



GUIDANCE

RICS Conflict Avoidance Process: Frequently Asked Questions

RICS Dispute Resolution Service

RICS Conflict Avoidance Process: FAQs

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About CAP

How long does CAP take to complete?

The CAP Panel will normally discuss and agree an appropriate timetable with the parties.

The duration of the CAP process can depend on several factors, including:

- the complexity of the matter in dispute
- the documentation and other expert evidence required to progress, and
- the availability of both parties and any key individuals.

Is CAP a confidential process?

Neither the CAP Panel, the parties, nor RICS will not disclose any information provided by or on behalf of the parties, nor will they disclose the substance or outcomes of the CAP negotiations to any individual, organisation or third party not involved in the CAP, unless otherwise agreed.

With the agreement of the contracting parties, the CAP Panel may provide a copy of the CAP Report to RICS, which may use it in redacted form only for training CAP professionals and improving the RICS CAP service.

The CAP Panel will, upon request by RICS, provide a copy of the CAP Report to RICS for the purpose only of dealing with any complaints it may receive about the CAP or CAP Panel under its established complaints procedures.

Do I have to participate in CAP?

CAP is voluntary, and any party may withdraw from it at any time.

How formal is the CAP process?

CAP is a common-sense, non-adversarial process. The process will normally be conducted relatively informally.

Formal court or arbitration rules do not apply, nor is there an opportunity for leading oral evidence or cross-examination.

The process is inquisitorial and investigative by nature and led by the CAP Panel.

Can I use CAP even if my contract says disputes are to go to arbitration?

It is very unlikely that any arbitration (or adjudication) clause in a contract will exclude the parties' right to negotiate a settlement before using those procedures. CAP is a mechanism designed to assist such settlements. Conversely, CAP doesn't exclude the right of parties to use any other dispute resolution process, such as adjudication, available under their contract.

How does CAP interact with the main contract?

The CAP procedure and timetable can be:

- included in the main contract between the parties or
- agreed by the parties separately, and at any time.

CAP operates alongside the main contract; it does not suspend the operation of the main contract unless the parties agree that it should. Any notices, steps or processes under the main contract will usually continue as they would were the CAP not in place, save that the parties should provide the CAP Panel with copies of any such notices and inform them of the nature of such steps or processes, without delay.

Can I use CAP on an existing project and dispute?

Yes. Parties can agree to use CAP to address all disputes, even if they are well advanced towards adjudication, arbitration, or court. Parties can simply agree to refer the dispute to CAP for an impartial, informed report on how they should proceed.

Can I use CAP if it isn't written into my contract?

Yes, parties can agree at any stage of a project that they want to appoint a CAP Panel to assist them.

What kind of disputes can CAP tackle?

Disputes that parties may choose to refer to CAP can be:

- simple or complex
- single- or multi-issue
- at initial disagreement stage or well advanced towards formal dispute resolution.

CAP can be used to address construction design, delivery and delay issues, contract interpretation, compensation events, accounting and legal issues, technical and specialist challenges, or in fact any manner of issue capable of being addressed in court, adjudication, arbitration or mediation.

What are the key benefits of CAP?

The headline benefits of adopting conflict avoidance measures are the saving of money through reduced legal spend, the preservation of important business relationships, and keeping resolution of the matter in the hands of the project team. Other benefits include:

- **Flexibility** – it can be scaled to fit issues of varying complexity and value
- **Collaboration** - parties work together with an impartial professional to achieve an agreed outcome

- **Control** - parties retain control of the process and outcomes. Being employed early on, CAP ensures that commercial business directors, managers and project delivery teams retain control over the outcome of the dispute before it escalates to lawyers (whose focus is to prepare matters for litigation)
- **Risk mitigation** – the recommendations in the CAP Report are fully reasoned, offering parties a clear understanding of the potential outcomes should their dispute proceed to court or adjudication
- **Nips issues in the bud** – it’s designed to be used early, before matters escalate to formal disputes requiring adversarial procedures
- **Credibility and expertise** – CAP is carried out by credible professionals - the CAP professionals are industry experts. They are expert and experienced in the subject matter at the heart of the parties’ disagreement.
- **Cost effective** – you don’t pay if you don’t use it
- **Relationship preservation** - fFor all the reasons above, it preserves commercial relationships and brand reputation.

Is CAP like a Dispute Board?

