select a mutually acceptable independent third party, the mediator, who will assist them in negotiating and arriving at an acceptable solution to their conflict or dispute. It is advisable to select a suitably qualified and experienced person to act as mediator. The process of mediation is very informal but strictly confidential. The parties don't usually spend much time in presenting and arguing the various issues in the dispute. The mediator typically will discuss the problem with the parties, both together in open forum, and separately in private sessions. The manner in which the mediation is conducted or the powers and duties of the mediator may be stated in the conditions of contract entered into between the parties. The standard forms of contract are beginning to include clauses under which disputes must be referred to mediation. The JCT 05 suite of contracts in the UK, for example, includes a mediation clause. The parties may decide upon rules in a subsequent agreement, but there are no determinative rules.

However various professional bodies in countries have produced guide rules. In the UK the Centre for Dispute Resolution (CEDR) has produced a set of guide rules for the conduct of mediation which are useful in respect of this dispute resolution method as there is little by way of tradition, statute or case law to fall back on.[7] The process usually takes a day or sometimes two with both parties and mediator together considering the dispute. The mediator is mostly concerned to enable both parties to recognize the weaknesses and the strengths of the other side and is concerned with underlying real interests and needs, rather than rights or liabilities. The mediator does not normally provide a decision or opinion and therefore there is no decision or award to enforce. However, if the parties fail to reach agreement, the mediator may be asked to produce an opinion. When an agreement has been reached, it is essential that the terms of the settlement are committed to writing and signed before the parties leave as memories can be fallible if left a day or two. These signed agreements can be enforced in court.

Courts generally encourage disputing parties to refer matters to mediation at an early stage in the litigation process, but it may be used partway through the process. However, mediation may be a soft option, as it may appear to the other party that the requesting party has requested it because is not in a strong bargaining position. The downside is that a party who has refused to take part in the mediation process may find that if matters are not settled, the court may severely reduce or eliminate the amount of costs which would have been awarded to that party, had the mediation taken place. ENE offers an acceptable alternative to this procedure, as it is not used to mediate but to clarify or resolve issues, and so losing face unlikely to be an issue.

2.2 Conciliation

Conciliation and mediation have similar features and are often used in respect of the same process. Like mediation, conciliation is a "without prejudice" private and confidential and economic (compared to litigation) procedure, and is non-binding in that either of the parties, or the conciliator, may terminate the procedure at any time before a settlement is achieved. But conciliation is often preferred to mediation when the parties need to be able to define in advance the duration of the process, so that they can plan to cut off the process even though there may not be a settlement, whilst agreeing that they have tried the process in good faith. It is probably accurate to state that this process also differs from mediation and is similar to ENE in that the neutral conciliator may express an opinion on the merits of the dispute and will recommend a resolution of the dispute if he cannot persuade the parties to create their own.

If all or any of the parties consider that they will need to, or want to rely on the conciliator's recommendation, it is advisable to specify prior to conciliation in an agreement that the conciliator's recommendation will be binding as a contract. Failing this move, the party may seek to have an agreement to be bound by the recommendation recorded in writing at the same time the conciliation settlement agreement is drawn up. The settlement agreement may also be drawn up as a consent award to make it enforceable by the courts as if it were an arbitration award. However all this may involve considerable expense, an expense which the use of ENE could be used to avoid.

2.3 Expert Determination

The expert determination process involves the appointment of a neutral expert by the parties to determine what the outcome of the dispute should be. The procedure is informal but the expert, if he or she so

desires, may adopt an inquisitorial procedure. Unlike mediation, expert determination is not geared towards facilitating an agreement between the parties. The process is usually simple, fast and relatively inexpensive, but differs from simple forms of dispute resolution because it has the added potential complication of being governed by a contractual arrangement between the parties often involving legal expenses. The parties must comply with all the provisions of their contract, so that if there is a breach of contract, potentially more legal expenses will be incurred. Again, the use of ENE can avoid contractual complications and additional legal expenses.

Because the whole procedure is governed by a contractual arrangement between the parties, the decision of the expert may or may not be binding, depending upon the terms of the contract. Clauses in a contract which require the parties to resolve a dispute by expert determination are valid and binding. Therefore, where a defendant has refused to comply with an expert determination clause in the contract, the claimant may recover damages if it has to issue legal proceedings. Unlike an arbitrator, who is immune from actions being brought by either of the parties for negligence, the law offers no such protection to an expert. The question of such protection should not arise in the case of the use of ENE.

