

SCHEDULE 5

OTHER CONTRACTUAL TERMS

PART 8

VARIATION AND TERMINATION OF AGREEMENTS

Variation of an agreement: general

98.—(1) Subject to sub-paragraph (2) and paragraphs 70(3) and 109, no amendment or variation shall have effect unless it is in writing and signed by or on behalf of the relevant body and the contractor.

(2) In addition to the specific provision made in paragraph 109, the relevant body may vary the agreement without the contractor's consent where it—

- (a) is reasonably satisfied that it is necessary to vary the agreement so as to comply with the Act, any regulations made pursuant to that Act, or any direction given by the Secretary of State pursuant to that Act; and
- (b) notifies the contractor in writing of the wording of the proposed variation and the date upon which that variation is to take effect,

and, where it is reasonably practicable to do so, the date that the proposed variation is to take effect shall be not less than 14 days after the date on which the notice under paragraph (b) is served on the contractor.

Termination by agreement

99. The relevant body and the contractor may agree in writing to terminate the agreement, and if the parties so agree, they shall agree the date upon which that termination should take effect and any further terms upon which the agreement should be terminated.

Termination by notice

100.—(1) Either the contractor or the relevant body may terminate the agreement by serving notice in writing on the other party.

(2) Where a notice is served pursuant to sub-paragraph (1), the agreement shall terminate on the date provided for under the agreement.

Late payment notices

101.—(1) The contractor may give notice in writing (a “late payment notice”) to the relevant body if the relevant body has failed to make any payments due to the contractor in accordance with a term of the agreement that has the effect specified in regulation 12, and the contractor shall specify in the late payment notice the payments that the relevant body has failed to make in accordance with that regulation.

(2) Subject to sub-paragraph (3), the contractor may, at least 28 days after having served a late payment notice, terminate the agreement by a further written notice if the relevant body has still failed to make the payments due to the contractor, and that were specified in the late payment notice served on the relevant body pursuant to sub-paragraph (1).

(3) If, following receipt of a late payment notice, the relevant body refers the matter to the NHS dispute resolution procedure within 28 days of the date upon which it is served with the late payment

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notice, and it notifies the contractor in writing that it has done so within that period of time, the contractor may not terminate the agreement pursuant to sub-paragraph (2) until—

- (a) there has been a determination of the dispute pursuant to paragraph 95 and that determination permits the contractor to terminate the agreement; or
- (b) the relevant body ceases to pursue the NHS dispute resolution procedure,

whichever is the sooner.

(4) Paragraph 100 and sub-paragraphs (1), (2) and (3) are without prejudice to any other rights to terminate the agreement that the contractor may have.

Termination by the relevant body: general provisions

102. The relevant body may only terminate the agreement in accordance with the provisions in this Part.

Termination by the relevant body for breach of conditions in regulation 4

103. The relevant body shall serve notice in writing on the contractor terminating the agreement forthwith if—

- (a) a medical practitioner who is a party to the agreement no longer satisfies the condition specified in regulation 4(1); or
- (b) a qualifying body which is a party to the agreement no longer satisfies the condition specified in regulation 4(2).

Termination by the relevant body for the provision of untrue etc information

104. The relevant body may serve notice in writing on the contractor terminating the agreement forthwith, or from such date as may be specified in the notice if, after the agreement has been entered into, it comes to the attention of the relevant body that written information provided to the relevant body by the contractor before the agreement was entered into in relation to the conditions set out in regulations 4 and 5 (and compliance with those conditions) was, when given, untrue or inaccurate in a material respect.

Termination by the relevant body on fitness grounds

105.—(1) The relevant body may serve notice in writing on the contractor terminating the agreement forthwith, or from such date as may be specified in the notice if—

- (a) in the case of an agreement with an individual as a party, that individual; or
- (b) in the case of an agreement with a qualifying body as a party—
 - (i) the qualifying body,
 - (ii) any person legally and beneficially owning a share in the qualifying body, or
 - (iii) any director or secretary of the qualifying body,

falls within sub-paragraph (3) during the existence of the agreement.

(2) In the case of a person who is a party to an agreement made before the 1st April 2004 and which is deemed to be an agreement made under section 28C of the Act, the reference to “during the existence of the agreement” shall be read as excluding any period before the 1st April 2004.

