MEDIATION & CONCILIATION

MEDIATION
& CONCILIATION

værdibyg.dk
VÆRDISKABENDE BYGGEPROCES

FASTER AND MORE AFFORDABLE CONFLICT RESOLUTION

Building and construction projects include many elements that have to work together, as well as a large number of parties who have to combine their projects into a greater whole. The complexity of the construction sector and the different activities of the many parties can result in disagreements and conflicts arising along the way. Conflicts are frequently allowed to develop, and this is both costly for the parties and damaging to their collaborative relations.

Mediation and conciliation are conflict resolution tools that deal with more aspects of a conflict than a traditional arbitration process. Mediation and conciliation does not only look at the legal issues, but to a greater extent also weighs up the parties' interests in a flexible resolution. This broadens the scope for resolving the dispute and enables the parties to find a good solution, end the conflict and continue the project together.

Mediation and conciliation are therefore processes that seek to clarify the substance of the conflict and reach a satisfactory common solution and strive for reconciliation or a win-win situation for both parties, rather than having a winner and a loser from the conflict. A major advantage of mediation and conciliation is that it can proceed quickly and take place during the project while everyone has the details and history of the dispute fresh in their memory. This makes it easier for the parties to find a mutually acceptable solution and preserve their collaborative relations on the project, despite their disagreements.

In this guide, we encourage the parties in the construction sector to use mediation or conciliation to resolve their conflicts. The guide supports the rules in the AB system ('General Provisions' for various types of contract) and the rules of procedure of the Danish Building and Construction Arbitration Board, as well as providing an understanding of the mediation and conciliation process. The guide also makes several recommendations on how the parties can prepare themselves and contribute to an effective and value-creating mediation or conciliation process.

Værdibyg, 2019

Værdiskabende Byggeproces is a partnership between:

BAT-KARTELLET

BYGHERRE FORENINGEN

dansk byggeri

DANSKE ARKITEKT VIRKSOMHEDER

Foreningen af Rådgivende Ingeniører FRI

TEKNIQ ARBEJDSGIVERNE

MEDIATION & CONCILIATION

This guide has been produced and published by the industry initiative Værdiskabende Byggeproces (Værdibyg) with assistance from Boligfonden Kuben.

The authors have been assisted by the following expert group:
Danish Association of Construction Clients: Britt Hansen (Boligselskabet Sjælland), Carsten Bjørlund (co2con), Lis Holm Matthiassen (COWI) Mikael Bredsdorff (Emcon A/S), Per Christian Nielsen (LIFA A/S), Torkil Schrøder-Hansen (Danish Road Directorate) | **Danish Construction Association**: Henrik Ingeman Nielsen (Enemærke & Petersen), Michael Lynge-Svendsen (Einar Kornerup A/S), Michael Vestergaard Jacobsen (CG Jensen), Louise Dahl Krath Jensen (Danish Construction Association) | **Danske Ark**: Kurt Schou (H+ Arkitekter A/S), Lars Vind Scheerer (Mangor & Nagel Arkitekter A/S), Lorens Meyer (Meyers Tegnestue ApS), Mikael Sterr Sørensen (Arkitema) | **Danish Association of Consulting Engineers – FRI**: Flemming Stenaa (Rambøll), Lene Ravnholt (NIRAS A/S), Maria Miret (Rambøll), Peter Halkjær (Danakon a/s) | **TEKNIQ**: Allan Løvgreen (GK Danmark A/S) | **Værdibyg**: Jan Eske Schmidt (TEKNIQ/Værdibyg), Christine Bjerregaard (Værdibyg), Rolf Simonsen (Værdibyg), Sidse Buch (BAT/Værdibyg)

Consultant and rapporteur Christine Meden Bjerregaard (Værdibyg)

With input from:
Anne Buhl (Buhl Mediation), Banafsheh Salehi (Danish Building and Construction Arbitration Board), Bjarne Bæk (Copenhagen Airports), Finn Lænkholm (Danske Mediatoradvokater), Kurt Helles Bardeleben (Sirius Advokater), Lene Ahlmann-Ohlsen (Danish Building and Construction Arbitration Board), Thomas Samsø Bloch (Danish Mediation Institute)

Layout: **Resonans Kommunikation**

Copenhagen, 2019

værdibyg.dk
VÆRDISKABENDE BYGGEPROCES

BOLIGFONDENKUBEN

CONTENTS

CONFLICT RESOLUTION IN THE CONSTRUCTION SECTOR

Mediation and conciliation are not new. What is new is that the common contract standards for the construction sector, the AB documents, contain provisions and guidelines for dispute resolution in construction projects using mediation and conciliation. The provisions in the AB system are intended to ensure that disputes that arise in the construction process are clarified and resolved affordably, quickly effectively and ideally by the parties themselves so that their continuing collaboration on the project is not compromised by the disputes that arise.

