

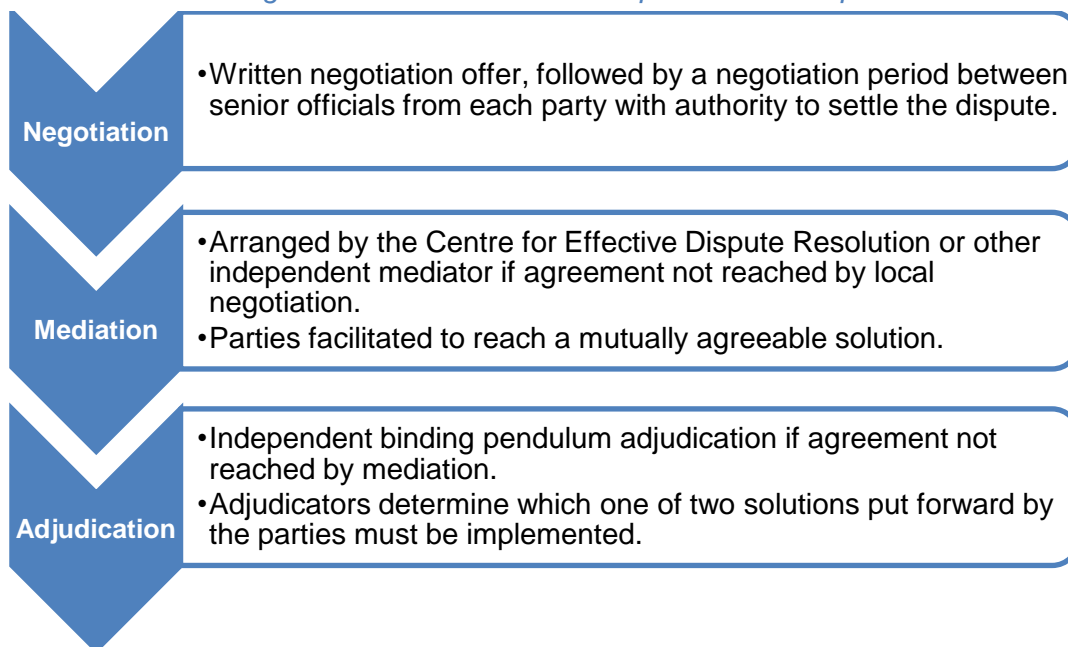
## Contract dispute resolution: advice for NHS foundation trusts

This advice summarises the dispute resolution procedure for NHS foundation trusts.

### Background and overview

1. NHS foundation trusts are required to enter into legally binding contracts with their commissioners for the provision of services. All foundation trusts have adopted the standard contract. However, a number of foundation trusts come into dispute with their commissioners either before signing the contract or following challenge from either party once the contract is in place.<sup>i</sup>
2. Dispute resolution can be time-consuming and expensive. Many contract disputes are resolved informally through hard work on the part of local negotiators. However, some local discussions may not reach a resolution and, consequently, one of the parties involved in the negotiations contemplates triggering the formal dispute resolution process set out in clause 28 of the standard contract.
3. Whether foundation trusts are currently 'in' or 'out of' contract, Monitor would expect them to utilise the mechanisms within the contract (set out below) to resolve any dispute.<sup>ii</sup> This will allow rapid resolution for pre-agreement disputes and ensure contracts and their associated activity agreements are in place early in the year.

Figure 1 - The three stages of the formal contract dispute resolution process



<sup>i</sup> A dispute constitutes a formalisation of a difference of opinion between commissioners and providers.

<sup>ii</sup> The process works slightly differently for NHS trusts and NHS foundation trusts.

4. This advice sets out a summary of the dispute resolution procedure in the 2011/12 standard contracts for [acute services](#) and [mental health and learning disability services](#).<sup>iii</sup> It also draws on the associated contract guidance.<sup>iv</sup> It includes good practice and provides answers to frequently asked questions and reference to further information throughout.

