



# **Dispute Resolution Process for the 2016/17 Contracting Process**

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# **NHS England Publications Gateway Reference: 04918**

## **1. Introduction**

### **1.1. Scope**

1.1.1. NHS England, the NHS Trust Development Authority (NHS TDA) and Monitor have agreed a joint Dispute Resolution Process, the scope of which is detailed below.

1.1.2. This document has been prepared to support the 2016/17 contracting round only. Where a multi-year contract is in place and the dispute relates to the agreement of the Variation to update its terms for 2016/17 then this process will not apply, and the parties must follow the processes set out in their contract to resolve their failure to agree terms for the forthcoming year. Should an in-year contractual dispute arise, the processes set out in the NHS Standard Contract should be used to reach a resolution.

### **1.2. Expectations**

1.2.1. It is vital that all commissioners and providers have in place between them mutually-agreed contracts prior to the start of the financial year to which they relate. Without signed contracts in place individual commissioners and providers are unable to plan accurately for the year ahead, while the drawn-out process of negotiation is likely to distract detrimentally from delivery.

1.2.2. NHS England, the NHS TDA and Monitor have very clear expectations for the 2016/17 contracting round. All parties must properly engage with one another and ensure that disputes are resolved in time to meet the contract signature deadline of 31<sup>st</sup> March 2016.

1.2.3. Formal arbitration processes are a last resort: organisations should do all they can to avoid disputes and, when they occur, to resolve them swiftly and independently. Resorting to arbitration 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 organisations can be supported in resolving disputes before they require a last resort dispute resolution process.

1.2.4. Given Monitor's regulatory responsibilities, Monitor will not sit on any Arbitration Panel or be directly involved in resolving any disputes. However, NHS England and the NHS TDA will consult with Monitor in cases involving an NHS foundation trust (FT) or independent provider, for example when deciding on the constitution of an Arbitration Panel. This should be borne in mind when reading this guidance as it applies to cases involving FTs or independent providers.

1.2.5. To assist organisations in understanding the likely outcome of any arbitration cases NHS England, NHS TDA and Monitor have produced a set of contract dispute resolution principles. These principles are included in Appendix 3, and organisations are encouraged to assess their contracting proposals and potential arbitration cases against the principles described.

### 1.3. Layout of this document

1.3.1. This guidance is divided into four sections:

- **Section 2:** deals with the scope of the dispute resolution process;
- **Section 3:** describes the different stages of the overall dispute resolution process;
- **Section 4:** describes the advice and assistance NHS England, NHS TDA and Monitor can provide in advance of parties having to enter the final arbitration stage of the dispute resolution process; and
- **Section 5:** details the last-resort arbitration process for contracting disputes that remain unresolved following contract negotiations. All contracts between commissioners and providers should be signed by 31<sup>st</sup> March.

## **2. Operation of the dispute resolution process**

### **2.1. When the dispute resolution process applies**

2.1.1. The dispute resolution process applies to disputes arising in relation to agreement of terms for a new contract, as part of the 2016/17 planning round:

- between commissioners and providers, and which typically have material financial implications;
- where the scope of the dispute relates to contractual payment, services and obligations; and
- where another means of resolution is not otherwise stated in national guidance.

2.1.2. The advice and mediation stages of the dispute resolution process are advisory for all organisations, and are designed to support the local resolution of disputes without recourse to formal last-resort proceedings. The arbitration stage is mandatory for NHS commissioners and NHS trusts (where contracts remained unsigned after the national deadline date), and is expected to be followed equally by other organisations (see 2.2 for disputes involving FTs and independent providers).

### **2.2. Application of the dispute resolution process**

2.2.1. This dispute resolution process relates to disputes between providers and commissioners. In this context, 'providers' deliver services and raise invoices; 'commissioners' are organisations that procure services on behalf of their populations. Provider organisations may include Acute Trusts, Ambulance Trusts, Care Trusts, Mental Health Trusts, Community Trusts and independent or third sector providers. Commissioner organisations include Clinical Commissioning Groups (CCGs) and NHS England as a Direct Commissioner.