(3) A person falls within this sub-paragraph if—

- (a) he or it (in the case of a qualifying body) is the subject of a national disqualification;

- (b) subject to sub-paragraph (4), he or it is disqualified or suspended (other than by an interim suspension order or direction pending an investigation or a suspension on the grounds of ill-health) from practising by any licensing body anywhere in the world;
- (c) subject to sub-paragraph (5), he has been dismissed (otherwise than by reason of redundancy) from any employment by a health service body unless before the relevant body has served a notice terminating the agreement pursuant to this paragraph, he is employed by the health service body that dismissed him or by another health service body;
- (d) he or it is removed from, or refused admission to, a primary care list by reason of inefficiency, fraud or unsuitability (within the meaning of section 49F(2), (3) and (4) respectively⁽¹⁾) unless his name has subsequently been included in such a list;
- (e) he has been convicted in the United Kingdom of murder;
- (f) he has been convicted in the United Kingdom of a criminal offence and has been sentenced to a term of imprisonment of over six months;
- (g) subject to sub-paragraph (6), he has been convicted elsewhere of an offence—
 - (i) which would, if committed in England and Wales, constitute murder, or
 - (ii) which would, if committed in England and Wales, constitute a criminal offence other than murder, and been sentenced to a term of imprisonment of over six months;
- (h) he has been convicted of an offence referred to in Schedule 1 to the Children and Young Persons Act 1933⁽²⁾;
- (i) he or it has—
 - (i) been adjudged bankrupt or had sequestration of his estate awarded unless (in either case) he has been discharged or the bankruptcy order has been annulled,
 - (ii) been made the subject of a bankruptcy restrictions order or an interim bankruptcy restrictions order under Schedule 4A to the Insolvency Act 1986⁽³⁾, unless that order has ceased to have effect or has been annulled,
 - (iii) made a composition or arrangement with, or granted a trust deed for, his or its creditors unless he or it has been discharged in respect of it,
 - (iv) an administrator, administrative receiver or receiver appointed in respect of it,
 - (v) an administration order made in respect of it under Schedule B1 to the Insolvency Act 1986⁽⁴⁾, or
 - (vi) been wound up under Part IV of the Insolvency Act 1986;
- (j) he has been—
 - (i) removed from the office of charity trustee or trustee for a charity by an order made by the Charity Commissioners or the High Court on the grounds of any misconduct or mismanagement in the administration of the charity for which he was responsible or to which he was privy, or which he by his conduct contributed to or facilitated, or
 - (ii) removed under section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (powers of the Court of Session to deal with management of charities)⁽⁵⁾, from being concerned in the management or control of any body;

(1) Section 49F was inserted into the Act by section 25 of the 2001 Act and amended by the 2002 Act, section 2(5) and Schedule 2, paragraph 21 and by the 2003 Act, Schedule 14.

(2) 1933 c. 12 as amended by the Criminal Justice Act 1988 (c. 33), section 170, Schedule 15, paragraph 8 and Schedule 16, paragraph 16; Sexual Offences Act 1956 (c. 69), sections 48 and 51 and Schedules 3 and 4 and as modified by the Criminal Justice Act 1988, section 170(1), Schedule 15, paragraph 9.

(3) 1986 c. 45. Schedule 4A was inserted by section 257 of, and Schedule 2 to the Enterprise Act 2002 (c. 40).

(4) Schedule B1 was inserted by section 248 of, and Schedule 16 to, the Enterprise Act 2002.

(5) 1990 c. 40.

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- (k) he is subject to a disqualification order under the Company Directors Disqualification Act 1986⁽⁶⁾, the Companies (Northern Ireland) Order 1986⁽⁷⁾ or to an order made under section 429(2)(b) of the Insolvency Act 1986 (failure to pay under county court administration order)⁽⁸⁾; or
 - (l) has refused to comply with a request by the relevant body for him to be medically examined on the grounds that it is concerned that he is incapable of adequately providing services under the agreement.
- (4) A relevant body shall not terminate the agreement pursuant to sub-paragraph (3)(b) where the relevant body is satisfied that the disqualification or suspension imposed by a licensing body outside the United Kingdom does not make the person unsuitable to be—
- (a) a party to the agreement;
 - (b) in the case of an agreement with a qualifying body—
 - (i) a person legally and beneficially owning a share in the qualifying body, or
 - (ii) a director or secretary of the qualifying body,
 as the case may be.
- (5) A relevant body shall not terminate the agreement pursuant to sub-paragraph (3)(c)—
- (a) until a period of at least three months has elapsed since the date of the dismissal of the person concerned; or
 - (b) if, during the period of time specified in paragraph (a), the person concerned brings proceedings in any competent tribunal or court in respect of his dismissal, until proceedings before that tribunal or court are concluded,
- and the relevant body may only terminate the agreement at the end of the period specified in paragraph (b) if there is no finding of unfair dismissal at the end of those proceedings.
- (6) A relevant body shall not terminate the agreement pursuant to sub-paragraph (3)(g) where the relevant body is satisfied that the conviction does not make the person unsuitable to be—
- (a) a party to the agreement; or
 - (b) in the case of an agreement with a qualifying body—
 - (i) a person legally and beneficially owning a share in the qualifying body, or
 - (ii) a director or secretary of the qualifying body,
 as the case may be.