#### When do foundation trusts have to sign a contract with commissioners?

5. The following documents set out the importance and necessity of foundation trusts and their commissioners entering into signed contracts.
  - [The Operating Framework for the NHS in England 2011/12](#) sets out a clear commitment to the contract as the way of conducting business between commissioners and providers. It requires that contracts are signed on time (before 1 April) and reflect the needs of the local health economy. It states that penalties and sanctions should be used when contract terms are not fulfilled.
  - Condition 7 of the terms of authorisation requires that legally binding contracts are in place between the trust and its commissioners to cover the goods and services specified in Schedule 2. For recently authorised foundation trusts, legally binding contracts must be place within 12 months of authorisation. Foundation trusts are also subject to condition 18 of the terms of authorisation. This requires them to cooperate with other NHS bodies, such as primary care trusts, including in cases of dispute resolution. Boards of directors are accountable for ensuring that foundation trusts remain compliant with the terms of their authorisation.

#### Contract dispute issues

6. Monitor’s quarterly monitoring process includes looking at the number of foundation trusts with unsigned contracts, outstanding contract disputes from the previous year and any likely disputes arising from the current contract period. As expected, the number of each of these decreases from quarter to quarter and there are no unsigned contracts beyond the first half of the financial and contractual year. By monitoring these disputes, we are better able to understand the risk profile of individual foundation trusts. Disputes are considered to be significant (or material) where they are likely to, for example, negatively impact on a foundation trust’s financial risk rating, duty to cooperate with other stakeholders or reputation, or present a risk to patient care or future planning. Monitor should be notified once foundation trusts come into dispute with their commissioners.
7. Communication and good relationships between key parties clearly help prevent disputes and resolve them more easily should they arise. According to the standard contract, commissioners and providers should meet not less than every six months to review, monitor and discuss performance.
8. The following issues have been contributing factors in contract disputes to date. The list is not intended to be exhaustive.

*Table 1 - Examples of contributing factors in contract disputes*

	Pre contract signing	Post contract signing
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<sup>iii</sup> A summary relating to the 2009/10 contracting round was previously published in Monitor’s [May 2009 FT bulletin](#).

<sup>iv</sup> This is set out in Annex E of [Guidance on the NHS Standard Contract for Acute Services 2010/11](#) and [Guidance on the NHS Standard Contract for Mental Health and Learning Disability Services 2010/11](#). An [annex to the 2010-11 guidance](#) relating to the 2011-12 standard contracts is also available.

<b>Process</b>	<ul style="list-style-type: none"> <li>• Changes to standard contract terms.</li> <li>• Changes to standard deed of variation.</li> </ul>	
<b>Activity</b>	<ul style="list-style-type: none"> <li>• Commissioner proposals to impose caps on over-performance and/or withdrawal of contracted services following previous foundation trust over-activity.</li> <li>• Commissioner proposal to reduce non-tariff activity.</li> </ul>	<ul style="list-style-type: none"> <li>• Commissioner challenge of a high proportion of invoiced activity, for example, consultant to consultant referrals or zero lengths of stay.</li> <li>• Commissioner payment withheld following provider over-performance on agreed levels of elective or non-elective activity.</li> </ul>
<b>Pricing and payment</b>	<ul style="list-style-type: none"> <li>• Failure to agree non-tariff prices.</li> <li>• Failure to agree local variation to tariff prices within allowed local flexibilities.</li> <li>• Moving away from a block contracting approach.</li> </ul>	<ul style="list-style-type: none"> <li>• Disagreement over application of local variation to tariff prices.</li> <li>• Challenge on all or any part of an agreed payment, for example, regarding coding of case mix complexity.</li> </ul>
<b>Data</b>		<ul style="list-style-type: none"> <li>• Challenge on completeness of activity data.</li> <li>• Challenge on data quality and validity.</li> </ul>
<b>Quality</b>		<ul style="list-style-type: none"> <li>• Disagreement on fulfilment of Quality Performance Incentive Scheme (such as CQUIN).</li> </ul>
<b>Other</b>	<ul style="list-style-type: none"> <li>• Uncertainty over future risks, such as the impact of <i>Transforming Community Services</i> transactions and 30 day readmissions.</li> </ul>	<ul style="list-style-type: none"> <li>• Commissioner under significant financial strain.</li> </ul>

### Informal dispute resolution

9. In practice, most disputes are resolved through local negotiations prior to invoking the formal dispute resolution process. While the prospect of initiating the formal process may be enough to reach a reasonable resolution at this stage, it should not be used as a tactic to either delay payment or accept a lower settlement value than either party should receive.