The parties should attempt to resolve their disagreements within the project by negotiation – firstly at a project manager level and secondly at a higher senior management level. If the management representatives cannot reach a solution, they should discuss the way forward, which is where mediation or conciliation are the next and most appropriate steps on the dispute resolution ladder.

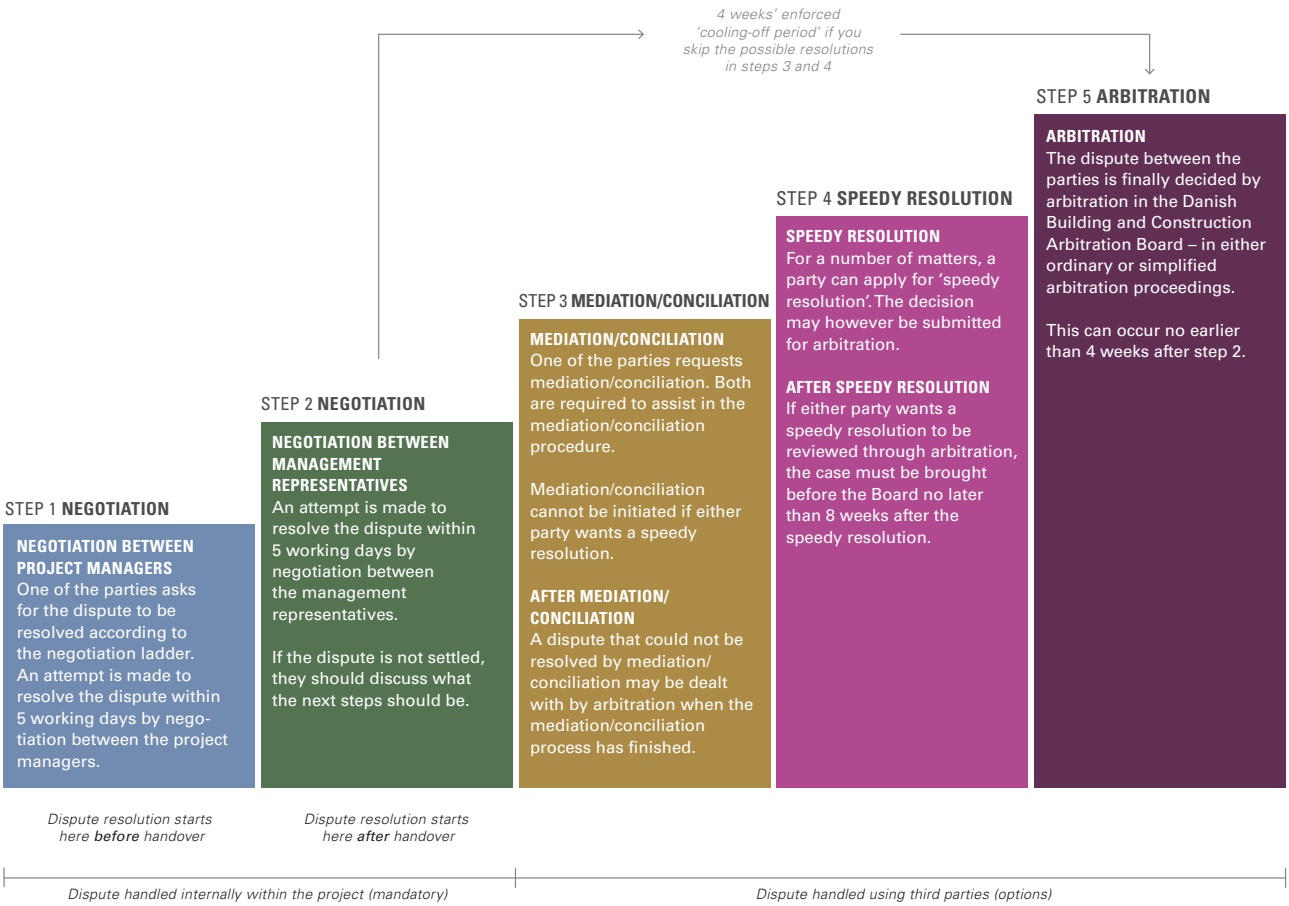


Figure 1. The dispute resolution ladder as per AB 18 clauses 64, 65, 68 and 69 and ABR 18 clauses 59, 60, 62 and 63.

