

Avoiding Risk - Avoiding Disputes - Early Intervention to Resolve Disputes

A combined risk analysis and early intervention service utilising
RADAR and Conflict Avoidance Panels (CAPs)

Traditional dispute resolution can be slow and expensive, and outcomes can be painful, even when Parties settle before a judgment, award or decision is given.

On construction and engineering projects, risk analysis and dispute avoidance are now just as important as dispute resolution, especially when linked to a commitment by contracting Parties to a wider collaborative culture.

This joint offering is a forward-thinking approach to risk management and dispute avoidance and resolution. When used in accordance with agreed principles and rules for co-operation, it will avoid many disputes and settle those that do arise at an early stage, thus avoiding escalation to litigation or arbitration.

Rationale

RICS and ResoLex offer complementary services to clients wishing to avoid costly and disruptive disputes on projects. RICS offers services, which help to resolve conflict situations when they arise, early in the hope of preventing escalation. Whilst individually each service delivers value to clients, the combined offering helps clients identify risks and potential disputes and takes them through a managed process for resolution. The use of the combined service on complex projects will drastically reduce the risk and associated costs of disputes on projects, and the negative impact these have on commercial relationships and brand reputations.

RICS Dispute Resolution Service

- The Royal Institution of Chartered Surveyors (RICS) was founded in 1868, and has over 140,000 members worldwide. RICS is the oldest and largest professional organisation for the international land, property, construction and related sectors.
- The primary role of RICS is to preserve and advance professional standards. As governments, commercial organisations and individuals across the globe increasingly demand the assurance of certified standards and ethics, RICS guidance, qualifications and standards set the benchmark in land, property and construction.
- RICS is incorporated by Royal Charter, and acts independently, free of political or commercial pressure. The Charter requires RICS to 'maintain and promote the usefulness of the profession for the public advantage'. This obligation to protect the public interest is a key function of RICS worldwide, and this underlies its role in the modern professional world as the 'gold standard' of excellence and integrity.
- The RICS Dispute Resolution Service (DRS) is the division of RICS responsible for providing Alternative Dispute Resolution (ADR) services throughout the world, with a focus on the built environment sector.
- DRS has provided ADR services for 40 years, and during this time has made over 200,000 dispute resolution appointments globally.
- DRS provides a wide range of conflict avoidance and dispute resolution services, including but not limited to; arbitration, adjudication, mediation and numerous bespoke services designed for individual clients.
- Internationally, DRS is also responsible for:
 - a) Advising and assisting governments, judiciaries, property professionals and consumers on the development and provision of conflict avoidance and dispute resolution services in the land, property, construction and related sectors.
 - b) Designing and delivering high quality, branded, training, qualifications, accreditation and CPD in dispute avoidance, resolution, representation and management, to dispute resolution practitioners.