### The formal management process for dispute resolution

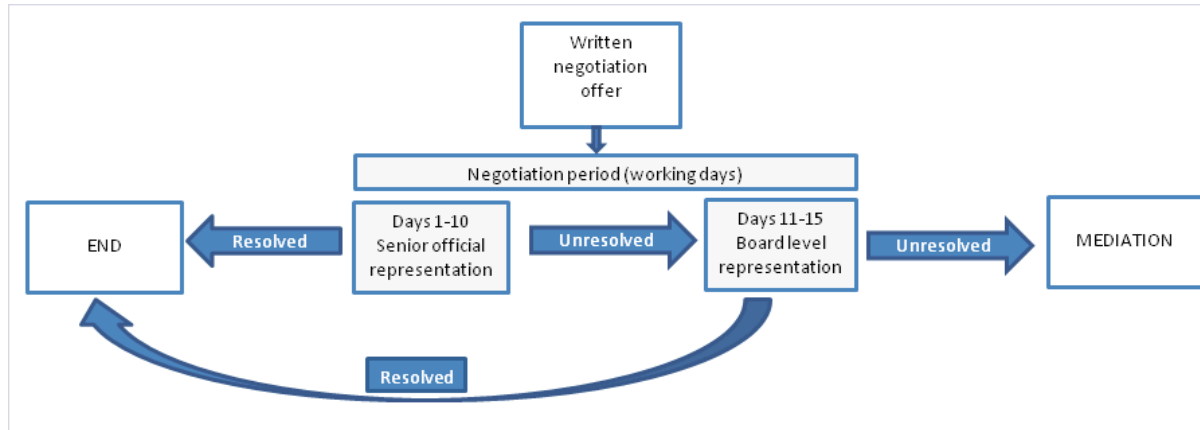
10. Clause 28 of the standard contract provides for a three stage dispute resolution process (detailed below) to enable disputes between NHS commissioners and providers to be resolved efficiently. Each foundation trust's experience of the process is unlikely to be the same in practice. The result of the dispute resolution will be binding between the parties, without setting a precedent to be adopted in similar disputes between other parties.

#### Stage 1 - Escalated negotiation

11. The formal dispute resolution process is initiated by either party making a written negotiation offer to the other. A 15 working day negotiation period will follow the written offer.

- During the first ten working days, the parties must be represented by a senior person with authority to settle the dispute and, preferably, who has not had any direct involvement in the dispute.
- If the matter is not resolved, during the next five working days the parties must be represented by their respective chief executives or other director or board member with authority to settle the dispute.

Figure 2 - The escalated negotiation stage of the contract dispute resolution process



12. In practice, however, the informal and formal negotiations may blur and parties tend to prolong the two stages of the 15 day negotiation period. Some negotiations continue for many months before progressing to the mediation stage. Delays often relate less to the actual issues in dispute but more to management and process issues, such as poor communication, inadequate negotiation skills and poor relationships between the main parties. Sometimes the dispute in question may mask the real issue.
13. The trust and commissioner may find it helpful to prepare a written statement of the issues in dispute from the outset. This should include an indication of their position on particular points. By sharing this with the other party, and encouraging active questioning of the issues, it will help each party better communicate their viewpoint and understand the detail of the situation from both sides. Even if no resolution is reached at this stage, it is certainly a useful process to have engaged in before, and output to take into, mediation.

## Stage 2 - Mediation

14. If the matter is not resolved through negotiation, the next stage in the dispute resolution process is mediation, or assisted negotiation. This should be viewed as a straightforward, logical progression of the process rather than as a complex, major hurdle in reaching resolution. Monitor should be notified once foundation trusts become aware that mediation might be required.
15. Within five working days following the end of the 15 working day negotiation period, the parties in dispute must submit the dispute to mediation by either the [Centre for Effective Dispute Resolution](#) (CEDR) or another independent organisation agreed by the parties prior to the Service Commencement Date, as set out in Schedule 9 of the Contract. The parties must follow the mediation process set out by the chosen mediator.<sup>v</sup> Annex E of the 2010-11

<sup>v</sup> Where the commissioner is a primary care trust and the provider is an NHS trust, the relevant strategic health authority will resolve the dispute locally.

contract guidance sets out a suggested Model Mediation Procedure and Model Mediation Agreement.

16. It is important that each party arrives at the mediation session with a clear idea of the main facts of the dispute. Prior to the mediation session, we recommend that each party submits a signed position statement to the mediator describing the points of dispute and setting out a proposed solution and all relevant documents. Each party should then be allowed to comment on the other party's proposed solution to the dispute. The mediator will challenge and test, and invite the parties to agree. Any settlement that is reached by the mediator is not legally binding until it is put in writing and signed by both parties.
17. The role of the mediator is to find a commercial compromise between the parties and not to provide a judgement on the dispute. The solution remains with the parties in dispute. Mediation generally achieves resolution within 1-2 days. The costs of mediation (such as the independent mediator's fees and other expenses) are shared equally between the parties. Experience to date suggests that mediation costs approximately £4,500 per day.