Termination by the relevant body where there is a serious risk to the safety of patients or risk of financial loss to the relevant body

106. The relevant body may serve notice in writing on the contractor terminating the agreement forthwith or with effect from such date as may be specified in the notice if—

- (a) the contractor has breached the agreement and as a result of that breach, the safety of the contractor's patients is at serious risk if the agreement is not terminated; or
- (b) the contractor's financial situation is such that the relevant body considers that the relevant body is at risk of material financial loss.

⁽⁶⁾ 1986 c. 46 as amended by the Insolvency Act 2000 (c. 39).

⁽⁷⁾ S.I.1986/1032 (N.I. 6).

⁽⁸⁾ 1986 c. 45.

Termination by the relevant body: remedial notices and breach notices

107.—(1) Where a contractor has breached the agreement other than as specified in paragraphs 103 to 106 and the breach is capable of remedy, the relevant body shall, before taking any action it is otherwise entitled to take by virtue of the agreement, serve a notice on the contractor requiring it to remedy the breach (“remedial notice”).

(2) A remedial notice shall specify—

- (a) details of the breach;
- (b) the steps the contractor must take to the satisfaction of the relevant body in order to remedy the breach; and
- (c) the period during which the steps must be taken (“the notice period”).

(3) The notice period shall, unless the relevant body is satisfied that a shorter period is necessary to—

- (a) protect the safety of the contractor’s patients; or
- (b) protect itself from material financial loss,

be no less than 28 days from the date that notice is given.

(4) Where a relevant body is satisfied that the contractor has not taken the required steps to remedy the breach by the end of the notice period, the relevant body may terminate the agreement with effect from such date as the relevant body may specify in a further notice to the contractor.

(5) Where a contractor has breached the agreement other than as specified in paragraphs 103 to 106 and the breach is not capable of remedy, the relevant body may serve notice on the contractor requiring the contractor not to repeat the breach (“breach notice”).

(6) If, following a breach notice or a remedial notice, the contractor—

- (a) repeats the breach that was the subject of the breach notice or the remedial notice; or
- (b) otherwise breaches the agreement resulting in either a remedial notice or a further breach notice,

the relevant body may serve notice on the contractor terminating the agreement with effect from such date as may be specified in that notice.

(7) The relevant body shall not exercise its right to terminate the agreement under subparagraph (6) unless it is satisfied that the cumulative effect of the breaches is such that the relevant body considers that to allow the agreement to continue would be prejudicial to the efficiency of the services to be provided under the agreement.

(8) If the contractor is in breach of any obligation and a breach notice or a remedial notice in respect of that default has been given to the contractor, the relevant body may withhold or deduct monies which would otherwise be payable under the agreement in respect of that obligation which is the subject of the default.

Termination by the relevant body: additional provisions specific to agreements with qualifying bodies

108. Where a party to the agreement is a qualifying body, if the relevant body becomes aware that the qualifying body is carrying on any business which the relevant body considers to be detrimental to the contractor’s performance of its obligations under the agreement—

- (a) the relevant body shall be entitled to give notice to the contractor requiring that the qualifying body ceases carrying on that business before the end of a period of not less than 28 days beginning on the day on which the notice is given (“the notice period”); and

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- (b) if the contractor has not satisfied the relevant body that the qualifying body has ceased carrying on that business by the end of the notice period, the relevant body may, by a further written notice, terminate the agreement forthwith or from such date as may be specified in the notice.

Agreement sanctions

109.—(1) In this paragraph and paragraph 110, “agreement sanction” means—

- (a) termination of specified reciprocal obligations under the agreement;
- (b) suspension of specified reciprocal obligations under the agreement for a period of up to six months; or
- (c) withholding or deducting monies otherwise payable under the agreement.