ResoLex

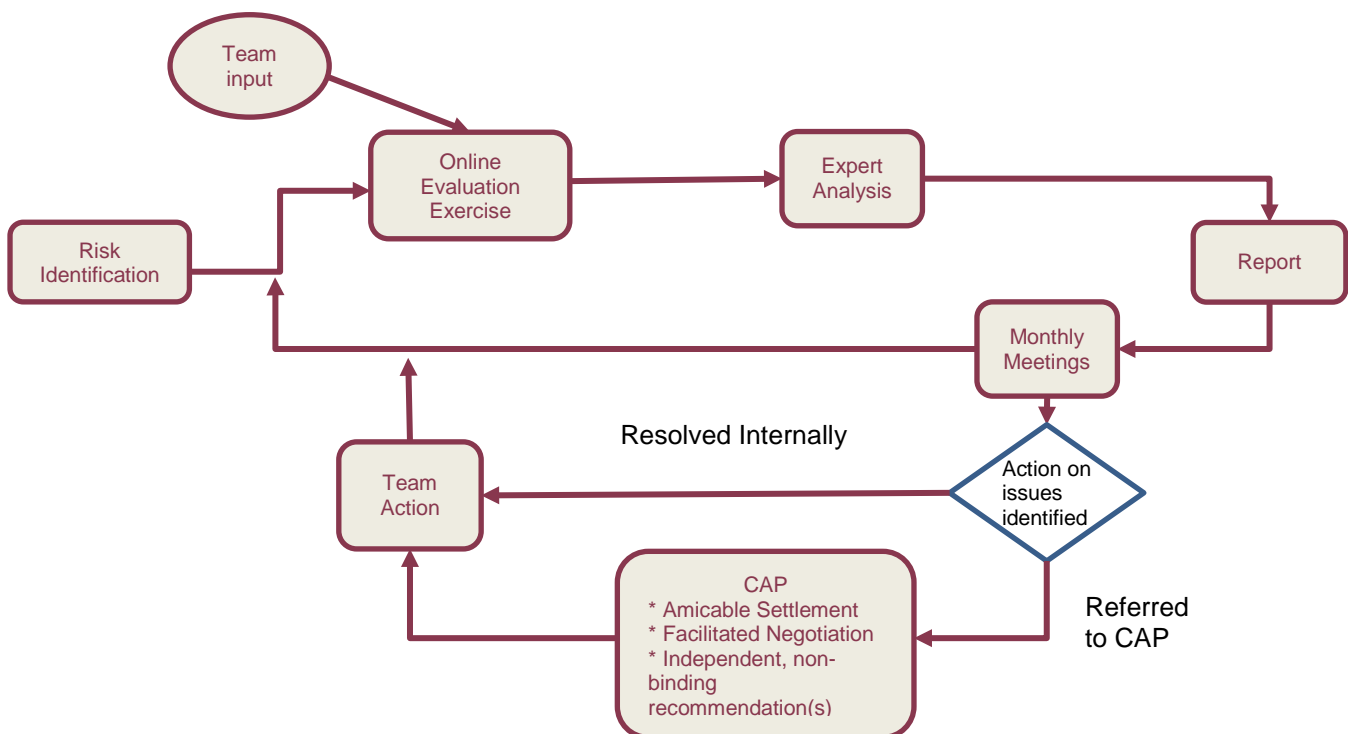
- ResoLex is a specialist consultancy that supports projects with communication, stakeholder engagement and risk identification to enable project teams to build a consensus approach to project delivery.
- ResoLex provides RADAR, a project horizon scanning service that reduces the risk of disputes and supports a collaborative working environment. RADAR operates on behalf of the project team as a whole and provides a confidential and anonymous early warning system that can identify emerging risks and conflicts.
- ResoLex has supported infrastructure, higher education, commercial, housing and mixed-use projects.

Overview

RICS and ResoLex have used their expertise to collaborate and develop a combined risk analysis and early intervention service. Whilst the combination of services is innovative, the principles are tried and tested, and draw on the collective experience of both organisations of successfully providing RADAR and conflict avoidance processes to respective clients.

The ethos of the combined offering accepts that differences between project team members happen. In fact, differences provide positive challenge and opportunities for innovation. However, if problems are not identified, managed and resolved, projects can face problems. This new service provides a contractual mechanism for early identification and resolution of differences on a project without the need for formal dispute resolution processes. The rationale of the service is the complementary nature of the core skill set of each organisation, with the involvement of RADAR, to create an environment for proactive identification on the project.

RADAR's continual assessment and reporting processes identify issues at an early stage. As an issue is identified, there are multiple routes open to the team for resolution. The senior leadership team may resolve it, or it may be dealt with through internal negotiation between the Parties or by referral to an independent assessment through the RICS Conflict Avoidance Panel (CAP). The important feature of the service is that there are pre-agreed processes available for further support and resolution. When necessary the project will draw on the expertise of the RICS membership, through the CAP, to facilitate resolution.



RADAR - ResoLex Avoiding Dispute, Avoiding Risk

The RADAR project horizon scanning service has been developed by ResoLex in response to its experience providing stakeholder engagement and dispute avoidance services on projects over the last 15 years.