2.2.2. Providers may hold multiple contracts with different commissioners. For the purposes of this dispute resolution process, where there is a single contract involving multiple commissioners, the dispute resolution process would be applied once to the contract as a whole, not separately for each commissioner party to the contract. The financial thresholds for entering the process will be applied to the aggregate value of each dispute (or grouping of similar disputes) across all commissioners. For the purposes of the dispute resolution process, therefore, the Co-ordinating Commissioner will represent all of the commissioners who intend to be a party to the contract.

2.2.3. As set out in their collaborative commissioning agreements, Co-ordinating Commissioners must ensure that they take account of the requirements of other commissioners in negotiating contracts with providers and that issues of importance to these other commissioners are addressed through the mediation and arbitration processes where necessary. In-year disputes should be managed in line with the dispute resolution process set out in the relevant signed contract. Disputes relating to failure to agree a contract for a new financial year should be referred into this dispute resolution process.

2.2.4. Where mediation and/or ongoing negotiation fails, and there is still no signed contract in place by the national deadline for contract signature of 31<sup>st</sup> March, the parties should begin considering whether arbitration is a likely outcome, and should begin drafting the necessary papers.

### **2.3. Specifics for disputes involving NHS trusts**

2.3.1. Commissioners and NHS trusts should work to ensure that contracts are signed no later than the national deadline for contract signature, 31<sup>st</sup> March. Arbitration is mandatory for NHS commissioners and NHS trusts whose contracts remain unsigned by the final date for avoiding arbitration, 25<sup>th</sup> April.

2.3.2. On or before the final date for avoiding arbitration, 25<sup>th</sup> April, the parties must jointly submit either:

- a copy of the signature page to evidence agreement, together with a list of any minor, non-material unresolved items which the parties accept can be finalised after contract signature (section 2.7 describes the key elements of an agreed contract; note that contracts should not be signed with material issues outstanding and that such issues must not be 'parked' as outstanding 'long stop' items); or
- arbitration papers (completed and submitted jointly with the Co-ordinating Commissioner).

### **2.4. Specifics for disputes involving NHS foundation trusts (FTs)**

2.4.1. FTs, as public benefit corporations, are independent legal entities. Contracts signed by these organisations are legally binding documents, ultimately enforceable by the courts.

2.4.2. As already stated, arbitration is mandatory for NHS commissioners and NHS trusts whose contracts remain unsigned at this national deadline date. Although arbitration is not mandatory for FTs in a statutory sense, Monitor expects well-governed FTs to take all reasonable steps to achieve signed contracts in a timely manner. Therefore in all cases where FTs fail to achieve signed contracts with their commissioners in accordance with the national timetable, Monitor expects those FTs to voluntarily enter arbitration.

2.4.3. On the final date for avoiding arbitration, 25<sup>th</sup> April, the parties must jointly submit either:

- a copy of the signature page to evidence agreement (see section 2.7 for what constitutes an agreed contract), together with a list of any minor non-material unresolved items which the parties accept can be finalised after contract signature; or
- arbitration papers (completed and submitted jointly with the Co-ordinating Commissioner); or
- a letter explaining why neither of the above applies.

2.4.4. This letter (in place of either a signed contract or arbitration papers) should contain a short account of the key issues outstanding, the steps taken to resolve the issues and any dispute resolution processes taking place locally to conclude the position.

2.4.5. Monitor and NHS England will review this letter and discuss the issues. Between us we will endeavour to understand the issues and consider where the balance lies between the parties in failing to resolve the dispute. Where NHS England has reason to believe that the commissioner has acted unreasonably, it will immediately consider whether any breach of duties may have occurred, which would be covered by the CCG assurance framework, possibly leading to an intervention or direction. Where Monitor has reason to believe that the FT has acted unreasonably, it will immediately consider whether an investigation, possibly leading to regulatory action, is appropriate.

## **2.5. Disputes involving independent or third sector providers**

2.5.1. Where the provider is an independent or third sector provider, the parties may by mutual agreement choose to enter the arbitration process.

## **2.6. Disputes which have material financial implications**

2.6.1. The informal stages of the dispute resolution process do not carry set limits; however the cost of entering mediation should be borne in mind by parties before initiating this element of the process. The arbitration process will be available only for disputes which have material financial implications. For disputes that fall below the thresholds set, it is imperative that commissioners and providers resolve them outside of this process.

