

Dispute Resolution Process between Commissioners and Providers for the 2014/15 Contracting Process

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1. Introduction

NHS England and the NHS Trust Development Authority (NHS TDA) have agreed a Joint Dispute Resolution Process to cover all commissioners and all non-Foundation Trusts. The process is outlined in this document.

This document has been prepared to support the 2014/15 contracting round only. Should an in-year contractual dispute arise during 2014/15 the formal mechanisms outlined in the NHS Standard Contract for 2014/15 should be used to reach a resolution.

This document outlines the process that NHS England and the NHS TDA will use to resolve disputes between commissioners (including Direct Commissioners) and all non-Foundation Trusts. Disputes with Foundation Trusts will follow the contractual arrangements set out in their existing contracts. Disputes between an NHS Trust and an Area Team as a Direct Commissioner will be undertaken by an independent third-party panel.

The dispute resolution process is a last resort: organisations should do all they can to avoid disputes and, when they occur, to resolve them swiftly. NHS England and NHS TDA formal involvement in a dispute is a sign that the parties have failed in their duty to work together effectively. To reduce the number and scale of these failures, this document also outlines how NHS England and the NHS TDA can support organisations in resolving disputes before they require the formal dispute resolution process.

The process is divided into three sections:

- **Section 2:** deals with the scope of the dispute resolution process. The process applies to material disputes between commissioners under the jurisdiction of NHS England and providers under the jurisdiction of the NHS TDA. It does not apply to disputes involving a Foundation Trust, independent, or third sector provider;
- **Section 3:** describes the assistance NHS England and the NHS TDA can provide before parties enter the formal dispute resolution process and risk the minimum £100,000 charge for arbitration;
- **Section 4:** details the arbitration process for contracting disputes that occur during service-level agreement (SLA) negotiations. All SLAs between commissioners and providers must be agreed by the dates set out as part of the national timetable. Organisations that fail to meet this deadline will be subject to the process set out in this section.

2. When the dispute resolution process applies

The NHS England and NHS TDA dispute resolution process applies to disputes:

- between commissioners and providers which have material financial implications;
- that fall under the jurisdiction of NHS England and the NHS TDA.

2.1 Disputes between commissioners and providers

This dispute resolution process applies to disputes between providers and commissioners. In this context, 'providers' deliver services and raise invoices; 'commissioners' are organisations to whom the service is provided. Acute Trusts, Ambulance Trusts, Care Trusts, Mental Health Trusts, Community Trusts, Clinical Commissioning Groups (CCGs) and NHS England as a Direct Commissioner can commission and/or provide services.

Arbitration disputes should only be between an NHS Trust and the relevant lead Commissioner - associate CCGs are expected to adopt the arrangements made on their behalf by the lead commissioner.

Arbitration disputes between an NHS Trust and an Area Team as a Direct Commissioner will be undertaken by an independent third-party panel and the costs of the external support will be passed onto the parties.

2.2 Disputes that fall under the jurisdiction of NHS England and NHS Trust Development Authority

NHS England and the NHS TDA only has jurisdiction for a subset of the disputes that involve NHS organisations. This document outlines the dispute resolution process, having regard to the principles in the NHS Standard Contract for the relevant period. If one party is a Foundation Trust or private or third sector organisation, NHS England and the NTDA cannot mandate the dispute resolution process but can offer informal mediation and support.

2.2.1. Disputes involving Foundation Trusts or private or third sector providers

Foundation Trusts, as public benefit corporations, and private and third sector providers are independent legal entities. Contracts that NHS organisations sign with these entities are legally binding documents, ultimately enforceable by the courts. In a dispute with one of these organisations, any resolution procedures specified in the contract will apply. This may involve CEDR or any other independent body agreed between the parties.

NHS England and NHS TDA will expect all parties to use the dispute resolution mechanisms within their existing contracts to resolve the dispute. If use of these formal contract mechanisms does not lead to an agreement, it will be followed by independent binding pendulum arbitration.

Foundation Trusts may, however, elect to use the NHS England and NHS TDA Dispute Resolution Process by submitting a joint request to NHS England and NHS TDA. This can constitute binding arbitration or informal mediation, but must be confirmed in writing by both parties before this can commence.

2.3 Disputes which have material financial implications

NHS England and the NHS TDA must use its limited resources where they will have most impact. Consequently, the NHS England and NHS TDA dispute resolution process will only apply to disputes which have material financial implications. For disputes that fall under the thresholds below, it is imperative that commissioners and providers resolve them themselves.

