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Conflict Avoidance Week – Conflict Avoidance & Collaborative Contracting

This week, as part of Conflict Avoidance Week, we spotlight the frameworks in NEC4, RICS CAP, and FIDIC contracts designed to avoid disputes before they escalate.

1. NEC4 Engineering and Construction Contract conflict avoidance clauses
2. RICS DRS CAP Clause – Short and Long-form sample clauses

Summary

Both the NEC4 Engineering and Construction Contract and the RICS DRS CAP Clause recognise the importance of proactive conflict avoidance in construction projects. They aim to resolve disagreements early, preventing escalation into formal disputes. This review examines NEC4's Option W1 and W2 (via a Conflict Avoidance Panel) and the RICS Conflict Avoidance Process (CAP).

NEC4 Conflict Avoidance Clauses Analysis

Strengths:

- NEC4 allows integration of a Conflict Avoidance Panel via a “Z clause” and Option Z in Contract Data part one.
- Under Option W1, a disagreement must be notified within two weeks [Z1.3(1)], replacing standard Senior Representative referral periods.
- A meeting occurs within one week to define the issue and agree on the panel [Z1.3(2)]; if no agreement, a nominating body is used [Z1.3(3)].
- Panel members must act personally, declare interests, be qualified and experienced, and maintain confidentiality [Z1.3(4)-(5)].
- A scoping meeting within one week of appointment sets the issue, recommendation sought, process, and understanding [Z1.4(1)-(2)].
- Referral is made within one week of the scoping meeting [Z1.5(2)], followed by a response within a week [Z1.5(3)]; further submissions may be requested [Z1.5(4)].
- The panel issues its recommendation within two weeks [Z1.5(5)], including findings, reasoning, and guidance [Z1.6(1)].

- If accepted, the recommendation becomes binding [Z1.6(2)]; otherwise, escalation to Senior Representatives occurs within two weeks [Z1.7].
- Panel and nominating body costs are split equally [Z1.8(1)]; under Options C-F, these are Disallowed Costs [Z1.8(2)].
- Option W2 mirrors W1 but requires agreement to refer a disagreement [Z1.3(1)]; the process is otherwise similar [Z1.3(2)-(5), Z1.4, Z1.5, Z1.6, Z1.7].
- Option W3 also allows Dispute Avoidance Boards as an alternative.
- The contract promotes collaboration and early resolution.

Weaknesses:

- Rigid timescales may be impractical for complex issues or internal reviews [Z1.3(1), Z1.4(1), Z1.5(5)].
- Failure to agree on panel members triggers external nomination, possibly delaying progress [Z1.3(3)/(4)].
- Recommendations are only binding if accepted [Z1.6(2)], risking unresolved costs.
- Disallowed Costs status under Options C–F could deter use [Z1.8(2)].

Benefits to Contracting Parties:

- Structured early-intervention process.
- Promotes timely issue identification and resolution.
- Independent panel brings objectivity.
- Potential time and cost savings over formal disputes.
- Encourages stronger collaborative relationships.

RICS DRS CAP Clause Analysis

Strengths:

- Flexible use; can be adopted verbatim or tailored [Intro]. Both SF and LF reference CAP Rules (styled as 'Articles').
- Can address live or longstanding disagreements, even if not initially included.
- Emphasises early identification, notification, and resolution [SFa, LF1a, Article 2].
- Requires parties to refer disagreements to CAP before adjudication/ arbitration/ litigation [SFb, LF1b].
- Parties should agree on issue definition, number of panel members, and suitable appointees [LF2a-c, Article 4.1].
- Referral goes to RICS [LF3, Article 4.1-.2], which conducts due diligence on proposed members [LF4a-g, Articles 4.3, 5, 8].
- If agreement fails or nominees are unsuitable, RICS appoints [LF4, Article 4.4].
- A joint meeting defines the issue, process, and timescales [LF5a-c, Article 3.2]; panel decides procedure if needed [LF5, Article 9.2b].
- CAP Panel may investigate, seek submissions, and rely on expertise [LF6, Article 3.3].
- Provides written recommendations with findings and rationale [LF7, Article 13.1]; follow-up meetings optional [LF7, Article 12.3.f].
- Recommendations are non-binding unless agreed otherwise [Article 13.4]; become binding

upon communicated satisfaction [LF8, Article 3.4, Article 13.5].

- Parties bear own costs, share panel fees, and cover agreed or directed expenses. Expert costs are jointly agreed or determined [LF9, Article 14].
- Confidentiality is upheld [LF10, Article 6].
- CAP Rules apply [LF11].

Weaknesses:

- Non-binding recommendations may not resolve issues [LF8, Article 3.4, Article 13.4, 13.5].
- Process depends on mutual cooperation at the outset [LF1, Article 2]; early disagreement can delay resolution.