CAP draws on methodologies used in other forms of dispute management and resolution, but it is not quasi-adjudication or arbitration, and it is distinguishable from Dispute Boards, whether standing or ad hoc.

Being a pay-when-needed service, CAP costs substantially less than maintaining a standing Dispute Board. It also enables parties to benefit from CAP panel members who are selected from the breadth of the RICS President’s Panel because they possess the specific skills and experience needed to deal the particular dispute which has arisen. They can therefore bring a far more focused range of expertise to bear than that which can normally be provided by a traditional three-person standing Dispute Board, appointed in advance and acting for the duration of the project. CAP panellists are thus less likely to need additional expert reports, as they are selected specifically for their own expertise.

As far as ad hoc Dispute Boards are concerned, a CAP serves a similar function, but does so in the context of an established RICS service with a superb track record, drawing on a register of panellists who genuinely understand and implement a significantly different approach to dealing with disputes.

CAP Costs

Do I need to pay an application fee to RICS?

No, parties are not required to pay an application fee to RICS for appointing a CAP Panel.

Who pays for CAP?

Unless agreed otherwise, each party will bear their own costs and will bear in equal shares the expenses of the CAP Panel.

How much does CAP cost and is it cost effective?

Putting the CAP process into a contract costs nothing.

There are no upfront fees or retainers to be paid by either party.

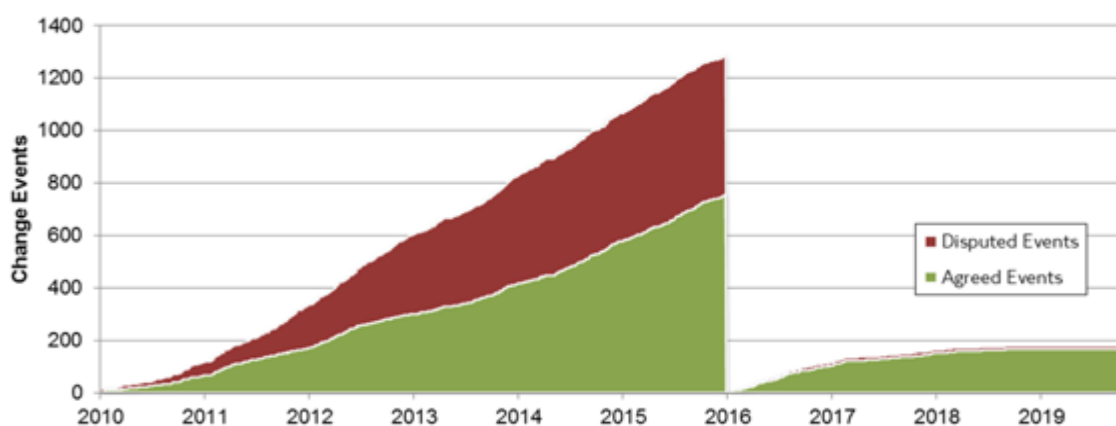
If no problems arise during a project, and CAP is not needed, the parties do not incur any costs. They only pay for CAP if and when they need to use it.

CAP is more cost-effective than litigation and other adversarial dispute resolution procedures. Parties know what the cost will be before they engage in CAP as the fee scales will have been agreed before the CAP Panel is appointed.

There are no ongoing retainer fees and parties who include CAP in their contract don't pay anything if they never need to use it. It is effectively a "pay-when-needed" service.

Transport for London (TfL), which was an early adopter of CAP for one of its major infrastructure projects, has said that:

- The average cost of using a CAP Panel for TfL has been £12,500.
- The average increase between tender price and target cost for infrastructure projects is typically 79.8%. Using CAP, TfL delivered a £2.2bn station upgrade programme with a contract cost increase of 46%. By comparison, the cost increase between the initial estimate and final cost of the London Olympics and Para-Olympics 2012 was 269.3%
- CAP not only resolved the conflicts that had already accrued, but also dramatically reduced further claims from developing, as the TFL graph below demonstrates:



Change Events on major station upgrade project over lifetime

The CAP Report

What can I expect from the CAP Report?

A CAP Report contains impartial, non-binding recommendations, which can be used by the parties to form the basis of settlement for the issues between them; and/or it can support further negotiation between the parties who will be appraised by the CAP Report of the risks and likely outcomes should matters proceed to adversarial dispute resolution or litigation.

How is the CAP Report delivered?