(2) Where the relevant body is entitled to terminate the agreement pursuant to paragraph 104, 105, 106, 107(4) or (6) or 108, it may instead impose any of the agreement sanctions if the relevant body is reasonably satisfied that the agreement sanction to be imposed is appropriate and proportionate to the circumstances giving rise to the relevant body’s entitlement to terminate the agreement.

(3) If the relevant body decides to impose an agreement sanction, it must notify the contractor of the agreement sanction that it proposes to impose, the date upon which that sanction will be imposed and provide in that notice an explanation of the effect of the imposition of that sanction.

(4) Subject to paragraph 110, the relevant body shall not impose the agreement sanction until at least 28 days after it has served notice on the contractor pursuant to sub-paragraph (3) unless the relevant body is satisfied that it is necessary to do so in order to—

- (a) protect the safety of the contractor’s patients; or
- (b) protect itself from material financial loss.

(5) Where the relevant body imposes an agreement sanction, the relevant body shall be entitled to charge the contractor the reasonable costs of additional administration that the relevant body has incurred in order to impose, or as a result of imposing, the agreement sanction.

Agreement sanctions and the NHS dispute resolution procedure

110.—(1) If there is a dispute between the relevant body and the contractor in relation to an agreement sanction that the relevant body is proposing to impose, the relevant body shall not, subject to sub-paragraph (4), impose the proposed agreement sanction except in the circumstances specified in sub-paragraph (2)(a) or (b).

(2) If the contractor refers the dispute relating to the agreement sanction to the NHS dispute resolution procedure within 28 days beginning on the date on which the relevant body served notice on the contractor in accordance with paragraph 109(4) (or such longer period as may be agreed in writing with the relevant body), and notifies the relevant body in writing that it has done so, the relevant body shall not impose the agreement sanction unless—

- (a) there has been a determination of the dispute pursuant to paragraph 95 and that determination permits the relevant body to impose the agreement sanction; or
- (b) the contractor ceases to pursue the NHS dispute resolution procedure,

whichever is the sooner.

(3) If the contractor does not invoke the NHS dispute resolution procedure within the time specified in sub-paragraph (2), the relevant body shall be entitled to impose the agreement sanction forthwith.

(4) If the relevant body is satisfied that it is necessary to impose the agreement sanction before the NHS dispute resolution procedure is concluded in order to—

- (a) protect the safety of the contractor's patients; or
- (b) protect itself from material financial loss,

the relevant body shall be entitled to impose the agreement sanction forthwith, pending the outcome of that procedure.

Termination and the NHS dispute resolution procedure

111.—(1) Where the relevant body is entitled to serve written notice on the contractor terminating the agreement pursuant to paragraph 104, 105, 106, 107(4) or (6) or 108, the relevant body shall, in the notice served on the contractor pursuant to those provisions, specify a date on which the agreement terminates that is not less than 28 days after the date on which the relevant body has served that notice on the contractor unless sub-paragraph (2) applies.

(2) This sub-paragraph applies if the relevant body is satisfied that a period less than 28 days is necessary in order to—

- (a) protect the safety of the contractor's patients; or
- (b) protect itself from material financial loss.

(3) In a case falling with sub-paragraph (1) where the exception in sub-paragraph (2) does not apply, where the contractor invokes the NHS dispute resolution procedure before the end of the period of notice referred to in sub-paragraph (1), and it notifies the relevant body in writing that it has done so, the agreement shall not terminate at the end of the notice period but instead shall only terminate in the circumstances specified in sub-paragraph (4).

(4) The agreement shall only terminate if and when—

- (a) there has been a determination of the dispute pursuant to paragraph 95 and that determination permits the relevant body to terminate the agreement; or
- (b) the contractor ceases to pursue the NHS dispute resolution procedure,

whichever is the sooner.

(5) If the relevant body is satisfied that it is necessary to terminate the agreement before the NHS dispute resolution procedure is concluded in order to—

- (a) protect the safety of the contractor's patients; or
- (b) protect itself from material financial loss,

sub-paragraphs (3) and (4) shall not apply and the relevant body shall be entitled to confirm by written notice to be served on the contractor, that the agreement will nevertheless terminate at the end of the period of the notice it served pursuant to paragraph 104, 105, 106, 107(4) or (6) or 108.