2.6.2. The arbitration process is applicable to each contracting dispute if the total full-year value of all the disputed amounts, in aggregate across all commissioners, is either:

- over 1% of the expected annual contract value for the contract; or
- over £1,000,000 if higher

2.6.3. In terms of the presentation of issues by the parties in dispute, 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 aggregated to lift the issue over the dispute threshold.

2.6.4. Where disputes fall below this materiality threshold, it is essential that the parties resolve these themselves at local level. This process will only apply to lower-value disputes if the circumstances are exceptional, as determined by NHS England, NHS TDA and Monitor.

## **2.7. What is a signed contract?**

2.7.1. For the avoidance of doubt, completion of Heads of Agreement or Heads of Terms, or equivalent documentation, does not constitute satisfactory agreement. On or before the final date for avoiding arbitration, 25<sup>th</sup> April, all parties will be required to evidence agreement by providing a scanned copy of the signature page, together with a list of minor non-material unresolved items which the parties accept can be finalised after contract signature.

2.7.2. Satisfactory agreement of contracts constitutes:

- signature of the contract by the Co-ordinating Commissioner and the provider;
- confirmation by the Co-ordinating Commissioner that other commissioners party to the contract are content with the outcome of negotiations, with a process under way for them to sign the contract by the national deadline; and
- inclusion within the signed contract of all key schedules, including Indicative Activity Plan (2B), Local Prices (3A), Marginal Rate Emergency Rule (3D), Emergency Re-admissions Threshold (3E), Expected Annual Contract Value (3F), Local Quality Requirements (4C), CQUIN (4D) and Reporting Requirements (6A). Where applicable, performance improvement trajectories agreed as a condition of access to the Sustainability and Transformation Fund must also be included as Service Development and Improvement Plans within the local contract (Schedule 4D).

### 3. Outline of the dispute resolution process

- 3.1.1. This dispute resolution process operates in two stages, consistent with the revised national timetable.
- 3.1.2. The first stage involves **advice and/or mediation**, which must be undertaken locally. CCG commissioners and providers should notify NHS England and the NHS TDA/Monitor by 23<sup>rd</sup> March that they wish to enter mediation. NHS England and the NHS TDA/Monitor will agree with the parties if mediation will be undertaken via Regional leads or through an external mediator. Mediation required for Direct Commissioning and for cases involving FTs will always be undertaken by an external mediator. The mediation stage is described in section 4 below, which also details other ways in which NHS England, the NHS TDA and Monitor can assist the parties in resolving disagreements at an early point.
- 3.1.3. The second stage involves last-resort **formal arbitration**, which will be organised by NHS England, NHS TDA and Monitor. This is described in section 5 below. In each case, an Arbitration Panel will be established. To ensure no conflict of interest from the mediation stage, the panel for disputes involving CCGs and NHS trusts will consist of senior staff within NHS England and the NHS TDA from different Regional teams to those that undertook any mediation. In other cases, including all disputes involving NHSE direct commissioning and FTs, an independent third-party Panel will be established.
- 3.1.4. Details on how the different stages of the process are triggered are set out in sections 4 and 5 below.
- 3.1.5. The overall timeline for the process will be as follows:

Milestone	Description	Date
Milestone 1	National contract stocktake: <ul style="list-style-type: none"> <li>Monitor, NHS TDA and NHS England to work with health communities to understand progress and status of contracts.</li> </ul>	23 March 2016
Milestone 2	Post national contract stocktake, local decision whether or not to enter mediation, and communication of this: <ul style="list-style-type: none"> <li>to Monitor, NHS England and NHS TDA;</li> <li>to Boards / Governing Bodies as appropriate, as per section 4.</li> </ul>	by close of business, Wednesday, 23 March 2016
Milestone 3	National deadline for signing of contracts	31 March 2016
Milestone 4	Final date for avoiding arbitration and submission of appropriate documentation (see sections 2.3 and 2.4)	Monday 25 April 2016

<b>Milestone</b>	<b>Description</b>	<b>Date</b>
Milestone 5	Arbitration Panel and/or hearing.	Between 26 April and 10 May 2016
Milestone 6	Written Arbitration findings issued to both parties.	by two working days after Panel date
Milestone 7	Contract and schedule revisions reflecting arbitration findings completed and signed by both parties.	by 13 May 2015

3.1.6. It is essential that commissioners and NHS providers inform their Boards or Governing Bodies (or the Executive Team in the case of NHS England Direct Commissioning contracts) when they are entering the mediation stage of the dispute resolution process. They must report clearly to Boards / Governing Bodies, setting out the issues in dispute and the total potential charge that may be levied (see section 5 below) if mediation is unsuccessful and the formal arbitration process is triggered (or expected for FTs). We anticipate the Boards and Governing Bodies will wish to ensure that every possible step has been taken to ensure timely contract signature.