This experience enabled ResoLex to identify that projects fail when communication breaks down, and led them to formulate a unique service to approach the problem from a different angle and actively help clients avoid risks and disputes on their projects.

Human interactions within a team are as important to the ultimate success of a project as funding or planning requirements, but few are equipped to measure communication and team effectiveness. Although technical reporting has increased significantly on projects over the last decade, the resulting documentation often provides an impersonal, one-dimensional view. ResoLex identified that between technical data and effective delivery exists a critical gap in understanding.

RADAR bridges that gap between forensic data and stakeholder perceptions, and completes the project communications feedback loop. It provides an early warning system which picks up issues that need attention and allows them to be addressed before they damage the project.

The service uses industry experts who produce anonymous reports based on information provided by the project team members. These highlight any project areas requiring additional focus.

The RADAR system is a proprietary project evaluation tool developed by ResoLex. It is a secure system that enables confidential, anonymous reporting and analysis along with evaluation tools. It both records information and allows ResoLex panel members to efficiently interrogate the data to produce insightful project reports. The reports are then disseminated to the whole project team for discussion.

The strengths of the service include a cost effective method of information gathering and communication, a neutral and expert ResoLex panel and anonymity of the final report. These enable RADAR to provide effective horizon scanning and to tackle subjects that would rarely be raised in open meetings.

The report provides the project with an insight as to how identified risks are performing over time, on emerging risks and issues of importance and, importantly, whether there is a coherent understanding of these risks and issues across the project team.

The early warning system increases the effectiveness of the RICS CAP process, which encourages reality checking for possible compromise with the aim of avoiding formal dispute resolution procedures. Parties to a dispute are encouraged to demonstrate genuine willingness to prevent the need, where possible, for expensive and drawn-out litigation or arbitration. In the unlikely event that a dispute goes to litigation or arbitration, the contractual arrangements between the Parties will require them to show that they have complied with the agreed amicable resolution and/or CAP resolution procedures defined in the contract. The ethos of the RADAR-CAP service is, therefore, to catch disputes early and to find reconciliation points.

How RADAR works:

INITIAL ACTIONS

Start-up meeting and panel selection

- A start-up meeting sets the parameters and scope of the project or programme on which RADAR is to be used.
- An appropriate RADAR panel is selected for approval. ResoLex experts come from a wide range of sectors with varied and high levels of experience. ResoLex recommends particular experts based on their skills and experience, and panel members may change during the lifecycle of the project to ensure that the members with the best skillsets are offered at the right point in the project.

Attendance at initial project workshop

- ResoLex can run a specific RADAR workshop or slot into an existing project initiation workshop or meeting.
- Maximum attendance at this workshop is recommended as it is invaluable to the speed at which RADAR can positively impact the project.

Risk and root cause analysis

- The first step of this process is to clarify the risk register. If a risk register is not present, ResoLex will facilitate a risk workshop to establish an initial robust risk register.
- Once the risk register has been accepted, the team will be taken through a root cause analysis exercise. This identifies the underlying causes associated with the risks. The team then identifies tell-tale behaviour that would indicate whether the everyday management of those issues was working well or whether they require additional focus.
- The result of this workshop is the agreement to monitor specific sets of behaviours which have been identified as contributing to the root causes of the risks to the project.

Gaining trust in the confidentiality and anonymity of the system

- ResoLex will explain how the system works, how all stakeholders will receive the questionnaire, the process they are expected to follow and the resulting report they will receive.
- Trust in the system comes from the team using the system and seeing the results for themselves. Experience shows that there is a marked increase in the amount and quality of information gathered after a three month period once users appreciate what the system can do for them.

Disseminating the questionnaire

- The date is set for dissemination in line with the project timetable.
- An email is sent to all members of the team who have been selected to contribute and they are all given unique login and password details to access the questionnaire.
- Each month (or other agreed time) members of the team will receive an email link to a fresh questionnaire and the deadline by which they must submit their responses.
- The first page of the questionnaire viewed by team members is an 'update' section. This is an important communication tool for the project leadership as it gives the opportunity to identify the key lessons learned from the last report and to describe what action has been taken since. This is an empowering cycle for participants as it demonstrates the effect of their involvement.