Again, the expert determination process is informal. It does not require pleadings, disclosure or formal hearing with cross-examination or formal oral submissions. The expert determination can also be limited to the material put before the determiner, if the parties agree. This is similar to ENE, but is not necessarily the case with procedures approaching court proceedings, such as arbitration. However, as with other alternative dispute resolution processes discussed above, the determination if agreed upon, should be reduced to writing and signed by all parties as well as by the determiner. If an expert determination clause in the contract provides that the expert should give reasons for his decision(s) then 'adequate' reasons need to be given. The agreement to seek expert determination of a dispute should, as far as possible, ensure that the parties will be bound by the decision, or should specify a time limit and method for challenging the determination by court proceedings. However, the decision of the neutral expert will not be binding, unless the parties have agreed so.

Unlike an arbitrator, an expert cannot make an award or order, and it is possible that the parties may agree only to be bound by his determination for a limited time, or pending some other event or finding. Although there is no right of appeal against the decision of the expert, the court may refuse to enforce a decision if it is shown that the expert was in breach of the rules of natural justice. These rules require a tribunal to inform each party as to the case which it is required to answer and to allow them an opportunity to properly state it case.

2.4 Arbitration

Traditionally arbitration was seen as a quick and inexpensive alternative to litigation. It employs an arbitrator with expertise related to the type of dispute. Arbitration is now associated with litigation due to similar problems- the length of time taken to resolve disputes, its court-like procedures delays and high cost. The process of Arbitration governed by the Arbitration Act 1996, and arbitration is referred to in most standard contracts as a means of dispute resolution, although a choice may be given between it and other forms. There are standard rules for the conduct of arbitration such as the Construction Industry Model Arbitration Rules (CIMAR). Arbitrators may be appointed by the parties who need to agree, but most standard construction contracts provide for an appointing body such as the RIBA or the RICS to make the appointment. In the UK disputes are usually referred to a single arbitrator, however there are three arbitrators on international arbitrations, which is governed by the International Chamber of Commerce Rules. Arbitrators' awards are final and binding. Although they are enforceable in the courts there is a limited right of appeal, and only regarding errors of law.

The Society of Construction Arbitrators UK has produced a 100 Day arbitration procedure in an effort to reduce both the length of the process and the cost. The 100 day period begins on the date the defence is delivered. The arbitrator must establish a suitable timetable to enable an award being issued within the 100 day period. During this period any further pleadings must be delivered together with disclosure of documents, service of witness statements and any oral hearing. The hearing however must not last for longer than 10 working days.[8] However, if the contract is governed by the Housing Grants, Construction and Regeneration Act 1996 (The Construction Act) then if there is a dispute, either parties have a right to seek adjudication. The use of adjudication to resolve domestic disputes in England and Wales has now overtaken that of arbitration in the UK.

In Australia, recent reforms to the International Arbitration Act and the domestic Commercial Arbitration Acts with an International dispute Resolution Centre in Sydney should establish Australia as key centre for international arbitration. This is aided by the States' and Territories' agreement to adopt uniform national laws on domestic arbitration based on the United Nations Commission on International Trade Law (UNCITRAL).[9]

2.5 Adjudication

Adjudication usually addresses disputes in a considerably cheaper and more efficient manner than arbitration, but it is still a relatively minor force in international dispute resolution. Adjudication may be used because the contract says to use it, or even when the contract does not mention it, if parties later agree to use it, or because of a legislative requirement. The parties may agree in their contract that disputes will be referred to adjudication: e.g., in the UK, before the passing of The Construction Act, the standard subcontract conditions used on building contracts Housing Grants Construction and Regeneration Act 1996 included an adjudication clause which provided for the referral to adjudication of disputes relating to set off. If the contract says nothing

about adjudication, the parties may agree to refer a dispute to adjudication. But the most widely used adjudication process arises out of The Construction Act. The contract has to qualify as a construction Act under ss. 104-5 of the Act, which defines 'what is a construction contract for the purposes of the legislation'. Certain contracts have been excluded from the operation of the Act, including domestic contracts and oil and gas contracts. But if the contract falls within the operation of the Act and there is a dispute in legal terms, then either party to a construction contract may refer a dispute at any time to adjudication. The adjudicator may be named in the contract, or be subject to agreement of the parties, or be appointed by one of the adjudication nominating bodies named in the contract such as the RICS, RIBA or C.I.Arb. The Act requires the process to be completed in the form of an adjudicator's decision within 28 days of his or her appointment. The adjudicator may secure an extra 14 days with the approval of the referring party or both parties can agree to extend the period. In practice however, since many complex disputes are now referred to adjudication, rather than the courts, the process may take much longer and this is a concern. Often the adjudicator has to spend much time discerning whether and what the dispute/s is.