## **4. Advice and mediation**

### **4.1. Overview**

4.1.1. The NHS England, NHS TDA and Monitor dispute resolution process exists as a last resort: it is not intended to be heavily used. Commissioners and providers should make every effort locally to reach agreement on their contracts for 2016/17. To help, NHS England, the NHS TDA and Monitor offer two services to parties which may be used in any combination:

- Advice on technical or other aspects of disputes; and
- Providing or arranging mediation.

### **4.2. Advice**

4.2.1. Where there is a risk of dispute, the parties may seek advice from NHS England, NHS TDA and Monitor, either individually or jointly. NHS England, NHS TDA and Monitor can help clarify the issues, interpret guidance, share knowledge of how other parties have resolved similar disputes, and in appropriate cases make suggestions about the management of the negotiation process.

4.2.2. Advice on technical issues is available as follows:

- on the 2016/17 NHS Standard Contract and CQUIN through the Contract Technical Guidance and CQUIN guidance (both available at <https://www.england.nhs.uk/nhs-standard-contract/16-17/> and through the email helpdesk [nhscontractshelp@nhs.net](mailto:nhscontractshelp@nhs.net)); and
- on the National Tariff Payment System for 2016/17 through the guidance available at the email helpdesk ([pricing@monitor.gov.uk](mailto:pricing@monitor.gov.uk)).

4.2.3. NHS England, NHS TDA and Monitor, however, will not make decisions on behalf of the disputing parties when offering advice. When it appears that mediation rather than advice is required, NHS England, NHS TDA and Monitor will consult with the parties and consider offering mediation themselves - or they may offer to arrange the services of a third party, as described in the next section.

4.2.4. CCGs 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.

4.2.5. Direct Commissioning teams should discuss any potential disputes with the NHS England Regional Directors of Finance and Commissioning.

### **4.3. Arrangement of mediation**

4.3.1. Where, even after escalation to Chief Executive / Chief Officer / Area Director level, the parties in dispute are not confident that 2016/17 contracts will be

agreed by 31<sup>st</sup> March 2015, they should initiate a process of mediation. In the case of disputes involving NHS FTs and independent providers, it is for the parties to consider whether external mediation is appropriate.

4.3.2. Local decisions on whether mediation is required should be made by no later than 23<sup>rd</sup> March 2016. After agreeing the status of the contract with the provider, the Co-ordinating commissioner must email NHS England, NHS TDA and Monitor, using the contact details set out in Appendix 4, and copying the provider, to confirm whether the parties are:

- entering local mediation, and therefore wish to agree if this will be offered by NHS England / NHS TDA or if an external mediator will be appointed (all FT cases); or
- confident of signing their contract by the national deadline 31<sup>st</sup> March 2016 and therefore not entering mediation.

4.3.3. Again, for the avoidance of doubt, completion of Heads of Agreement or Heads of Terms, or equivalent documentation, does not constitute satisfactory agreement. At the final date for avoiding arbitration of 25<sup>th</sup> April 2016, all parties will be required to evidence agreement by providing a scanned copy of the signature page, together with a list of minor non-material unresolved items which the parties accept can be finalised after contract signature.

4.3.4. The agreed mediators will require briefing as to the nature of the issues on which the parties have been unable to agree. At the stage of entering mediation, therefore, the parties must complete Appendix 1 and 2 of the dispute resolution process on a provisional basis and provide these to the mediator. This paperwork will facilitate a common understanding of the outstanding issues, support the mediation process and help the dispute avoid going to arbitration.

4.3.5. To assist the mediator Appendix 1 must be a joint statement from the two parties, with Appendix 2 being completed jointly with each party setting out the justification for the position it has taken on each disputed issue. All paperwork must be shared between the parties to ensure transparency of opinion on the disputed items. Any paperwork submitted that has not been completed on the terms outlined above will be returned to the parties for revision/correction.