THE QUESTIONNAIRE

RADAR provides a web based questionnaire which is accessed by a link sent out in an email to the project team members.

Each login and password is unique and all answers are held securely on ResoLex servers. The identity of the respondent is only known to the expert panel members analysing the results.

The feedback from project team members is analysed by the panel members using the RADAR collation tool and then its analysis, trending and mapping tools to assist them in their report production.

THE REPORT

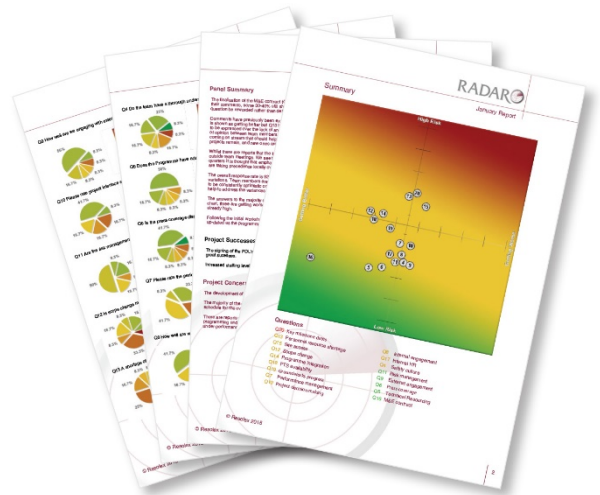
After the questionnaire closes:

- The selected project panel members meet and review the overview chart to identify immediate risk factors.
- They then review the comments made by team members and link these with the identified risk factors.
- The panel use the other tools within RADAR, along with their experience in the field, to review additional information about the risk areas. The system builds organisational models of delivery teams to allow the panel to quickly spot divergence of opinion whether relating to functions, individuals or companies within the project team.

- They then produce the overview and key messages. All responses are amalgamated and anonymised to avoid identification.
- The report is then published and disseminated to all stakeholders within two working days of the deadline for responses.

USING THE REPORT

- The entire project team receives the anonymised report, making it an inclusive process that increases engagement.
- The report production is timed to provide current and timely information for regular project meetings.
- The report effectively becomes part of the meeting agenda, identifying areas the team needs to concentrate on to their increase understanding of risk.
- The report often includes difficult topics that would typically not be raised in meetings and just left to fester and get worse.
- RADAR draws out these issues for resolution and delivers neutral, anonymised data. It reduces the personal emotional reaction within teams, thus encouraging participants to explore solutions collaboratively.