The adjudicator's decision is binding until it is finally determined by arbitration, litigation or agreement. Once the adjudicator has made a decision it must be complied with by the referring party/ies. Otherwise, it may be referred to the courts for enforcement. The main reason why courts have refused to enforce an adjudicator's decision is because it is not satisfied that the adjudicator has jurisdiction, for example, The Construction Act requires contracts to be in writing (although this will change when amendments come into force April 2011) and so if it is not in writing or evidenced in writing, there is no contract which the adjudicator can adjudicate on. Adjudicators' decisions are only final and binding once they have been finally determined by arbitration, litigation or agreement Courts will refuse to enforce an adjudicator's decision if it is considered that the adjudicator has breached the rules of natural justice. However since the courts and arbitration frequently uphold the adjudicator's decision it is becoming unusual for parties to incur the further costs of litigation or arbitration.

In contrast, there is a lack of clear construction rules i n the UAE. The UAE Civil Code does provide some guid ance on construction law matters but there are some probl ems with the interpretation of payment provisions and the right to suspend works. For example, Article 247 (the *exc eptio* doctrine) may entitle a contractor to cease performa nce where they have not received payment. Article 879 en titles a contractor to withhold the property where they hav e not received payment. So it may be argued that when ta ken together, articles 247 and 879 of the Civil Code allow a contractor to suspend works for non-payment.[10]

Despite the fact that adjudication in the UK was devised under The Construction Act to reduce delay in the resolution of disputes and hence to enable cash flow, disputes of a complex nature are increasingly being referred to adjudication, with large extensions of time to the standard 28 day process. The adjudicator can find that he needs an extension of time to consider the dispute because the issues have not been clearly identified by the parties. The parties must agree to this or the adjudicator may decide that he cannot determine the dispute, and the costs of the process may increase considerably. This is where ENE may be helpful in reducing costs as well as the duration of the resolution of disputes.

3. EARLY NEUTRAL EVALUATION

3.1 Procedure

Just what one understands by ENE varies. The proced ure differs by degrees of sophistication in various countri es and states which use it. Technology Arbitrators & Med iators in Australia explain that it can incorporate either 'a method used in mediation whereby the parties discuss the strengths and weakness of their case with an independent party (the mediator) who provides some feedback to the parties in relation to those strengths and weaknesses; or it may be a method whereby an independent party is appoin ted as an expert to produce a binding or non-binding opini on on their respective chances of success at trial which is shared with both parties'.[11] In the UK (ENE) is underst ood as a tool whereby a neutral third party, which can be a specialist construction solicitor with relevant expertise o r a judge, or another party with relevant expertise, is appo inted by the parties to discern the relevant facts, and espec ially identify the legal issues, evidence and merits of a dis pute. It is designed to avoid litigation or arbitration; and t o provide a basis for further negotiation, because it gives guidance as to the likely outcome of the matter if it proce eded to adjudication, arbitration or the courts.

The parties need to determine and agree on the terms of our evaluator's role. They may only want the evaluator to determine one issue of their dispute. The parties are al so free to decide whether the early neutral procedure (EN E) will be on a 'without prejudice' basis or whether the pa rties agree to be free to use any of the information reveale d and opinions reached at a trial or other hearing. In the U K the usual way of proceeding is on an entirely 'without p rejudice' basis. CEDR has devised an agreement for parti es which clearly states all the relevant matters for the part ies to agree, and even includes a mediation option.[12]

Similarly to some forms of dispute resolution such as adjudication, an ENE can be carried out entirely on paper or by an oral hearing (with or without evidence). The evaluator then issues an "evaluation", which is a summary of the merits of the case.

In contrast, the law re adjudication has yet to be harm onized in Australia. There is different legislation in each S tate and Territory and each must be considered, though th ere isn't scope in this paper to do so. However, it should b e mentioned that the Law Society of New South Wales, A ustralia has developed a sophisticated Early Neutral Evalu ation (ENE) Program with a set procedure. It is aimed at people with disputes at a pre-trial stage, and evaluators ar e senior legal practitioners who are currently appointed to the Supreme Court Evaluators' Panel. The evaluator orga nizes a preliminary conference for all parties, their solicit

ors and other advisor, each of whom are required to sign t he Law Society Evaluation Agreement, which defines the roles of all participants. The evaluator conducts the evalu ation session, which the parties must attend the evaluation session unless otherwise agreed with the evaluator.