2.3.1 Contracting disputes which have material financial implications

The dispute resolution process applies to contracting disputes if either:

- the value of the disputed amount is over 1% of the annual income of one of the parties; or
- the specific amount in dispute is over £1,000,000.

2.3.2 If the value of the dispute or series of closely related disputes is below these thresholds, this process will only apply if the circumstances are exceptional, as determined by NHS England and NHS TDA.

3. Assistance before the formal dispute resolution process

The formal NHS England and NHS TDA dispute resolution process exists as a last resort: it is not intended to be heavily used. Commissioners and providers should resolve disputes themselves as part of their core duties as outlined in the NHS Standard Contract for 2014/15. The NHS Standard Contract for 2014/15 provides guidance on the Escalated Negotiation, Mediation and Expert Determination processes. To help, NHS England and the NHS TDA offers three services to parties which may be used in parallel:

- advice;
- arrangement of optional mediation;
- disputes.

3.1 Advice

Parties in dispute may seek advice from NHS England and the NHS TDA, either individually or jointly. NHS England and the NHS TDA can help clarify the issues, interpret guidance, share knowledge of how other parties have resolved similar disputes, and make suggestions about the management of the negotiation process.

NHS England and NHS TDA, however, will not devote extensive time to mediating individual disputes, nor will it make decisions on behalf of the disputing parties when offering advice. When it appears that mediation rather than advice is required, NHS England and NHS TDA will offer to arrange the services of a third party, as described in the next section.

CCG's and NHS Trusts are urged to discuss potential disputes with their NHS England Financial Assurance Manager or NHS TDA Business Director respectively, in advance of the process. They will be able to provide advice on technical issues and assist organisations in achieving resolution by ensuring there is a thorough and joint understanding of their positions prior to arbitration.

Area Teams should discuss any potential direct commissioning disputes with the NHS England Regional Directors of Finance and Commissioning.

3.2 Arrangement of optional mediation

The NHS England and NHS TDA dispute resolution process includes mandatory mediation. Mediation, however, is also available on an optional basis outside the formal dispute resolution process.

Parties in dispute may jointly ask NHS England and NHS TDA to arrange mediation, which it will do by hiring a third-party provider of mediation services, and passing the cost onto the parties.

Section 4.3 provides further detail on mediation, including information about the mandatory mediation approach in the formal NHS England and NHS TDA dispute resolution process.

4. Dispute resolution process for contracting disputes

The formal NHS England and NHS TDA dispute resolution process will reflect latest Planning Guidance and timetables for contracting disputes.

The timescale for 2014/15 SLA's is summarised below:

Table 1: Timescale

1 January to 28 February 2014	Negotiation
By 28 February 2014	Organisations to confirm contracts are signed
6 March 2014	Commissioners and Providers that have unsigned contracts to prepare the joint arbitration paperwork (Appendix 1 & 2)
1 March to 13 March 2014	Negotiation and optional mediation for unsigned contracts
By noon on 14 March 2014	Arbitration paperwork to be sent to NHS England /NHS TDA

w/c 24 March 2014	Arbitration process takes place, organisations attend Panel hearings as required
w/c 31 March 2014	Notification of panel decision and contract signed

It should be noted that the NHS England and NHS TDA will be running a contract reconciliation process in parallel to this process. The contract reconciliation process will reconcile provider and commissioner contract information collected on the 5 March 2014 by commissioner/provider by point of delivery.

4.1 Entering the contracting dispute resolution process for 2013/14 unsigned contracts

If a commissioner and provider have not satisfactorily concluded their contracting negotiations for 2013/14 they will enter the dispute resolution process. Parties should try hard to resolve disputes themselves. This process should certainly include negotiations at Chief Executive and Chief Officer level and would likely involve using the services described in section 3.

4.2 Entering the contracting dispute resolution process for 2014/15 unsigned contracts

If a commissioner and provider have not satisfactorily concluded their 2014/15 contracting negotiations by 28 February 2014, they will automatically enter the dispute resolution process. Parties should try hard to resolve disputes themselves and this process should certainly include negotiations at Chief Executive and Chief Officer level and would likely involve using the services described in section 3.