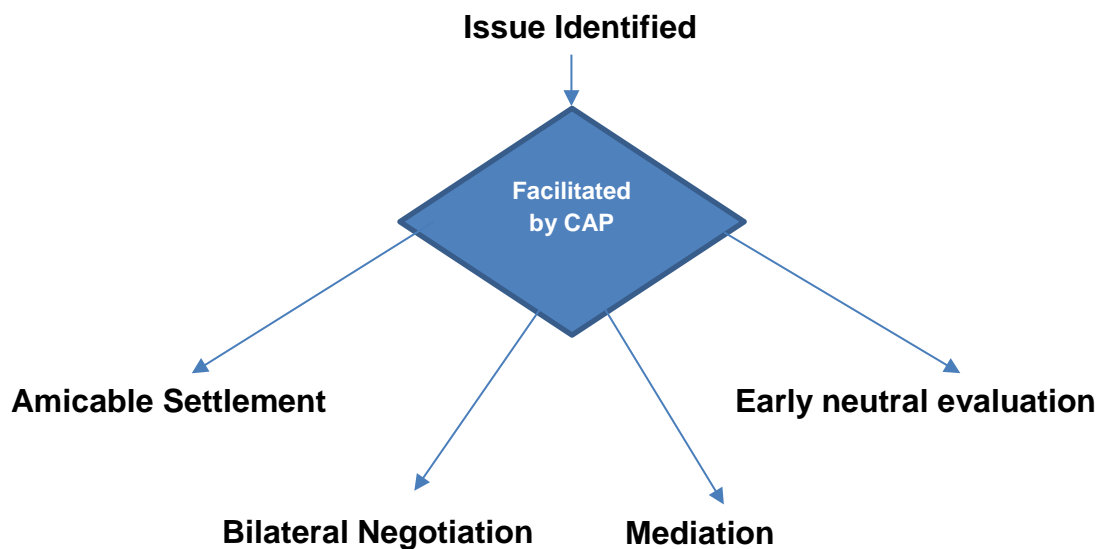
Resolving Disagreements

The monthly RADAR reports will identify any project issues and areas of disagreement. The route taken to resolve these will depend on the severity and relative complexity of the matter.

At this point, those involved in the project delivery will have already contractually agreed to use the CAP process to deal with issues that cannot be resolved internally, and/or would benefit from independent assessment and non-binding recommendations by an expert. The aim is to ensure that minor issues and disagreements do not escalate into full blown disputes and are resolved amicably.

The CAP process is flexible and draws on a range of established ADR methods to help resolve issues early and quickly, and may use one or more resolution techniques, depending on the issues identified.

Any outcomes of the CAP process are not binding, and these decisions are not imposed. However, the process does deliver fully reasoned, independent recommendations for settlement and if a Party does not accept these recommendations, they can be obliged under the terms of their contract to provide the other Party with a written and fully reasoned explanation for this.



Conflict Avoidance Process - Avoidance and Early Settlement of Disputes

How CAP works:

The Parties agree to address and resolve issues early and in accordance with agreed principles and rules for co-operation.

The principles for co-operation are supported by an agreement between the Parties to:

- Promote open and honest communication about any event or circumstance that may possibly lead to a claim from or against the other Party.
- Encourage compromise, wherever possible, and avoid matters escalating into formal dispute resolution procedures such as adjudication, arbitration or litigation.
- Demonstrate genuine willingness to prevent the need for expensive, drawn out litigation or arbitration wherever possible.
- Be able to demonstrate that the conflict avoidance process has been attempted in the event that an issue goes to litigation or arbitration.

The process operates as follows:

Amicable Settlement

Where there is disagreement on an issue, the Parties will attempt to resolve the matter at an early stage, in accordance with agreed principles and rules for co-operation, and/or through a process of Amicable Settlement to avoid escalation to litigation or arbitration.

Either Party may give notice to the other of the disagreement and the Party's decision to refer the disagreement to the Amicable Settlement process.

Bilateral negotiations phase

Within three days of the notice, each Party will appoint a representative to participate in the Amicable Settlement process, which will begin within seven days of the notice. The Parties will actively engage in open and honest communications in an effort to avoid escalation to litigation or arbitration.

The Parties should participate in all reasonably necessary steps to facilitate the Amicable Settlement process. These steps will include, but not be limited to:

- Making any and all useful documents available to the representatives
- Providing a venue or venues for the process to take place
- Allowing any necessary inspections for obtaining clarity to take place

- Releasing the representatives from other duties to allow them to take fully part in the process

Mediation phase

If the disagreement is not resolved within seven days of the Amicable Settlement process starting, the Parties can, through their representatives, jointly instruct an independent mediator who will help to negotiate a settlement.

If the Parties cannot agree to the identity of the mediator, either Party can appoint a mediator or apply for RICS to nominate a mediator at any time after the stated seven day period has passed.

The Parties will actively engage in the mediation and continue to try to resolve the disagreement at an early stage. They will engage in open and honest communications, with the help of the mediator, to avoid escalation to litigation or arbitration.