Benefits to Contracting Parties:

- Structured yet adaptable process [Intro].
- RICS involvement ensures panel quality [LF4, Article 4.5].
- Can be applied to existing or uncontracted disputes [Intro].
- Helps avoid costly and adversarial formal resolution [Intro].

Comparative Analysis and Assessment

- **Initiation**: NEC4 W1 allows unilateral initiation [Z1.3(1)]; RICS CAP prefers mutual agreement [LF2, Article 4.1]. NEC4 W2 requires agreement [Z1.3(1)].
- **Prescriptiveness**: NEC4 W1 is highly time-bound [Z1.3-1–Z1.5-5]; RICS CAP is more flexible [LF5b, Articles 3.2, 9.2b, 13.2].
- **Panel Appointment**: NEC4 and RICS both use appointing bodies if needed [Z1.3(3), LF4]; RICS handles due diligence directly [LF4, Article 5].
- **Binding Effect**: NEC4 can be binding if agreed [Z1.6(2)]; RICS is non-binding unless accepted [LF8, Article 3.4, Article 13.4].
- **Escalation**: NEC4 W1 mandates escalation to Senior Representatives [Z1.7]; RICS allows any formal method [SFb, LF1b, LF8, Article 3.4, Article 13.4]. NEC4 W2 allows optional escalation [Z1.7].
- **Costs**: Both share panel costs [Z1.8(1), LF9, Article 14]; NEC4 may categorise them as Disallowed Costs under certain options [Z1.8(2)].

Benefits to Practitioners

- Provides structured resolution methods, reducing uncertainty and delays.
- Encourages early, proactive conflict management.
- Independent panels ensure objectivity and expertise.
- Promotes collaborative project culture.
- Reduces reliance on costly, time-consuming formal dispute mechanisms.

Additional Beneficial Information

- Effective panel selection is key. While RICS is a valuable institution, its panel selection process is perceived as closed and non-transparent. Broader participation could enhance credibility and accessibility.

- Clearly defining the issue at the start is vital.
- Confidentiality provisions in both approaches support openness [LF10, Article 6; Z1.3(5)].
- Both focus on early prevention rather than reactive resolution.
- NEC4 Practice Note references the Conflict Avoidance Coalition Pledge, underscoring industry-wide commitment.

Note on FIDIC Contracts and Dispute Avoidance

FIDIC contracts also recognise the importance of proactive dispute management. Most notably, the 2017 editions of the Red, Yellow, and Silver Books mandate the use of a **Dispute Avoidance/Adjudication Board (DAAB)**, a standing body appointed at the project's outset.

- The **DAAB** is empowered to assist parties in avoiding disputes, not just resolving them. It can proactively offer informal assistance if both parties agree (Clause 21.3).
- If a formal dispute arises, the DAAB adjudicates and issues binding decisions (Clause 21.4), subject to possible further challenge via arbitration.
- The standing nature of the DAAB throughout the contract allows for real-time understanding of project context, promoting early intervention.
- The FIDIC approach aligns with global trends, promoting dispute avoidance through ongoing, collaborative oversight rather than reactive adjudication.

By embedding a standing dispute avoidance mechanism within the contract framework, FIDIC complements the aims of NEC4 and RICS CAP—namely, resolving issues early, maintaining project momentum, and reducing formal disputes.

Conclusion

NEC4 and RICS CAP offer effective frameworks for early conflict management. NEC4 is more prescriptive; RICS more flexible. NEC4 allows binding outcomes through agreement; RICS requires explicit acceptance. The choice depends on project needs, but both support reduced disputes, better relationships, and greater efficiency.

The construction industry faces billions in dispute costs. Conflict avoidance is vital—not just to save money but to protect reputations and relationships. A growing number of infrastructure bodies are embedding these mechanisms to manage and prevent conflict. Sign the pledge here.

#ConflictAvoidance #EarlyIntervention #CollaborativeWorking #DisputeResolution #ConstructionContracts #NEC4 #NEC #ConflictAvoidancePanel #RICS #RICS_CAP #DisputeAvoidanceBoard #ConstructionDisputes #EarlyResolution #ConflictManagement

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Adjudicator Assessor and Re-Assessor for the ICE and the CIArb
Arbitrator Assessor for the CIArb
ICE DRC Member
ICE DRC CPD Committee Chairman
Adjudicator Exam Question Setter for the ICE

CIArb Adjudication Panel Member since 2006
CIArb Arbitration Panel Member since 2006
CIC Adjudication Panel Member since 2010
Law Society Panel Arbitrator
RIBA Adjudication Panel Member since 2018
RICS Adjudication Panel Member since 2006
TECSA Adjudication Panel Member since 2012
FIDIC Adjudication Panel Member since 2021
ICE Adjudication Panel Member since 2021
RICS Dispute Board Registered since 2013

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