4.2.1. Identification of satisfactorily concluded negotiations

A negotiation has been satisfactorily concluded when:

- a 2014/15 SLA or contract (not just a Heads of Agreement) has been signed by 28 February 2014 and where there is a host commissioner, an activity schedule is signed by each commissioner and the contract includes CQUIN schemes;
- the SLA or contract is comprehensive, sustainable, and set out in detail, including being supported by any appropriate schedules;
- all current year (2013/14) disputes between the parties have been resolved.

Where such an agreement has not been secured by 28 February 2014, and the criteria in section 2 are met, those parties enter the mediation phase of the dispute resolution process.

All providers and commissioners that have unsigned contracts at the 28 February 2014 should now complete appendix 1 and 2 of the dispute resolution process with immediate effect. This paperwork will facilitate a common understanding of the outstanding issues, support the mediation process and help avoid going into formal arbitration. If the situation remains the same at the 13 March 2014, the parties enter the arbitration phase.

4.2.2. Informing the Board / Clinical Commissioning Group Governing Body / NHS England Executive Team

Organisations that enter the dispute resolution process must inform their NHS Trust Board / CCG Governing Body or the NHS England Executive team for direct commissioning disputes.

For parties entering mediation, it is recommended that their Board / governing body / NHS England executive team report includes a clear summary of the dispute and makes clear the total potential charge that may be levied as result of failing to agree a contract by the 13 March 2014 and therefore entering arbitration.

For parties entering arbitration, it is recommended that their NHS Trust Board / CCG Governing Body / NHS England Executive team report includes completed versions of the templates in Appendix 1 and 2 and reiterates the total potential charge that may be levied.

4.3 Mediation of contracting disputes

Mediation can be very valuable in helping parties resolve disputes. NHS England and NHS TDA will provide support to organisations in resolving disputes and may invite third-party professionals to mediate. Any costs will be passed on to the relevant parties.

4.3.1. Principles of mediation

The core principle of mediation is that the mediator does not impose solutions; rather, ownership for solutions remains with the parties themselves.

Mediators can have impact at three levels. They can:

- **restructure the process** – The mediator may push for changes to the negotiating process. For example, the mediator may attempt to de-couple issues, pushing the parties to ‘bank’ what can be settled rather than adopting a ‘nothing is agreed until everything is agreed’ attitude;
- **facilitate the discussion** – As well as redesigning the process, the mediator may also join the conversation. For example, a mediator can calm tensions by recommending speakers rephrase statements;

- **engage on the content** – The mediator can go further than restructuring the process and guiding the discussion: they can engage on issues of content. For example, the mediator can propose (non - technical) solutions that draw on elements of each party's offer or generate a creative solution by looking at the issue in a new way.

4.3.2. Process of mediation

CCGs and NHS Trusts entering mediation must submit the templates shown at Appendix 1 and 2 by noon on the 14 March 2014 jointly to the relevant regional NHS England contact and NHS TDA Portfolio Director.

NHS England (as a direct commissioner) and NHS Trusts entering mediation must submit the templates shown at Appendix 1 and 2 by noon on the 14 March 2014 jointly to their NHS England Regional Director of Finance and the relevant NHS TDA Portfolio Director.

This joint paperwork will describe the nature and value of the dispute, and the reason(s) for it. The mediators may require the parties to submit additional documentation and respond to one another's submissions.

Mediators do not impose a resolution and the parties are free to accept or reject proposed agreements. They must, however, follow the process outlined by the mediators.

4.4 Arbitration of contracting disputes

If, despite mediation, the parties still failed to agree by the 13 March 2014, they automatically enter the arbitration phase of the NHS England and NHS TDA dispute resolution process.

4.4.1. Charges for entering arbitration

A total charge of £100,000 will usually be levied on the parties in arbitration. A higher penalty (minimum charge of £250,000) will jointly apply if arbitration is subsequently required after either party has confirmed that arbitration will not be necessary. However, NHS England and NHS TDA may reduce or eliminate the charge if, for example, the arbitration stems from a good faith disagreement about a piece of new and ambiguous guidance that affects many other commissioners and providers. NHS England and NHS TDA may delegate this decision to the Arbitration Panel.

In addition, the Arbitration Panel may impose an additional levy of up to £20,000 per issue. This is intended to reduce the volume of disputes that result in arbitration and will apply if, in the view of the Panel:

- the parties have brought an unreasonable number of issues to arbitration, and this indicates that the process is being used in lieu of a robust negotiation process; or
- the Panel believes that the issue has not been discussed and that resolution could have been achieved without recourse to arbitration.

