

Guidance

# RICS Conflict Avoidance Process: FAQs



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## About CAP

### 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 Dispute Panel.

### What kind of disputes can CAP tackle?

Any issue capable of being addressed in court or by adjudication, arbitration or mediation are suitable for resolution by CAP. In addition, other perhaps less readily defined issues, which lawyers might hesitate about placing before the court or arbitrator, can be eminently suitable for the less formal and inquisitorial approach used by the CAP Dispute Panel, where the focus is on sorting out the problem, rather than dealing with evidence and a legal claim.

### Can I use CAP on an existing project and dispute?

Yes. Parties can agree to use CAP to address 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.

### How is CAP triggered?

- Either party can trigger CAP by submitting a request to RICS Dispute Resolution Service (DRS).
- Parties are encouraged to appoint a CAP Champion, responsible for:
  - Ensuring their team has a clear understanding of CAP
  - Identifying when an issue is escalating toward a dispute
  - Referring an emerging issue to CAP for early resolution.

### Does CAP work on lower value projects?

Yes, CAP is suitable for projects of any value. RICS will ensure the Dispute Panel has the necessary skills and knowledge to deal with the subject areas in contention and will assist the parties to negotiate fees appropriate to the size and complexity of the matter in dispute.

### How long does CAP take?

CAP is designed to be quick and efficient. The timeline can vary depending on how complex the issues are, but typically resolution of the issues will usually take between 2-4 weeks, with simpler matters being capable of resolution in just a few days.

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

A typical timeframe of submissions is as follows:

- the referring party submits a written referral (within seven days)
- the responding party replies in writing (within seven days)
- further documents including expert reports, plans, accounts etc may be agreed with the Dispute Panel and exchanged by the parties
- the Dispute Panel provides a written recommendation (within seven days of these documents being shared).

### What factors can influence the length of the CAP process?

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.

The CAP Dispute Panel will, however, always discuss these aspects with the parties to ensure that the process moves forward as quickly as possible.

### 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 used at any time.

For examples of CAP provision in contract clauses can be [found here](#).

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 Dispute Panel with copies of any such notices and inform them of the nature of such steps or processes, without delay.

### 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 Dispute Panel to assist them.

### Is CAP a confidential process?

Yes. All discussions, documents, and the resulting CAP Report and recommendations are confidential unless agreed otherwise by the parties. They cannot be referred to in future dispute resolution proceedings unless agreed by all parties.

### 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 a very wide range of issues, including 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 primary 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** – CAP can be scaled to fit issues of varying complexity and value
- **Collaboration** - parties work together with an impartial Dispute Panel 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 conducted by credible professionals who are industry experts 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** - for all the reasons above, it preserves commercial relationships and brand reputation.

### Is CAP like a Dispute Board?

CAP draws on recognised dispute resolution methodologies, but it is not quasi-judicial decision making, like adjudication or arbitration. Unlike Dispute Boards - whether standing or ad hoc – CAP is more flexible, adaptable, and proportionate to the issue in dispute.

### Why choose CAP over a standing Dispute Board?

CAP is a “pay-when-needed” service, making it significantly more cost effective than maintaining a standing Dispute Board on retention for the duration of a project.

CAP Dispute Panel members are selected for possessing the specific expertise, skills and experience needed to easily understand and effectively deal with the particular issue that has emerged. This means they are less likely to need additional, external experts, as they hold this expertise themselves.

### How does CAP compare to an ad hoc Dispute Board?

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

The appointment of the CAP Project and Dispute Panels are made in consultation with the parties, but ultimately, independently, by RICS as a Royal Charter Institution. This negates any perception of bias or undue connection with one of the parties to the project and/dispute.

The CAP process is supported by RICS's hugely experienced Dispute Resolution Service team throughout, and the CAP panellists are subject to RICS regulatory oversight, ethical standards and obligations arising out of the Service Level Agreements they will have signed with RICS before being appointed.

## CAP Costs

### Do I need to pay an application fee to RICS?

No, parties are not required to pay an administration fee to RICS.

### Who pays for CAP?

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

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

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 a Dispute Panel is appointed.

### How does RICS get paid for the service it provides?

There are no hidden fees paid by either party to RICS which could impact on the impartiality of RICS as the appointing body. Once the Dispute Panel process is completed, RICS recovers a small percentage of the panellists fee from the panellist.

## The CAP Report

### What can I expect from the CAP Report?

A CAP Report contains impartial, pragmatic recommendations to resolve the issue(s) referred to the Dispute Panel.

It will set out the risks and likely outcomes should matters proceed to adversarial dispute resolution or litigation.

The recommendations can be used by the parties to either:

- form the basis of settlement for the issues between them, or

- support further negotiation between the parties

### Are the recommendations in the CAP Report binding?

Parties may choose to be bound by the recommendations set out in the CAP Report, or agree on a process by which, if neither party makes formal objection within an agreed period of time, the recommendations become binding.

### 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 the period agreed by the parties, and then
- provide the other party with fully reasoned grounds, in writing, for not doing so within the agreed period.

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:

- Make suggestions for compromise, taking into account the recommendations in the CAP Report
- 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
- 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
- Elect to leave the process altogether and to proceed to adjudication, arbitration or court.

## The Dispute Panel

### What is the difference between the Project Panel and Dispute Panel?

A **Project Panel** is a curated register of professionals jointly established by RICS and the parties for a specific project. It comprises experts selected for their specialist knowledge in areas where disputes are most likely to arise.

A **Dispute Panel** is a one or three-person “tribunal” which is appointed to conduct the CAP process and help parties resolve an emerging dispute that has arisen on a project. Dispute Panel members are selected from the Project Panel according to the issue in dispute and the expertise required. Dispute Panels can also be used on an ad-hoc basis where a Project Panel has not been established.

#### **What approach will the Dispute Panel take?**

The Dispute 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 Dispute Panel will draw on their own experience and expertise to run the CAP and make their recommendations.

The Dispute Panel may also consult with others who are not directly involved in resolving the differences between the parties but who may have knowledge that will inform the investigations, e.g. site managers, individual contractors etc.

#### **How does the Dispute Panel obtain the information it requires?**

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

The Dispute Panel will normally meet commercial directors, managers and others who are directly or indirectly involved in the matter.

#### **How do I communicate with the Dispute Panel?**

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

### **CAP Meetings**

Once appointed, the CAP Dispute Panel will usually hold an initial joint meeting with the parties and will either then or during the course of the CAP process discuss with the parties whether any further meetings need to take place.

#### **Will CAP meetings be in person or online?**

The Dispute 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 Dispute 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 Dispute Panel will normally meet commercial and project directors, managers and others who are directly or indirectly involved in the matter which the Dispute 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 Dispute 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.

## Training and Support

#### Where can I get support or more information on CAP?

- You can contact [RICS Dispute Resolution Service](#) for advice on CAP. We are happy to talk to you.
- You can also our visit the [RICS website](#) for CAP resources and templates.

#### Is training available to help my team/supply chain learn about CAP?

Yes, DRS offers CAP training packages and can tailor them to include training on the contract or any other additional requirements. [Contact us](#) for a discussion and to make arrangements.