The parties or their representatives need to outline their respective cases on liability and damages and any other remedies sought during the session, and produce any related evidence by which they intend to prove their case.

The evaluator employs mediation tactics in helping the parties to identify the main issues in dispute, as well as the areas of agreement. The evaluator may offer an opinion as to the likely incidence of liability and where appropriate, a range of damages, but he/she has no power to impose a settlement or to determine the pre-trial management of the case. The evaluation is non-binding.

The parties are encouraged to discuss settlement with or without the evaluator's assistance, and to explore ways of narrowing the issues, exchanging information about the case, or otherwise preparing efficiently for trial.

The evaluator reports to the Court that the evaluation has taken place but not the details of the evaluation. There is a cost, but it is broken down so all can see how it is justified. Each party to the dispute must initially pay $660 (includes GST) to the Law Society covering a Law Society administration fee of $110, a preliminary conference of up to one hour, and a three hour evaluation session.[13]

Recently, the Subordinate Courts of Singapore introduced Court Dispute Resolution International (CDRI). It is a process conducted using the ENE approach, however the process is confined to the facts, unlike that in the UK and Australia. It is used at a very early stage of the proceedings, so that the parties can decide how they should proceed to resolve their dispute. It is a settlement conference co-conducted by a Singapore Subordinate Courts Judge and a Judge, from another jurisdiction, such as Australia, Europe, or the United States of America. The Settlement Judge is called upon to comment on the strengths and weaknesses of the cases of both parties. As with all ENE matters, the opinions of the Settlement Judge are not binding. The process is applied to complex civil matters with substantial claims. Solicitors for either party may write in, or attend at the Primary Dispute Resolution Centre to request for a CDRI session. The co-mediation in CDRI is carried out via real-time video conferencing. CDRI (like other Singapore CDR processes) is provided without any cost to the litigating parties. No fees are charged for the use of the CDRI and court facilities, or for the services of the Settlement Judges.[14] This is not the case in the UK, but perhaps it should be, as it would obviously encourage disputants to use ENE, and the early resolution of disputes assists cash flow in the industry. But then court fees may be increased to compensate for a loss of revenue.

3.2 Is ENE accessible?

The parties can choose who they want to be an early neutral evaluator, and they may contact professional bodies for advice, if they do not have someone in mind. They even have the benefit of the accessibility of judges as the courts in have certain countries made this form of dispute resolution accessible and by providing expertise at the highest levels- judges. As discussed, in Singapore judges in subordinate courts began using this procedure as early as 1998. In England and Wales judges in the Technology and Construction Court, are available to use this process even before proceedings have started. Judges are increasingly more involved in using this procedure as a preliminary to possible court hearings. The parties to the dispute may agree that a judge of the Technology and Construction Court (TCC) will provide an evaluation of certain issues or of the full case potentially to be heard. The early resolution of a dispute by experienced judges would considerably reduce the costs of a full hearing. Parties who have issued proceedings but have not started proceedings can apply for an ENE or during the pre-action protocol stage. However, if a claim form has not been issued, there may be the administrative problems of assigning a judge for ENE. Fortunately, the civil procedure rules the gives the court the discretion to carry out an ENE before proceedings are commenced. The parties may apply to the court for an order by consent for an ENE, before proceedings are commenced, in the same way as they may apply for pre-action disclosure. One way of resolving the administrative problem would be for the claimant to issue the claim form at the TCC, but not serve it immediately, and instead make an application for an ENE. There is currently a review of the pre-action protocol in England and Wales, which will hopefully make it clear in a proposal that the court should be able to give directions as to an ENE process during this early pre-action stage.

3.3 Advantages of ENE

ENE is welcome as a resolution tool in construction disputes, because it can be used to identify the legal issues and merits of construction disputes at an early stage of the dispute, either in preparation for adjudication, or even more quickly, to resolve them. It is cheaper, far more efficient and arguably less damaging for relationships between parties, than other more formal procedures of arbitration and court procedures and even its main competitor, adjudication, because it identifies relevant legal issues and evidence at an early stage, prior to debating the issues, and therefore prior to spending on adjudication or legal fees. The parties are given an indication of how their matter is likely to be resolved by more formal dispute resolution procedures. Consequently, it is being increasingly regarded as an effective alternative to litigation, adjudication or arbitration in the area of construction disputes.

