

Managing and Avoiding Disputes

December 2021

BAILEY & MOORE

Housekeeping

- The presentation usually lasts 60 minutes, including about 15 minutes of time for questions
- But we are happy to stay online as long as you want us to 😊
- Ask questions as we go, using the chat box or raise your ‘hand’
- All slides will be on our web site – link at the end
- If you’re using someone else's invite, send us your email address if you would like a copy of the slides or to be sent details of further courses

What we will cover...

- How to avoid disputes
- Importance of a strong Dispute Resolution Process
- What is needed for an effective contract?
- Creating a mindset that values mediation over conflict
- Dealing with disputes that require external intervention

How to avoid disputes



*“We have an agreement in principle.
The question is, do we all have the same principles?”*

How to avoid disputes

- Have a well-written contract/agreement – good fences make good neighbours
- Try informal solutions first, don't be in a hurry to use the written contract – a cup of tea and a biscuit may work wonders!
- Make an effort to understand the other party's point of view – go and look at the services in action
- Don't let it get personal – avoid “he says, she says” arguments
- Be nice 😊

How to identify and reduce disputes

- Start early – you know where there are likely to be disputes.... Don't let them get out of control
- Clear old issues as you go along... with permanent solutions – If you argued last year then it's probably an issue this year.
- Make sure anything from last year has been implemented
- Feel like you're repeating the same argument? Try something different, such as a "referee" or a trained facilitator
- Don't keep disputes "warm" to maintain your financial position (as if!)
- Be fair 😊

How to manage disputes

- If meeting minutes show the same unresolved issues every month... escalate!
- Follow the contract process: queries, issues, escalation, mediation and arbitration/ED
- Use early mediation or facilitation – don't wait until end of year and other deadlines
- Summarise disputes using the DRP format – helps define the issues and prepares for formal process. Plus, if you can't set it out on one side of A4, you probably don't understand it!
- Be clever 😊

Styles of agreement



Collaborating Style

combination of being assertive and cooperative
work with others to identify a solution that
addresses everyone's concerns... win-win
the opposite of avoiding
minimises risk of negative feelings, so good for
when maintaining the relationship is important



Competing Style:

combination of being assertive and
uncooperative
pursue your own interest to someone else's cost
– the outcome is all that is important
detrimental to relationships

Styles of agreement



Avoiding Style

combination of being unassertive and uncooperative

diplomatically avoiding an issue or retreating from a difficult situation

used when you can postpone dealing with a situation or not concerned about the outcome



Accommodating Style

opposite of competing - element of self-sacrifice
could be seen as taking advantage/weak/cause of resentment

when you are not concerned about the outcome but do want to preserve or build the relationship

Styles of agreement



Compromising Style

partly being assertive and cooperative

aims to find an pragmatic, mutually acceptable solution that everyone can live with

best when the outcome is not crucial but you need to just make a decision and move on

Parties willing to give a little, but outcome may be no one is really satisfied

- **Collaborating**
- **Competing**
- **Avoiding**
- **Accommodating**
- **Compromising**

Be aware of what approach might work best for each dispute.. and choose the right style

Keep yourselves up to date...

- Know the existing guidance and what it says – does that answer the question?
- Get technical advice – from the Region or national teams below (or us!)
- **Contract Technical Guidance:**
 - <https://www.england.nhs.uk/publication/nhs-standard-contract-technical-guidance/>
 - and via the helpline nhscb.contracts@nhs.net
- **National Tariff Payment System/Payment Reform:**
 - <https://www.england.nhs.uk/pay-syst/national-tariff/>
 - and via the helpline pricing@england.nhs.uk
- **Dispute Resolution Process (DRP)**... especially Appendix 3!
 - <https://www.england.nhs.uk/publication/nhs-operational-planning-and-contracting-guidance-2020-21-annex-d-nhs-standard-contract-and-supporting-guidance/> (NB not updated since 2020/21)

NHS Dispute Resolution Processes

GC14 Dispute Resolution

14.1 The provisions of GC14.2 to 14.21 will not apply when any Party in Dispute seeks an injunction relating to a matter arising out of GC20 (*Confidential Information of the Parties*).