#### **4.4. Principles of mediation**

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

4.4.2. 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.

## **5. Arbitration**

### **5.1. Overview**

- 5.1.1. It is hoped that following a process of local negotiations, advice and mediation, all contracts should be signed.
- 5.1.2. However where, a satisfactory agreement of contracts (refer section 2.7) has not been achieved by 25<sup>th</sup> April 2016 the parties will be expected to enter arbitration.
- 5.1.3. Entering the arbitration process will require the parties to submit joint documentation concerning the dispute to NHS England and NHS TDA/Monitor by noon on 25<sup>th</sup> April 2016.
- 5.1.4. Prior to submission of the paperwork both commissioner and provider must ensure that the paperwork correctly reflects the position of both parties. Draft paperwork must be shared properly between the parties prior to submission to present a consistent case. Failure to do so will result in the paperwork being returned to the parties for revision/correction. Where contracts have not been agreed by 15th April, parties are advised to begin drafting arbitration papers straight away, to allow for timely joint-submission.

### **5.2. The Arbitration Panel**

- 5.2.1. An Arbitration Panel will be established for each dispute.
- 5.2.2. Where the dispute is between a CCG and an NHS Trust, NHS England and NHS TDA will jointly review the submissions and determine the most appropriate method of arbitration. Where no conflict of interest exists, they may decide to establish an internal Arbitration Panel, consisting of senior staff from the two organisations, or otherwise to refer the issue to an independent, third party Arbitration Panel.
- 5.2.3. Should the dispute involve either a Direct Commissioner, an FT or an independent provider, the arbitration will always be undertaken by an independent third-party Arbitration Panel.
- 5.2.4. Members of the independent panel will have experience of the NHS at executive director or non-executive director level. A register of interests will be maintained for all panel members, to provide assurance that there is no strong prior or on-going relationship with any of the organisations or key staff from the parties coming forward for arbitration.
- 5.2.5. The panel will be jointly commissioned by NHS England, NHS TDA and Monitor, and both organisations will be required to support the appointment of panel members. Depending on the volume of direct commissioning disputes, the same panel may be used for all related disputes.
- 5.2.6. Arbitration panels are able to call on national expert advice at their discretion. For example, the Standard Contract team can provide advice on contracting issues arising from the NHS Standard Contract.

### **5.3. Method of arbitration**

5.3.1. Arbitration will 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.

#### ***Rationale for the pendulum principle***

5.3.2. Application of the pendulum principle is designed to reduce the need for arbitration in the first place. The party whose proposal will be accepted will be the one whose stance is consistent with guidance or, in matters where guidance does not determine the adjudication, is closest to what the Arbitration Panel believes is reasonable.

5.3.3. 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.

#### ***Application of the pendulum principle***

5.3.4. Where there are multiple areas of dispute between parties, these will normally be treated separately by the Arbitration Panel and the pendulum principle applied to each issue. However, the Panel may at its discretion decide to adjudicate once across a number of issues it perceives to be linked.

### **5.4. Factors the Arbitration Panel will consider**

5.4.1. In deciding the case, the Arbitration Panel will consider the relative reasonableness of the two final-offer proposals. In so doing, they will act in accordance with the overarching principles attached at Appendix 3, which include principles established as a result of previous arbitrations.

5.4.2. The Panel cannot consider the financial position of the two organisations. The role of arbitration is not to manage health economy-wide financial balance.

5.4.3. Commissioners, NHS Trusts and FTs will be required to submit the contract tracker throughout the planning process (see 2016/17 planning guidance). Where a party does not consistently make the required submission and subsequently enters arbitration, this may be counted against that party by the Panel in reaching its decision.

5.4.4. In exceptional circumstances, as determined by the panel, the behaviour of the parties may be taken into account in their final decision.

### **5.5. Charges for entering arbitration**

- 5.5.1. An overall charge of up to £100,000 may be levied on parties who enter arbitration. The amount levied will be used at least in part to fund third-party independent Arbitration Panels where these are required.
- 5.5.2. The charge for entering arbitration will be decided upon by NHS England and NHS TDA/Monitor and notified to the parties in advance of the arbitration panel. The charge will either be split equally between the parties or in such other way as the panel may decide.