STOP THE CONFLICT IN THE EARLY STAGES

Tvisteløsningstrappen i AB-systemet (figur 1) opfordrer parterne til altid selv at forsøge at forhandle og løse uoverensstemmelser tidligt i processen, inden bistand udefra bliver aktuelt. Hvis der foreligger en plan for konfliktløsning – både en individuel og en fælles – inden projektet startes op, hjælper det parterne med at være på forkant med de konflikter, der kan opstå i løbet af byggeprocessen, og det kan forebygge, at de eskalerer til tvister.

SIT DOWN TOGETHER BEFORE THE PROBLEMS GET ANY BIGGER

According to the AB system, agreements between the parties should be confirmed during the process. One example is when a site meeting is coming to an end. Here, the conclusions should be summarised for everyone to approve or amend before the meeting closes, thereby preventing potential conflicts.

EARLY CONFLICT RESOLUTION

It is helpful if conflicts can be resolved by the parties involved in the project. If a disagreement does arise, the first step on the dispute resolution ladder is for the project manager to try to manage the disagreement as quickly as possible and certainly within five working days.

Conflict resolution is a natural part of professional project management, and it should not be seen as a hostile action if either party takes the first step on the conflict ladder. It is a matter of resolving the conflicts, and as part of being a professional actor one should make use of the industry guidelines as described in the AB system. It is also important for project managers to understand their scope for action when they set out to resolve conflicts. For example, it is important to be clear about the project manager's power to influence events.

If it is not possible for the project manager to resolve the dispute, it should be referred to a higher level of management (step 2), which will seek to address the disagreement within a further five working days. On larger projects, a steering group may constitute this level of management. The advantage of the steering group is that it consists of people who are not directly involved in the project and are authorised to make decisions on behalf of the company. It can also be agreed that the steering group should get involved after the parties' management representatives have tackled the dispute. In this case, the steering group should address the dispute within a further ten working days to provide an effective process.

STEERING GROUP ON MAJOR PROJECTS

Larger projects can benefit from having a steering group with representatives for each contractor. The steering group looks after the strategic management of the project and is responsible for:

- Assisting in the resolution of conflicts that cannot be resolved between project managers or other actors on the project
- Decisions on the wider framework for the project, such as goals, organisation and processes
- Evaluation of the overall risk profile of the project
- Approval of high-level changes to budgets and timescales, and contribution to the overall project goals
- Evaluating the collaboration between the parties, their performance and function, including relationships between the individual employees.

It is helpful for the steering group to talk together or arrange formal meetings at specific times with an established agenda.

If the project's size and budget allow it, it may be a good idea to have an impartial external mediator, conciliator or arbitrator attached to the project. This person can be called upon early or on a regular basis when the parties detect a potential conflict. This will allow them to act faster when disagreements arise, and it may help to prevent the conflicts from growing or building up.

MAKE A PLAN FOR CONFLICT RESOLUTION

A plan for conflict resolution provides a guide to how the parties on the project should handle disputes and conflicts within the project. The client can provide a good foundation by incorporating guidelines for conflict resolution in the tender documentation. The conflict resolution plan can be expanded and elaborated by the parties in a start-up workshop held to discuss and agree on a common approach to handling disputes and conflicts in the specific project. The parties should also nominate the project managers who are to handle disputes in step 1 and the management representatives who are to handle disputes in step 2 so that it is clear to all concerned who these people are. The parties can also agree on whether to use mediation or conciliation, and in which cases – and possibly choose the mediator or conciliator they want to use throughout the process.

The purpose of making a plan for conflict resolution is to be clear about how disagreements are to be addressed and to make it easier, both internally and for the parties in the project, to take action when a dispute or conflict needs to be resolved. It may be necessary to modify the plan in the course of the project, as disputes can vary in scope and character depending on the phase the project has reached.

BE PREPARED

If a conflict arises, the other party may request mediation or conciliation. You should therefore be prepared and think about how mediation and conciliation can be used constructively ahead of every project. In this way, you can avoid being dragged into mediation or conciliation unprepared.

MEDIATION OR CONCILIATION?