Parties who submit documents that are late or of poor quality may also be fined up to 50% of the arbitration charge, at the discretion of the Panel and with the agreement of the NHS England and NHS TDA.

Once the total charge is set, the Arbitration Panel will allocate it between the parties as part of its decision. The charge may be split equally between the parties, but the Panel may allocate it disproportionately or even totally to one party to reflect its view of which party is at fault.

4.4.2. Method of arbitration

NHS England and the NHS TDA will jointly review the submissions and determine the most appropriate method of arbitration. NHS England and NHS TDA will jointly agree whether to resolve the arbitration case themselves or refer the issue to an Arbitration Panel. This decision will be binding.

Where NHS England and NHS TDA decide that they will resolve the issue without reference to the Arbitration Panel the method and style of any review, and investigation of the issues will be solely at the discretion of NHS England and NHS TDA. It is expected that NHS England Area Financial Assurance Managers / NHS TDA Business Directors will lead the first stage of work investigating the issues. Meetings may or may not be convened to assist in this arbitration process

If referred to the Arbitration Panel they will review the documents described below, asking for further clarification if necessary.

Should the dispute be between an NHS Trust and an Area Team as a Direct Commissioner the arbitration will be undertaken by an independent third-party panel. The panel will be independent but have access to direct commissioning expertise as required. The provider and commissioner will be required to pick up the full cost of the panel.

Arbitration will generally be conducted using the 'pendulum principle' for each issue (also known as 'final-offer' adjudication). This means that the Arbitration Panel can only find wholly in favour of the commissioner or the provider; they cannot propose a different solution or split the difference. If two parties have multiple areas of dispute, these will be considered separately – subject to the qualification in part (b) of this section.

(a) Rationale for the pendulum principle

Application of the pendulum principle is designed to reduce the need for arbitration in the first place. The party whose proposal will be accepted is the one whose stance is closest to what the neutral Arbitration Panel believes is reasonable.

The Panel will apply the pendulum principle to the most recent proposal made by each side. To ensure that each party is aware of the other's offer, it must form part of the joint understanding of the disputed value. Entry into arbitration should be avoided and will cost the parties at least £100,000.

(b) Application of the pendulum principle

Where there are multiple areas of dispute between parties, these will be treated separately and the pendulum principle applied to each issue. An issue may consist of a number of matters grouped together due to a common point of principle; however they must be demonstrably linked, not merely to lift the issue over the dispute threshold.

4.4.3. Factors the Arbitration Panel will consider

In deciding the case, the Arbitration Panel will consider the relative reasonableness of the two final-offer proposals. In so doing, they should remain consistent with precedents set by previous arbitrations (unless these have been superseded by DH or NHS England / NHS TDA guidance). This should diminish the number of arbitrations over time: once a precedent has been set, organisations with similar disputes will want to resolve them in line with the precedent rather than go to arbitration where they will almost certainly achieve the same outcome, but at a cost of at least £100,000.

As well as the merits of the issues, the Arbitration Panel can also consider the behaviour of the parties and so has scope to penalise uncooperative negotiating behaviour if appropriate. This risk gives the parties an incentive to negotiate and approach mediation in good faith, thereby decreasing the chance that arbitration will be needed. Equally, the Panel can penalise a party that does not submit its arbitration documentation on time or attend arbitration hearings.

While behaviour can be considered, the Panel cannot consider the financial position of the two organisations. The role of arbitration is not to manage health economy-wide financial balance.

4.4.4. The Arbitration Panel

Each arbitration between a CCG and an NHS Trust will be conducted by a Panel appointed by NHS England and the NHS TDA. The Panel will have a minimum of three members and NHS England and the NHS TDA will jointly designate the Chair of the Panel.

Should the arbitration be between an NHS Trust and an Area Team regarding a direct commissioning dispute the Panel will be undertaken by an independent third-party panel. The independent panel will be jointly commissioned by the NHS TDA and NHS England. Depending on the volume of direct commissioning disputes the same panel will be used for all related disputes. The provider and commissioner will be required to pick up the full cost of the panel

In addition the Panel(s) may call on expert advice at its discretion. None of the Panel will have strong prior relationships with the organisations or key staff involved in the arbitration.