Escalated Negotiation

14.2 If any Dispute arises, the Parties in Dispute must first attempt to settle it by any of them making a written offer to negotiate to the others. During the offer and be represented:

14.2.1 for the first 10 Operational Day direct day-to-day involvement in

14.2.2 for the last 5 Operational Days. Body who has authority to settle

14.3 Where practicable, no Party in Dispute and 14.2.2.

Mediation

14.4 If the Parties in Dispute are unable to settle within 10 Days after the end of the Negotiation Period

NHS STANDARD CONTRACT
2021/22 GENERAL CONDITIONS (Full Length)

NHS STANDARD CONTR

14.4.1 to mediation arranged by NHS Trusts, CCGs and/or NHS England and

14.4.2 to mediation by CEDR or other organisation and set out in the Particulars, in

14.5 Mediations under GC14.4.1 will follow the process of improvement from time to time.

14.6 Mediations under GC14.4.2 will follow the process of improvement from time to time, or the process of improvement from time to time of the organisation named in the Particulars.

Expert Determination



Annex D2: Joint contract dispute resolution process for new contracts for 2020/21

NHS Dispute Resolution Processes

- For disputes over agreeing a contract, there is the DRP:
 - <https://www.england.nhs.uk/publication/nhs-operational-planning-and-contracting-guidance-2020-21-annex-d-nhs-standard-contract-and-supporting-guidance/>
 - Last published for 2020/21
 - Annex D1 for updating terms of an existing multi-year contract, D2 for new contracts
- For in-year/year-end disputes which arise under a signed contract, follow General Condition 14 of the Standard Contract

Appendix 3 of the DRP

- Over-arching principles & key guidance
- Deviations from standard contract – including KPIs
- Local prices, pace of change and QIPP
- Demand & capacity planning, changes in commissioning policy
- ~~Sanctions & fines (no longer relevant!)~~

Before you get into formal dispute resolution – check it isn't already covered here!

NHS Standard Contract GC14: escalated negotiation & mediation

3 stages in General Condition 14:

- Escalated negotiation
- Mediation
- Expert determination (aka arbitration)

Escalated Negotiation & Mediation timetable	
WD 0	Escalated negotiation starts – By senior person with no day-to-day involvement and authority to settle dispute
WD 10	Escalated negotiation part 2 – By Director, CX or other Board Member
WD 15	Mediation – By NHSEI for NHS providers By party named in Particulars for non-NHS providers (Follows timetable set by mediator)

Dispute Resolution in the new world

- Each ICS will be encouraged to have its own dispute resolution process to settle local issues, quickly and collaboratively
- This is part of the **System Financial Management and Collaboration Agreement** (currently schedule 9 of the Standard Contract)
- A national over-arching DRP will probably still be needed to set out the rules of the game where NHS England intervention is needed
- Contracts may still have standard wording as per GC14 or just direct the parties to the ICS process? Need to consider contracts with providers that are not members of your ICS, including independent sector...

What is
needed for
an effective
contract?



Which parts of the Standard Contract are essential to avoiding disputes?

Theme	Service Condition	Contract Schedule	Reason
Thinking “System First”	SC4 – Co-operation	Schedule 8 (LSOP), 9 (SCFMA)	All providers work to one agreed ICS plan, facilitated by ICB
Service specifications	SC3 – Service Standards	Schedule 2A (service specs)	ICS needs to jointly agree and document how services provided
Patient outcomes	SC37 – Local Quality Requirements	Schedule 4C (local quality reqs), 4D (local incentive scheme)	Focus on patient outcomes, not volume of activity
Payment arrangements	SC36 – Payment Terms	Schedule 3A (prices), 3D (API), 3F (contract value)	Funding = block based on benchmarked cost ± variable adjs for volume/outcomes
Indicative activity plan	SC29 – Activity Management	Schedule 2B (IAP)	Still need to monitor volume/ outputs as these drive costs
Reporting requirements	SC28 – Information Requirements	Schedule 6A (reporting reqs)	Can’t do any of the above without good data!