The obvious benefit of ENE is that the neutral third party should give an unbiased and a non-binding evaluation of the merits of the matter with minimal cost involved. The aim is for this evaluator to give an opinion of an issue or the whole case in an impartial and confidential manner, so that his/her views are only made known to the parties involved. But this is a feature of other forms of dispute resolution such as the well known

mediation process. However the evaluator may be used simply to discern what the issues are that a court would determine upon. This is not as straight forward as it may seem. Often the parties know they are in disagreement but they do not agree what they are in disagreement about. There may be so much paperwork, e.g., emails, notes of meeting and telephone conversations as well as contract documents to go through before it could be said with any confidence that one side's argument is supported by the evidence. However, ENE can be used to clarify the issues and also to discover whether it is worth the cost of a court hearing.

The classic example of where clarity needs to be achieved is in sorting out which party is entirely or mostly responsible for a problem in complex situations. For example, contractors try to shift the blame for delay simultaneously to owners, design consultants, and one or more subcontractors or suppliers. One of the principal difficulties that arise from attempting to resolve these disputes is the disconnection between the contractual provisions for dispute resolution that exist in the various contracts and those, if any, in subcontracts. Unless the owner and principal contractors' dispute resolution mechanisms contractual provisions are mirrored in contracts with consultants, subcontractors, and suppliers, it will be difficult to compel the latter parties to participate in the formers' chosen dispute resolution mechanism. The situation is made worse by the interests of insurers, whose principal concern is to limit their financial exposure.

The best way to avoid the above problems is to carefully coordinate the various contractual provisions before signing, so that everyone involved in the project is compelled to participate in whatever dispute resolution method is selected. Where there is such potential for conflict it is advisable to build into the contracts provisions for the use of ENE in certain situations, e.g., that ENE will be used in the initial stages of a dispute to resolve who is responsible for a particular problem.

Some parties may consider it more useful to use a judge experienced in the area of law as an evaluator– as judges are making binding decisions on the merits every day in a binding fashion, and not lightly. Consequently, an inexperienced disputant may have more confidence in judge' decisions. A judge's opinion on the merits of the case is likely to provide the parties with a good platform for settlement and hopefully deter those clients, who, regardless of their lawyer's advice, may want their day in court. The parties don't have to abide by an evaluator's decision. It is up to either of the parties to decide to take the matter further to a full court hearing or to adjudication or to arbitration. But since appeals from adjudicators decisions go to courts, or to through the quasi-legal process of arbitration, a decision on the merits by a judge may seem a financial short cut to many. Whether or not judges make better evaluators may be an arguable point, as cases may go on appeal and sometimes the decision is changed, but they have the experience of being the final arbiters of a dispute.

The use of judges as evaluators, is one aspect of ENE that is not usually available to parties using other methods of dispute resolution, and therefore a benefit, as it can involve the services of the highest expertise in the land.

3.4 Disadvantages

Admittedly, it is not always easy to bring the parties to the table to discuss dispute resolution provisions, because construction project participants are often working on the basis of goodwill and optimism, and may therefore be reluctant to accept that problems will arise in the normal course of business. But this is a problem common to all forms of dispute resolution.

The parties using ENE would also be advised to sign an agreement using a CEDR form or other dispute resolution centre form, (depending on which country's jurisdiction the matter is resolved in). These are short forms, which can make clear how potential issues will be dealt with. These may concern the conduct of the ENE, fees and expenses, the jurisdiction to be employed, and the liability of the evaluator, and whether or not reasons will be given for the recommendation. If fees and expenses are involved, the cost of the fees is usually shared between parties. The fees can be paid to the centre before the ENE begins and the centre can be responsible then for payment to the evaluator. The evaluator cannot normally be sued for any omission. This can all be stated on the form.[15] But this to assist the parties, so that the procedure runs smoothly.

The main disadvantage of an ENE is that it is a non-binding process, and so parties can simply ignore an opinion they disagree with- however, they are less likely if, a judge has given an opinion. Negotiating positions may also be polarised, if one party perceives it is right in light of the expert's opinion, and so there is the problem of maintaining goodwill with employers. But this is a perennial problem common to forms of dispute resolution, but to a lesser extent with ENE, as it doesn't have litigious features, as in the case of expert determination, adjudication and arbitration, and it involves less party interaction than mediation.

4. CONCLUSION

As I have discussed above, the use of ENE as a resolution device, locally and internationally, is usually most effectively engaged early on in the dispute, before significant dispute resolution costs have been incurred. It is often the case that where parties are still engaged directly in discussing the dispute, the opinion of a mutually respected neutral party, especially a judge experienced in such matters, can assist the parties by providing the parties with a realistic appraisal of their legal positions, and break deadlocked positional bargaining. This can potentially save much time, stress and expense, and facilitate cash flow, than with other forms of dispute resolution.

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