4.4.5. Information to be provided to the Arbitration Panel

The Arbitration Panel will require and accept only a limited amount of information. This is to reduce the burden on the Panel and to put the nature of the dispute into sharper relief. The parties must submit **joint** papers as follows:

- **questionnaire response** this is designed to ensure the Panel has the core information from each party. The questionnaire can be found within Appendix 1 of this guidance. Contact details (including phone and email) must be supplied in order that the Panel may seek points of clarification;
- **summary of dispute** this should be completed in the format shown at Appendix 2 of this guidance. The summary should be agreed by both Chief Executives / Chief Officers / Area Directors, and should describe what issues the parties disagree on and the reasons they disagree. Key questions the Arbitration Panel should answer should be clearly described including the financial impact of the dispute;
- **latest draft agreement** this should be the latest version of the agreement that the parties had been negotiating.

When each party submits any documentation to NHS England and NHS TDA, it must also send copies to the other party. This is to ensure that the process is transparent and open.

All documents must be submitted by noon on the 14 March 2014 in line with the timescales outlined at section 4. Any parties that have not progressed contracting discussions by 6 March 2014 should prepare the arbitration documentation and agree their joint papers to ensure the deadline for submission is achieved.

After the Arbitration Panel has considered these documents, they may choose to meet with both the parties together. If they do, the delegation from each party must include the Chief Executive / Chief Officer / Regional Director. At this session, each party may present for a maximum of 15 minutes. The adjudicators will then ask questions to the parties, for a maximum of 45 minutes. No more than two delegates from each party may attend the Panel hearing.

The Arbitration Panel may also choose to speak to the mediators (where appropriate) to understand what processes were followed and to understand how the parties conducted themselves.

4.4.6. Communication of the arbitration decision

Once the Arbitration Panel decide, they will send both parties a letter, informing them of the outcome. Decisions will be made in line with the timescales indicated above and organisations must implement the decision immediately. They will be final and not subject to appeal.

Questionnaire for parties entering arbitration

Completion Notes:

These notes are intended as a guide for the completion of the template. Please read these before completing the blank templates attached.

Name of commissioner	Name of provider
Key contact at commissioner (name and full contact details)	Key contact at provider (name and full contact details)
<i>This should be the person to whom all queries and requests for further information should be addressed</i>	<i>This should be the person to whom all queries and requests for further information should be addressed</i>
What are the issues under dispute?	
<i>Provide an overview of the key issues. Appendix 2 should show details of (a) principles at stake, (b) specific invoices or SLA/contract clauses in dispute, (c) the value of the dispute, and (d) if relevant, activity levels).</i>	
How have you attempted to resolve this dispute and why have you been unable to?	
<i>Must demonstrate that a concerted effort has been made and that negotiations have been escalated to Chief Executive / Chief Officer level)</i>	
What is the total value of the dispute	
<i>This should be the jointly agreed position and should be consistent with the value shown at App. 2</i>	
<i>Trust Proposal</i>	<i>£X</i>
<i>Issues under dispute</i>	<i>£X</i>
<i>Commissioner Proposal</i>	<i>£X</i>
Is there anything else the Panel needs to know to make an informed decision?	
Signature of Chief Executives	
Name of Chief Executive Email:	Name of Chief Executive Email:
Date	

Questionnaire for parties entering arbitration

Name of commissioner	Name of provider
Key contact at commissioner	Key contact at provider
Name:	Name:
Email:	Email:
Tel:	Tel:
What are the issues under dispute?	
How have you attempted to resolve this dispute and why have you been unable to? Have you used the mechanism outlined in the NHS Standard Contract?	
What is the total value of the dispute?	
Is there anything else the Panel needs to know to make an informed decision?	
Signature of Chief Executive / Chief Officer	
Name:	Name:
Email:	Email:
Date	

Details of Arbitration Summary of Dispute

Area	
<i>Issue 1 – heading</i> <i>Please complete a new sheet for each dispute.</i> <i>The summary for each dispute should not be more than 2 sides of A4.</i>	
Issue	
<i>Provide brief description of issue under dispute</i>	
Value disputed	
<i>Jointly agreed value for each issue (£s)</i>	
Guidance	
<i>Please specify any relevant guidance that you have used in making your cases</i>	
View from XX Trust	View from XX Commissioner/XX
<i>Please provide a concise description of the dispute</i>	<i>Please provide a concise description of the dispute</i>

Details of Arbitration Summary of Dispute

Area	
Issue	
Value disputed	
Guidance	
View from XXXTrust	View from XXXCommissioner/XXX