What constitutes a signed contract according to the 20/21 DRP?

- Signatures of co-ordinating commissioner and provider
- Confirmation by co-ordinating commissioner that associates are content

Theme	B&M view	DRP view
Thinking “System First”	Schedule 8 (LSOP), 9 (SCFMA)	✘
Service specifications	Schedule 2A (service specs)	✘
Patient outcomes	Schedule 4C (local quality reqs) Schedule 4D (local incentive scheme)	✓ ✘
Payment arrangements	Schedule 3A (prices), 3D (API), 3F (contract value)	✓
CQUIN schemes	Schedule 3E (CQUIN)	✓
Indicative activity plan	Schedule 2B (IAP)	✓
Reporting requirements	Schedule 6A (reporting reqs)	✓

Using
mediation to
solve
conflicts



What is mediation?

- So... first consider mediation & facilitation
- Less formal – you have more control of the process than under arbitration
- Can be as simple as external facilitation or advice – as long as both parties sign up and are prepared to engage
- Different types and styles, so think about what suits your situation:
 - Can be arranged between the parties – have time out at a neutral venue?
 - Facilitated by your NHS England region
 - Engage some external mediation experts such as CEDR (or us!)

Mediation process

Set out the process and what the aim is:

- what is the dispute: £s and details
- date, time, location of mediation
- timescales e.g. for sharing papers
- jointly agreed mediator, or mediators for each party?
- who attends from the organisations; but must include decision-makers
- include 3rd party advisors or not?

Make sure it is clearly documented and jointly agreed!

Mediation process

The process should also set out:

- what papers will be included
- Including maximum number of pages
- and that they should be shared (transparency)
- How will the results be written up?
- What happens if agreement is reached... can you change your mind later?

We have some standard processes if required

Mediation: some thoughts from our experience...

- Important to set out detailed process, aims & principles... or you just end up with another dispute...
- Only useful if you want to find grounds to agree... Don't treat it as a precursor to arbitration
- Consider “binding mediation” – get an expert determination from your mediators if you fail to agree?
- Make sure you have at least one exchange of cases... or may get cases that don't “talk to each other” especially if dispute not properly escalated first
- Put the time into mediation rather than arbitration... control your own destiny!

Preparing for external intervention



NHS Standard Contract GC14: expert determination

- Final stage, if escalated negotiation and mediation fail
- Parties bear their own costs & jointly liable for Expert's costs
- Decision can only be enforced or appealed via the Courts...

Expert Determination Timetable

	One party gives notice to other (EDN) & proposes solution
WD 0	Parties appoint Expert or apply to CEDR if can't agree
WD 5	Party serving notice sends case to Expert & other party
WD 10	Other party sends case Expert & first party
WD 40	Expert produces written decision & sends simultaneously to all parties
WD 45	Parties have opportunity to notify 'minor clerical errors'
WD 50	Expert sends final report simultaneously to all parties

Rules for arbitration under the DRP

Principles:

- Pendulum decision on each issue – no 50:50s (in theory)!
- Most reasonable offer wins
- Can't consider financial position
- Overarching principles in Appendix 3 of DRP

Materiality:

- >1% of expected ACV or
- >£1m or
- “exceptional” 😊
- Based on expected annual contract value for all commissioners
- Can group common issues... but not to reach the threshold!

Arbitration/Expert Determination

- More formal – less control of the process than with mediation
- Viewed as a “failure”... does it give cover with Boards?
- Expensive! Especially if you lose...
- Know the rules (was the DRP, especially Appendix 3) and follow them
- Can be independent expert or run by NHSE directly (e.g. a panel)
- Often about the best paperwork...
- Or could be influenced by local politics...