The Parties will take all reasonably necessary steps to facilitate the mediation process. This includes, but is not limited to;

- Making any and all useful documents available to the representatives
- Providing a venue or venues for the process to take place
- Allowing any necessary inspections by the mediator for obtaining clarity to take place
- Releasing the representatives from other duties and allow them to take a full part in the process

The Mediator will:

- Set an agenda and timetable for the mediation
- Assist structured negotiations between the representatives of the Parties
- Work with the Parties to narrow the range of issues between them and propose possible solutions

Each Party to the disagreement will:

- Bear its own costs and expenses in the event of a referral of a disagreement to the Mediator.
- Bear equally the fees and expenses of the mediator and the fees of RICS, where RICS has been requested to nominate the mediator.

If the representatives of the Parties, assisted by the Mediator, are unable to resolve the disagreement(s) within twenty-one days of the Mediator being appointed (or a longer period that the Parties agree to), either Party may give notice to the other that the dispute will be referred to a Conflict Avoidance Panel.

Conflict Avoidance Panel (CAP)

A disagreement may be referred to a Conflict Avoidance Panel (CAP) for non-binding recommendations by notice in writing from the either Party to the other Party.

The Parties will endeavour to agree upon:

- The person(s) they would consider suitable to act as the member(s) of the Conflict Avoidance Panel.
- The number of member(s) on the Conflict Avoidance Panel, (which will usually depend on the complexity and value of the issues in dispute, but this will always be an odd number).

If the Parties fail to reach an agreement within seven days of the responding Party receiving the notice, either Party may request RICS to nominate the member(s) of the CAP (including determining the number of member(s) of the Panel).

Any person selected to act as a member of the CAP shall:

- Be acting in his/her personal capacity.
- Not be an employee of any of the Parties to the dispute.
- Declare any interest, financial or otherwise, in any matter relating to the dispute.

Within seven days the CAP being appointed (or any longer period agreed by the Parties), the referring Party will notify the CAP, in writing, of the issues on which the Parties disagree.

The written referral will give brief details of areas where there is disagreement, and details of any relief sought and the bases for claiming relief, including the provisions of the Contract that are relevant to the matter. The referring Party will provide the responding Party with a copy of any documents provided to the CAP at the same time as they are provided to the CAP.

The responding Party will provide the CAP with a brief written response within seven days of the CAP receiving the referral of the dispute. The responding Party may also provide the CAP with any relevant and important documents at the same time. The responding Party will provide the referring Party with a copy of any documents provided to the CAP, at the same time as they are provided to the CAP.

Within seven days of receipt of the response (or any longer period agreed by the Parties), the Conflict Avoidance Panel will either:

- Notify the Parties of what further steps it intends to take to investigate the dispute and provide a timetable for doing so (including when it will provide the Parties with its recommendation(s) for avoiding or resolving the dispute), or
- Provide the Parties with recommendation(s) for avoiding or resolving the dispute.

Recommendation(s) will be made in writing, and will include a summary of the CAPs findings and a statement giving reasons for the recommendation(s). Any recommendations made are not binding upon the Parties.

Recommendations will, if the parties wish, help inform further discussions between the parties aimed at finding a solution to the matter(s)

If a Party does not accept or does not intend to abide by the recommendation(s) made by the CAP, they may be required under the terms of their contract to notify the other Party in writing with full reasons for this within seven days of receipt of the recommendation(s).

This notification, and the Conflict Avoidance Panels findings and recommendations will be confidential and not admitted in any subsequent arbitration or litigation proceedings (unless the argument is regarding costs).

Each Party will:

- Bear its own costs and expenses in relation to a referral of a disagreement to the CAP
- Bear equally the fees and expenses of the CAP and the fees of RICS, where RICS has been requested to nominate the CAP.

Unless required by law, the Parties and the member(s) of the CAP will keep any submissions provided by the Parties and the recommendation(s) of the CAP confidential.

Reference to Courts

If the Parties fail to settle their disagreement under the Amicable Settlement process and/or referral to CAP, or if they reject the CAP's recommendation(s), either Party may refer the dispute to the formal dispute resolution procedure provided under the contract (e.g. adjudication, arbitration), or a court of competent jurisdiction.

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