

Conflict Avoidance: Get your thinking CAP on!

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In the complex world of construction and infrastructure, the potential for issues, disagreements and disputes is, as we know, huge. These can be costly — not just financially, but in terms of time, relationships, and reputations too. However, they don't have to be if parties are prepared to use procedures such as a **Conflict Avoidance Process (CAP)**: an innovative approach to dispute management developed by the RICS Dispute Resolution Services which, over the years, has proven to be effective at resolving issues on a range of projects whilst helping contracting parties complete projects on time and in budget. Rooted in collaboration, early intervention, and the preservation of working relationships, I think it's fair to say that CAP is helping to change the way the industry thinks about conflict resolution

So much so that conflict avoidance now too has its own place in the disputes calendar. Indeed, at the end of March, the inaugural Conflict Avoidance Week saw 5 days dedicated to fostering collaboration, awareness, and communication across the construction industry, and promoting efficient strategies to avoid unnecessary disputes. Matt and I were kindly invited by the RICS to take part in their event: *"Exploring ADR options in construction disputes"* and, along with fellow panellists (Fionnuala McCredie KC (Keating Chambers), Jonathan Pawlowski (Howard Kennedy) and Kim Franklin KC (Crown Office Chambers)), we explored the role of dispute resolvers in conflict avoidance. I was tasked with focusing on my experience with CAP. Though, it wouldn't be the first time I've talked about the process, and those with a good memory may recall my initial **blog** from 10 years ago about the "whys", the "wherefores" and the "what's involved", not to mention a worthy contender for my best blog title to date: Mind the CAP!

Here's a re-CAP ...

CAP was first used by Transport for London (TfL) and their joint venture partner on the Bond Street station expansion (due to Crossrail/Elizabeth Line). Given the scale and duration of the project, neither TfL nor the joint venture contractor were keen to resort to adversarial methods of dispute resolution. Instead, they sought a more collaborative, proactive alternative, so approached the RICS to create a mechanism for resolving emerging issues quickly and cost-effectively — whether those issues had the potential to escalate into disputes or already had. In response, RICS developed a process involving the appointment of a CAP Panel of one or three suitably experienced professionals. This panel would engage with the parties early on, work to understand the issue in detail, and provide a non-binding Recommendation aimed at resolving the matter and maintaining progress on the project. There were a number of advantages to adopting this approach, including:

1. The process could be dealt with at project level, thereby leaving the ownership and control of the issues arising on the Bond Street project with the project teams. It also resulted in a less adversarial

process than other more formal, tried and tested alternatives;

2. Although the Recommendations were non-binding, given the experience and qualifications of the TfL CAP members, most of whom also sat as adjudicators, arbitrators, etc., the Recommendations provided a useful indication of the likely outcome in a more formal dispute resolution process;

3. Whilst the Recommendations addressed the issues raised by the parties, the TfL CAP member/s were at liberty to introduce alternative proposals if they came to the view that these proposals might be of assistance to the parties. Such flexible outcomes are clearly not available in other more formal dispute resolution procedures; and

4. Finally, in terms of the facts and figures:

a) TfL confirmed that the cost of a smallish adjudication would historically be expected to be around £50k and a large matter would often be in excess of £500k. In stark contrast, the average cost of using CAP was £12k, and this was split between the parties; and

b) Using CAP, TfL delivered the £2.2billion 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 Paralympics 2012 was 269.3%

What began as a concept within the TfL scheme has developed into something which is more flexible, nuanced, and compelling. Since those first CAP panels were appointed, the process has evolved, and it can now ultimately be what the parties want it to be - at one end of the scale it might just be a meeting with the parties' surveyors to talk about valuation, or it might involve helping the parties to define what they agree and disagree about, it could also be conducting a mediation or it might be the production of one or many non-binding Recommendation(s).

It's worth noting that alongside CAP, a separate Dispute Avoidance Panel (DAP) scheme has also been developed by Network Rail and key rail industry stakeholders. Unlike the CAP where member(s) are normally appointed once a dispute/difference has arisen, DAPs work with parties on live projects to provide observations on potential areas where disputes could arise. The DAP, however, is not constituted to review or decide disputes, so if they do arise, the parties have to go to a third-party dispute resolver such as an adjudicator. Again it's something I [blogged](#) about the time and also talked about in depth in an [SCL paper](#) in 2018.

Them's the Rules

More recently, the RICS Dispute Resolution Service has published the [CAP Rules](#), which Matt and I were involved in reviewing and providing comments on. I won't go into them in any great detail as the document provides a detailed explanation of the process and approach that parties and the CAP Panel should consider adopting. However, I do think it's important to stress that, while the Rules provide a good framework, it's not a one-size-fits-all mechanism and the flexibility of the process can (and should) adapt to the project's specific needs.

So, how does CAP differ from traditional dispute resolution?