The CAP Report is typically presented in a face-to-face meeting, allowing parties to engage in detailed conversations.

Why isn't the CAP report just emailed to me?

Unlike arbitral awards or adjudication decisions, a CAP Report is not simply emailed to parties who must then read and decipher it, and ultimately be bound by its conclusions. Instead, the contents and recommendations in a CAP Report will be delivered at a meeting between the CAP Panel and the parties. The CAP Panel will take the parties through the report and its recommendations, answering any questions they may have.

What happens if one party disagrees with the CAP Report?

If a party does not agree with the recommendations set out in the CAP Report and does not intend to comply with them (in whole or in part) they should, in the first instance:

- ensure they notify the other party in writing (within five days of receiving the CAP Report)
- provide the other party with fully reasoned grounds, in writing, for not doing so (within two weeks of receiving the CAP Report)

Parties will often use the CAP Report and the recommendations within it as a platform on which to negotiate a settlement. The beauty of a CAP Report is that it demonstrates to parties what the potential outcome of their issues would be if pursued in court or other adversarial process.

Parties may also:

- a) Make suggestions for compromise, taking into account the recommendations in the CAP Report
- b) Propose that aspects be referred to the CAP Panel for further advice and recommendations.* The CAP Panel can act further in a mediative capacity to facilitate a negotiated settlement of issues, drawing on the recommendations in the CAP Report

- c) Make a “without prejudice” offer to settle based on the recommendations in the CAP Report, which offer will be admissible as to costs in arbitration or litigation
- d) Elect to leave the process altogether and to proceed to adjudication, arbitration or court.

**If the parties agree that the matter should be referred to the CAP Panel, then either (or both parties) will notify RICS, and RICS will arrange for the CAP Panel to resume the appointment.*

The CAP Panel

Who will be on the CAP Panel?

All RICS CAP Panellists sit on the international RICS President’s Panel of Dispute Resolvers and Expert Witnesses and are trained in the techniques involved in managing a CAP:

- evaluative mediation
- independent enquiry
- arbitration/adjudication
- competence in dealing with evidence
- writing clear and practical recommendations.

The CAP Panel can be 1 or 3 individuals. They will be qualified and experienced in the subject matter on which a recommendation is sought.

RICS CAP Panellists are drawn from legal, surveying, engineering, design, and other built environment professions.

What approach will the CAP Panel take?

The CAP Panel will adopt a pragmatic rather than overly legalistic approach, focused on moving the project forward rather than deciding questions of liability and damages, underpinned by construction sector and legal experience and understanding.

The CAP Panel will be expected to draw on their own experience and expertise in running the CAP and in making their recommendations.

The CAP Panel may also consult with others who are not directly involved in resolving the differences between the parties, but may have knowledge that will inform the investigations. This may include, but is not limited to, site managers and individual contractors and materials suppliers.

How does the CAP Panel obtain the information it requires?

The CAP Panel will work collaboratively alongside the parties but may also conduct their own enquiries to get to the root of the issues.

The CAP Panel will normally meet commercial directors, managers and others who are directly or indirectly involved in the matter which the CAP Panel has been instructed to investigate and report on.

How do I communicate with the CAP Panel?

Unless otherwise agreed by the parties, all correspondence and exchange of documents between the CAP Panel and the parties, or between the parties relating to the CAP, will normally be by way of email or other electronic means, unless hard copy is more convenient.

CAP Meetings

Are CAP meetings in person or online?

The CAP Panel will discuss and agree with the parties how much of the process will be conducted online and how much will be in-person.

What's the purpose of the CAP meetings?

CAP meetings will take place primarily to allow the CAP Panel to:

- develop a clear understanding of the issues on which the parties disagree and
- hold detailed discussions with the parties, help them to examine each other's positions, explore options for settlement and appreciate possible outcomes were the matter to proceed to adjudication, arbitration, or court.

Who should attend CAP meetings?

The CAP Panel will normally meet commercial and project directors, managers and others who are directly or indirectly involved in the matter which the CAP Panel has been instructed to investigate and report on. Lawyers and other professional advisers are not excluded, although the process is primarily intended to encourage and support dialogue between commercial parties, and inform their decisions on how to resolve emerging, or current issues.

Are both parties always present at CAP meetings?

The CAP Panel will generally conduct meetings with both parties present, but may meet separately with the parties where it is agreed that it would help to move a settlement process forward, and/or to narrow issues.