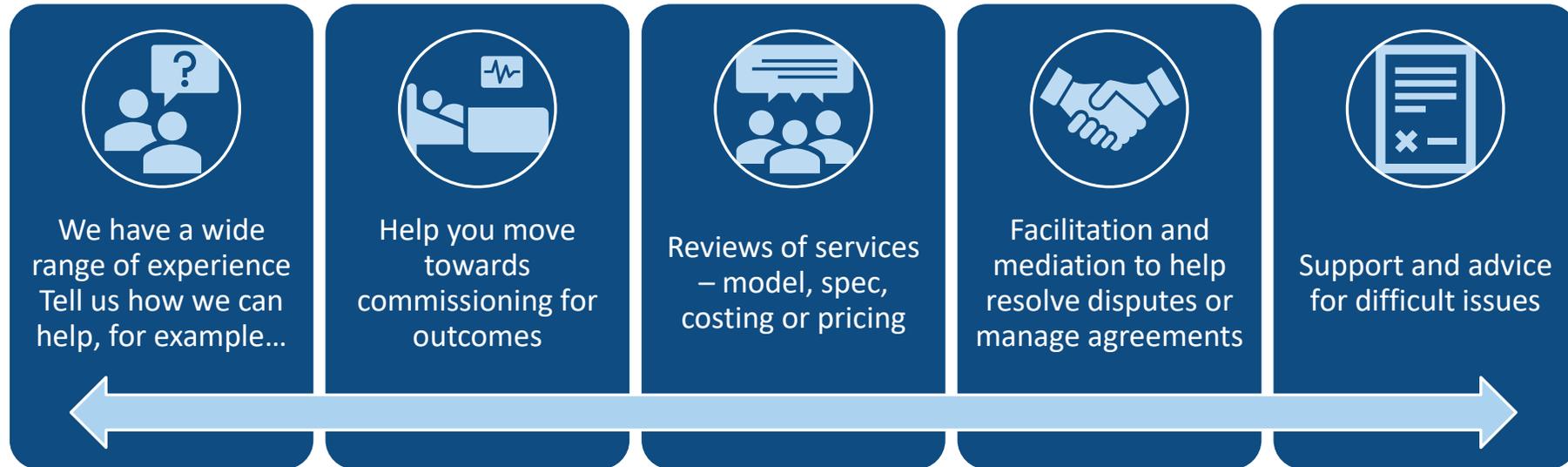
Preparing for external dispute resolution... some tips

- Start early – it will take longer than you think
- Pick your disputes – don't keep up the value
- Simplify the issue – as far as possible for the Panel/Expert
- Keep it short – you have limited space
- Evidence your statements
- Use guidance and technical aspects, and refer to them
- Test out your case on a “guinea pig”
- Get the paperwork right! Share drafts... yes, really!

In summary...

- Good fences really do make good neighbours – get the important stuff agreed and signed in writing, however tedious it may seem
- Invest time in setting up a local ICS DRP that can defuse potential conflicts with a quick, targeted process – you can't have real collaboration without a clear process for resolving disputes and reaching consensus!
- Value the role of mediation – getting external help to unblock problems is a sign of good management, **not** a weakness
- Try and avoid expert determination at all costs – asking Region to tell you the answer **is** a sign that the system is failing!

Can we help? We offer retainer services...



We have almost 30 years' experience at senior level within the NHS
and can provide practical support across a wide range of issues

Email us at info@baileyandmoore.com to discuss how we could help

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Other courses we offer include

- *Brave New World? Life in the NHS after the Health & Care Bill*
- *Understanding and documenting service pathways*
- *Commissioning for outcomes – adding value not volume*
- *Why costing matters more than ever*
- *Preparing for April 2022*

If you are interested in these or other topics, email us at training@baileyandmoore.com and we can discuss your requirements

Thanks for listening!

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Email us with any comments or requests for training courses at:

training@baileyandmoore.com

Slides available at:

<http://baileyandmoore.com/resources/training-slides/>

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