### **Stage 3 - Adjudication**

18. If a dispute involving a foundation trust cannot be settled through mediation, then it is referred to independent binding pendulum adjudication. The referral, by either party, needs to be made in writing within ten working days of the end of the mediation stage.
19. CEDR (or another independent body) is requested to appoint an independent panel of up to three members to determine the facts, according to their own procedures. Once the independent panel has been appointed, each party will most likely be required to serve on the other and the panel a statement of its case, together with supporting documentation, evidence, information and its preferred solution. The panel will not adjudicate the dispute in reference to the pre-mediation position.
20. The panel has the power to determine the dispute by finding entirely in favour of one of the parties, with the cost of the adjudication borne by the unsuccessful party. The parties will agree to be bound by the adjudicator's decision.

### **Frequently asked questions**

21. The following table sets out answers to key questions and includes information on useful points of contact.

#### **Q. Who can trigger the formal start of the process?**

**A.** The dispute resolution procedure can be initiated by either the commissioner directly concerned with the dispute or the provider. This is done by one party sending a written negotiation offer to the other following failure to agree either before or after a contract is agreed and signed.

#### **Q. What if a dispute occurs before the provider and commissioner have agreed a contract?**

**A.** Where foundation trusts are involved in disputes before contracts are signed, we would expect them to use the same dispute resolution process as those 'in' contract - that is, negotiation and mediation, followed by adjudication, in order to reach a binding agreement. We recommend that parties agree in writing to adopt the dispute resolution process in the contract and that they will be bound by the outcome of the process.

**Q. When should foundation trusts notify Monitor of contract disputes?**

**A.** We would expect foundation trusts to notify their Relationship Manager at Monitor once they become aware that mediation might be required or where a dispute may have a material effect on a foundation trust's finances. Monitor will not get involved in the resolution of contract disputes; however we may be able to provide advice to foundation trusts on the process at an earlier stage.

**Q. Why is CEDR involved in the process? What is their role and how can I contact them?**

**A.** CEDR, as a professional dispute body, is able to provide expert and independent mediation and adjudication rather than relying on strategic health authority and Monitor staff. CEDR's role is to arrange mediation where required and put in place administrative arrangements to schedule adjudication panels and provide independent chairs. Its staff are also willing to take enquiries on dealing with dispute issues before the mediation stage or to assist in the contract negotiation process itself. CEDR can be contacted on 020 7536 6000 or [info@cedr.com](mailto:info@cedr.com). Their website address is [www.cedr.com](http://www.cedr.com). Graham Massie, CEDR's Director of Consultancy, can be contacted on 07958 523030 or [gmassie@cedr.com](mailto:gmassie@cedr.com).

**Q. What is meant by independent binding pendulum adjudication? What is the advantage of this approach?**

**A.** The dispute is resolved by the independent adjudicators by settling the contract terms on the basis of the submission from either the primary care trust or the foundation trust. This approach encourages realistic positions and prevents any incentive to use the dispute process to 'split the difference' of costs between the parties. It also offers the finality of a definitive resolution. The high risk associated with this stage of the resolution process should certainly act as a disadvantage to progress to this stage and an incentive to resolve the dispute earlier. No dispute has yet reached the stage of independent adjudication.

**Q. What is the composition of the independent adjudication panel?**

**A.** Each panel is chaired by an independent adjudicator from a professional dispute body such as CEDR. The panel is made up of one or two further members drawn from nominations by NHS foundation trusts and strategic health authorities. The dispute is decided by a majority vote of the panel. Panel members are required to be impartial and are therefore not allowed to adjudicate on disputes involving parties within their local health economy or any with which they have significant links.

**Q. Who bears the cost of the dispute resolution process?**

**A.** The costs of mediation are shared equally between the parties, whereas the cost of adjudication is borne entirely by the unsuccessful party.

**Q. What will happen to the process once strategic health authorities and primary care trusts have been abolished? Will GP commissioning consortia be bound by the same resolution process?**

**A.** This is not yet known. We will update this advice as further information becomes available.