Firstly, let me bust a few myths about CAP. CAP is not just "non-binding adjudication" in disguise and I think that kind of thinking sells the whole idea short. Equally, some people have compared CAP to an ad-hoc Dispute Board, and, in some respects, there are some similarities. However, there are also some key differences because the output from a Dispute Adjudication Board might be a temporarily binding Decision as with adjudication, and in these circumstances the DB members obviously need to comply with the rules of natural justice which means things like not meeting with the parties individually. The same restrictions don't apply to CAP panels.

To illustrate some of the main differences in very simple, high-level terms, I thought it might be helpful to set it out as follows:

Method:	CAP	Dispute Board	Mediation	Adjudication	Arbitration	Litigation
Purpose:	Avoid disputes early	Ongoing project oversight and resolution	Resolve disputes collaboratively	Determine dispute quickly	Formal legal resolution	Formal legal judgment
Formality:	Informal	Semi-formal	Informal	Semi-formal	Formal	Very formal
Binding Decision:	No (unless parties agree otherwise)	Sometimes (depending on rules)	No – parties must agree	Yes – binding (interim)	Yes	Yes
Speed:	Very fast - often 21-28 days	Fast – built into project cycle	Fast (if parties cooperate)	Fast (28 days typical)	Slow (can take years)	Slow (can take years)
Cost:	Low	Moderate (ongoing cost)	Low to moderate	Moderate	High	Very high
Relationship impact:	Preserves relationship	Maintains relationship	Preserves relationship	Can strain relationship	Often adversarial	Highly adversarial
Flexibility:	Very high – tailored	Moderate – built into contract	Very high – party-driven	Low to moderate	Moderate	Low
Third Party role:	Recommends solution	Advises and/or decides	Facilitates agreement	Decides	Decides	Judge decides
Best used for:	Preventing issues on long-term projects	Complex, long-term projects	When parties want to settle amicably	Quick decision on defined dispute	Complex legal disputes	Legal precedent or enforcement

Does the CAP fit?

In theory, CAP is suitable for projects of any value and according to RICS, they “*will ensure the CAP Panel has the necessary skills and knowledge to deal with the subject areas in contention ...*”. However, despite its flexibility, I think it’s important to acknowledge that it’s not going to suit every project – for shorter term, faster paced projects, having a bespoke conflict avoidance process might not make sense. For long-running, high-value, or complex projects, especially those involving multiple stakeholders and ongoing relationships on the other hand, it can be a real game-changer.

My experience of acting on CAP panels so far has been on major public sector projects such as the TfL stations and new build hospitals and one of the things they all have in common is their longevity, often stretching over many years. Since it’s vital that relationships between the participants don’t breakdown, I think they are far more likely to be prepared to sit down, work through their differences and, if necessary, make compromises on these types of long projects, than they would on short-term, small-scale ones. I also think CAP panels could be equally if not more effective in the private sector where parties can more freely make commercial settlements. If you’re trying to facilitate an agreement where a public body is involved, they often can’t make a commercial settlement as they’re accountable to someone else (e.g. a health trust board or a government department etc).

However, irrespective of sector, there are, as with any mechanism of dispute avoidance or resolution,

challenges. In my experience, these have involved getting the parties to:

- engage with conflict avoidance processes early enough.
- adopt a less adversarial mindset, and realise that their first port of call does not need to be adjudication.
- understand that it's ok to settle part of a dispute. Very often I see parties saying that they don't want to agree a certain Compensation Event or loss and expense item without the other side's agreement on another item, or the parties are worried that settling part of a dispute will result in a precedent being set, which isn't the case. So, I think that over-coming that tactical one-up-man-ship mindset can be a challenge.
- expend some fees on a conflict avoidance process, which can save a lot of money in the long run!

All Aboard!

Let's face it, it's inevitable that conflicts are sometimes going to arise on construction projects the world over. However, in my experience, CAP panels can be incredibly effective at (and I seem to use this phrase a lot) "nipping disputes in the bud" at an earlier stage or narrowing those disputes if they can't be resolved, whilst helping to maintain relationships which can be incredibly important on larger projects. Though, whilst we have seen lots of positive use of the process over the last 10 years, I think it is still underutilised in the industry - perhaps because parties forget about the process, or because there is a lack of awareness or full understanding about how it all works.

So, it's time we all got on board and I'd encourage you all to familiarise yourself with the CAP Rules and to sign up to the [Conflict Avoidance Pledge](#). Not as a box ticking exercise or a logo on an email footer or website, but as a real opportunity to work better together. Do remember, it's not about assigning blame or shoehorning solutions into a rigid structure. It's about creating a culture of proactive, flexible conflict management and finding a way forward. That way, when challenges inevitably arise, everyone can pull in the same direction. And, if we do that, the world of construction is our *Oyster*



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