## **5.6. Information to be provided to the Arbitration Panel**

- 5.6.1. The Arbitration Panel will require submission of the joint papers detailed below. The joint papers must not be accompanied by further supporting information or embedded documents. Any supplementary information will not be considered by the Panel. This is to reduce the burden on the Panel and to put the nature of the dispute into sharper relief. The parties must submit papers as follows:

### ***Questionnaire response***

- 5.6.2. This is designed to ensure that the Panel has the necessary core information. The questionnaire can be found within Appendix 1 of this guidance. It requests factual information, including a brief description of each issue and its value. It should not be used to set out each party's argument - this should be detailed in Appendix 2. This must be agreed between the parties and then submitted by the Co-ordinating commissioner to NHS England and NHS TDA/Monitor (and copied to the provider).

### ***Summary of disputed issues***

- 5.6.3. This should be completed in the format shown at Appendix 2 of this guidance. Appendix 2 must be agreed by both parties before submission. Each party must submit a completed copy of Appendix 2 to NHS England and NHS TDA / Monitor, copying in the other party.
- 5.6.4. All documents must be submitted by noon on 25<sup>th</sup> April 2016 in line with the detailed requirements set out in Appendix 4.
- 5.6.5. Once it has reviewed the Appendices 1 and 2, the Arbitration Panel may request further information from either party. The parties must respond promptly to such requests and must copy their response to the other party.
- 5.6.6. After the Arbitration Panel has considered these documents, it may choose to meet with both the parties together. If it does, the delegation from each party must include the Chief Executive / Chief Officer / Area 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 30 minutes. No more than three delegates from each party may attend the Panel hearing.

## **5.7. Communication of the Arbitration Panel decision**

- 5.7.1. Once the Arbitration Panel has reached its decision, it will write jointly to both parties, two working days after panel date, informing them of the outcome of the arbitration. This letter will confirm how each of the disputed issues is to be handled so that the parties can agree a contract value for 2016/17.
- 5.7.2. Within 24 hours of receipt of the outcome letter, the parties to the arbitration will have the option to hold a clarification phone call with the Panel chair. This call will be for the purpose of factual clarification of the outcome (rather than to discuss the justification for the Panel's decision) and to ensure that no ambiguity or difference in interpretation follows. The call will be recorded and minuted verbatim.
- 5.7.3. Organisations must implement the decisions immediately and reflect the outcome in 2016/17 contracts, which must be signed on or before 13<sup>th</sup> May 2016 and in their final 2016/17 plans, which must be approved by their Boards or Governing Bodies. The decisions of the Arbitration Panel will be final, binding on both parties and not subject to appeal.
- 5.7.4. Each organisation must report the outcome of the arbitration process to its Board or Governing Body.

## Questionnaire for parties entering arbitration

These notes are intended as a guide for completion of the template, which must fill no more than two sides of A4 when submitted.

<b>1. Name of commissioner</b>	<b>2. Name of provider</b>
<b>3. Key contact at commissioner (name and full contact details)</b>	<b>4. Key contact at provider (name and full contact details)</b>
<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>
<b>5. What are the issues under dispute?</b>	
<i>List all of the disputed issues briefly and factually, giving the value of each</i>	
Issue 1 Description	
<b>Commissioner Proposal</b>	£X
<b>Issue under dispute</b>	£X
<b>Difference</b>	£X
<b>6. What is the total value of the dispute?</b>	
<i>Complete the table below; the difference should equate to the sum of the disputed issues.</i>	
<b>Commissioner proposed contract value</b>	£X
<b>Provider proposed contract value</b>	£X
<b>Difference</b>	£X
<b>7. How have you attempted to resolve this dispute and why have you been unable to?</b>	
<i>Must demonstrate that negotiations have been escalated to Chief Executive / Chief Officer level and that an external mediation process has taken place</i>	
<b>8. Is there anything else the Panel needs to know to make an informed decision?</b>	
<b>9. Signature of Chief Executives</b>	
<b>Name of Chief Executive</b> <b>Email:</b> <b>Date:</b>	<b>Name of Chief Executive</b> <b>Email:</b> <b>Date:</b>

## Summary of disputed issues

<b>Area</b>	
<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 and must not include any embedded documents.</i>	
<b>Issue</b>	
<i>Provide brief description of issue under dispute</i>	
<b>Value of each issue under dispute</b>	
<i>Agreed difference in value for each issue (£s)</i>	
<b>Guidance</b>	
<i>Please specify any relevant guidance that you have used in making your cases</i>	
<b>View from XX Trust</b>	<b>View from XX Commissioner/XX</b>
<i>Please provide a concise description of the dispute</i>	<i>Please provide a concise description of the dispute</i>

## Contract Dispute Resolution Principles

The parties should have regard to the following national guidance when agreeing contracts:

2016/17 NHS Standard Contract and Contract Technical Guidance

2016/17 National Tariff guidance

2016/17 CQUIN guidance, and

Dispute Resolution Process for the 2016/17 Contracting Process.

Where there is no national guidance relevant to a specific issue, the parties should apply the following principles:

- **Local agreements must be in the best interests of patients** - They must maintain the quality of health care now and in the future, support innovation where appropriate, make care more cost effective and allocate risk effectively.
- **Local agreements must promote transparency and accountability** - They should make commissioners and providers accountable to each other and to patients, and facilitate the sharing of best practice.
- **Providers and commissioners must engage constructively with each other when trying to reach local agreements** - This should involve agreeing a framework for negotiations, sharing relevant information, engaging clinicians and other stakeholders where appropriate, and agreeing appropriate joint objectives for service improvement and delivery.
- **The financial position of the two organisations should not be considered in the resolution of disputes** - A rules based approach will be adopted.

Area for consideration	Specific issues	Approach to be taken in dispute resolution
NHS Standard Contract	Deviations from standard national contract	<p>All commissioners and providers must use the NHS Standard Contract 2016/17, in line with the detailed provisions set out in the Contract Technical Guidance. Where a multi-year contract is in place, the parties must apply the published National Variation to update their contract for 2016/17.</p> <p>Mandated national text of the Contract or the National Variation must not be varied locally.</p> <p>Where both parties are in agreement local clauses such as sanctions / KPIs may be included in the contract but if agreement cannot be reached then the default position is that no local arrangements will be included.</p>
CQUIN	Deviations from national CQUIN schemes and guidance	<p>To the extent that CQUIN guidance allows for local flexibility for CQUIN Variation (that is, local agreement between commissioner and provider to vary the normal application of the national CQUIN scheme and guidance) such variations can only be put in place if both parties are in agreement. If agreement cannot be reached, then the default position is that no CQUIN variation will be applied.</p>
Negotiation of local prices where the services are not subject to national prices in the National Tariff	Negotiation of unit prices for locally priced services	<p>Where both parties agree that local prices (i.e. Prices for services not subject to national prices in the National Tariff) need revision, the expectation is that a jointly agreed and fully transparent review can be carried out to understand how this can be achieved – for example moving to a reasonable benchmark price is acceptable, as is using benchmarking data to flag which prices may need review. However, parties must demonstrate that they have addressed any issues of ‘cherry picking’ by either party.</p> <p>Pace of change in moving to benchmark price can be considered in the context of the scale of change, and within the guidance provided in the national Tariff.</p> <p>QIPP schemes that relate solely to price changes will not be accepted unless they are a renegotiation of unit prices for services outside of the tariff and the above guidance is followed.</p>

Area for consideration	Specific issues	Approach to be taken in dispute resolution
Activity Plan setting	Demand / capacity Planning	<p>Commissioners should determine demand requirements to inform activity plans. The start point for the baseline should be 2015/16 Forecast outturn as agreed between the provider and commissioner. If agreement cannot be reached on baseline volume of activity, the default position is month 8 forecast outturn adjusted for reasonable seasonal variations. Commissioners should consider health needs and demographic change for the upcoming year:</p> <ul style="list-style-type: none"> <li>• any planned changes in patient flows,</li> <li>• adjusted for full year effects of recurring changes that started after 1 April 2015 and any non-recurring activity changes,</li> <li>• considered the need to maintain elective referral to treatment times,</li> <li>• the application of changes in commissioning policy that impact on the volume of care commissioned</li> <li>• QIPP/ BCF schemes that would affect patient volumes or pathway steps needed to treat patients.</li> </ul> <p>Whilst it is for commissioners to determine their total purchasing across contracted providers, constructive engagement will be evidenced by giving due consideration where providers have provided additional intelligence about future demand.</p> <p>When agreeing contracts, providers must be cognisant of the level of capacity that they have in order to meet demand in a safe and sustainable way.</p> <p>Unless agreed by both parties, commissioners should not cap activity based payments or otherwise distort a provider's incentives to attract additional patients.</p>

Area for consideration	Specific issues	Approach to be taken in dispute resolution
Activity Plan setting	2016/17 activity plan changes from changes in commissioning policy	It is accepted that commissioners have the right to commission changes to clinical pathways and agree contracts on that basis. Commissioners' policies and service specifications should be informed by considering available evidence and where appropriate, by clinical, patient and public engagement.
Activity Plan setting	2016/17 volume changes from commissioner QIPP / BCF schemes	<p>QIPP / BCF impacts on activity plans will need to have a clear rationale for the scale and timing of impact, be underpinned by robust plans that are properly formed, have clinical engagement, contain measurable objectives, measurable success criteria and a trajectory for delivery of QIPP / BCF plans.</p> <p>QIPP / BCF schemes should also include details of:</p> <ul style="list-style-type: none"> <li>• Revised volumes of care to be delivered, at a granular level of detail;</li> <li>• Assumptions that have been tested and includes realistic trajectories and profiles; and</li> <li>• KPIs that have been developed to measure the success of the QIPP / BCF scheme to enable each party to understand if the scheme is delivering the expected change.</li> </ul>
Sanctions	Reductions to Baselines for impact of financial sanctions	Financial sanctions are non-recurring. No impact of financial sanctions should be built into expected the contract values for 2016/17.
Emergency Threshold Rebasing	Application of guidance in the National Tariff	<p>National Tariff guidance covers the marginal rate emergency rule.</p> <p>This sets out that baseline values must therefore be set according to 2008/09 activity levels, but giving flexibility for adjustments where there have been material changes to the pattern of emergency care in a local health economy</p> <p>Commissioners and Providers must consider whether the evidence base is robust and in line with the National Tariff guidance provided for appropriate baseline changes.</p>

Area for consideration	Specific issues	Approach to be taken in dispute resolution
Commissioner responsibility	Uncertainty as to which commissioner is responsible for commissioning services that may be affected by co-commissioning	Where there is a lack of agreement between commissioners, the applicable 'identification rules' in force as at the point of contract signature will determine whether activity is reflected in Specialised contracts or CCG contracts. Any changes moving responsibility between commissioners during 2016/17 will be actioned as an in-year variation.
Reporting Requirements		Reporting Requirement and any Data Quality Improvement Plans in contracts should be agreed in line with the NHS Standard Contract and Contract Technical Guidance.

### Submission and contact details for 2016/17

The contact e-mail addresses for mediation and arbitration papers are set out below. Please refer to the main body of the guidance for process and timetable details and Appendices 1 and 2 for standard templates that must be submitted for each mediation and arbitration case.

NHS England contact details:

NHS England region	Mediation and arbitration papers email address for submission
North	<a href="mailto:carol.stubley@nhs.net">carol.stubley@nhs.net</a>
Midlands and East	<a href="mailto:philipmorris@nhs.net">philipmorris@nhs.net</a>
London	<a href="mailto:england.londonsubmissions@nhs.net">england.londonsubmissions@nhs.net</a>
South	<a href="mailto:ENGLAND.Financesouth@nhs.net">ENGLAND.Financesouth@nhs.net</a>

NHS TDA contact details:

NHS Trust region	Mediation and arbitration papers email address for submission
North	<a href="mailto:TDA.planningnorth@nhs.net">TDA.planningnorth@nhs.net</a>
Midlands and East	<a href="mailto:TDA.planningmande@nhs.net">TDA.planningmande@nhs.net</a>
London	<a href="mailto:TDA.planninglondon@nhs.net">TDA.planninglondon@nhs.net</a>
South	<a href="mailto:TDA.planningsouth@nhs.net">TDA.planningsouth@nhs.net</a>

Monitor contact details: [apr@monitor.gov.uk](mailto:apr@monitor.gov.uk)