Both mediation and conciliation are concerned with resolving the conflict by reaching a settlement between the parties involved. The difference lies in the role taken by the mediator or conciliator. A mediator plays a facilitating role, manages the process and assists the parties with dialogue to ensure that their points of contention, attitudes and interests are understood. A conciliator plays an evaluating role and, as well as managing the process and assisting with dialogue, can present proposals for resolution or settlement and advise on the likely outcome and uncertainties if the case should go to arbitration. Neither mediators nor conciliators can advise the parties or make decisions on the matter in dispute – only the parties themselves can decide on the solution.

MEDIATION AND CONCILIATION

Mediation is used when the parties want assistance with settlement negotiations in the form of a person who is impartial and a neutral negotiator and does not advise on the outcome, any uncertainties or present proposals for settling the dispute. A mediator will always have knowledge of the industry and will, via their education and background, be qualified in using mediation techniques to help the parties find a solution for themselves.

Conciliation is used when the parties want assistance with settlement discussions in the form of a person who is impartial and neutral, has expert knowledge, and who can advise on the likely outcome and uncertainty of the resolution of the dispute and present proposals for settlement. This person will therefore generally have a background as a technical arbitrator, specialist expert or appraiser for the Danish Building and Construction Arbitration Board.

Source: Report no. 1570, 2018, Chapter C2, Comments on AB 18 Clause 64 subclause (1).

Mediation and conciliation, cf. rules of procedure of the Danish Building and Construction Arbitration Board[1], Sections 4 and 5	**Mediator** Section 4	**Conciliator** Section 5
Controls the process	✓	✓
Helps the parties to clarify their issues, attitudes and interests	✓	✓
Helps the parties to resolve the dispute for themselves	✓	✓
Can present proposals for settlement		✓
Advises the parties on the likely outcome or uncertainty if the case should go to arbitration		✓
Gives legal, financial or technical advice to the parties, either together or individually	No, this is a matter for lawyers, consultants or other specialists	
Makes decisions about the dispute between the parties	No, the parties themselves either agree on a settlement or request speedy resolution or arbitration	

1 You can find the rules of the Danish Building and Construction Arbitration Board for mediation and conciliation at www.voldgift.dk/maegling-og-mediation/?lang=en

Although the roles of mediator and conciliator are different, the rules of procedure apply to both mediation and conciliation. It is possible to switch from mediation to conciliation, but not the other way around.

WHAT SHOULD WE CHOOSE?

Both processes are suitable for all types of conflicts. Whether mediation or conciliation is more appropriate will depend on the situation in which the parties find themselves, what the disagreement is about, and what the parties hope to achieve.

Mediation is particularly recommended in situations where the future relationship is crucial. The mediation provides for a good process where the parties can continue collaborating and, for example, find solutions that go beyond the purely legal.

Conciliation is especially relevant in relation to very concrete conflicts where the parties feel that an impartial, expert proposal could benefit their case. This might be in situations where the parties disagree on what is agreed in the contract documents, e.g. contract work or extra works, or whether something has been built according to the contract and would like a non-binding impartial opinion. A conciliator will often have expert knowledge and will also be able to inspect any defects without being able to give an actual expert appraisal.

If there are technical questions that have not been clarified within the project, it may be difficult to resolve a conflict. In this situation, it is better to wait until the technical issues have been clarified before starting a mediation or conciliation process. If the conflict is only about technical questions, it may be possible to proceed to speedy resolution.

FAST RESOLUTION

A fast resolution is the next step on the dispute resolution ladder and aims at a quick, simple and binding resolution of the dispute. A fast resolution may be appropriate for disputes over relatively small amounts, disputes about changes, including the impact on timing and prices, and disputes over price adjustments, withholding and offsetting. The decisions are taken by an umpire appointed in writing by the Danish Building and Construction Arbitration Board, and are final unless they are taken to arbitration within 8 weeks.

In some cases, mediation or conciliation may be less relevant – for example, there may be other legislation that imposes restrictions. This might apply in conflict cases concerning parties who are bankrupt or in administration. In these situations, the case will more likely end up being decided by arbitration.

START OF MEDIATION OR CONCILIATION

If the conflict cannot be resolved directly in the dialogue between the project participants, their management or a steering group, they can proceed to mediation or conciliation. The process is initiated by either party requesting mediation or conciliation by telling the other party that they wish to do so and requesting the Danish Building and Construction Arbitration Board to appoint a mediator or conciliator. Note that the costs of a mediator or conciliator are generally shared equally between the parties – regardless of the result. Ask the mediator or conciliator for the expected costs of fees etc. beforehand. They will typically charge by the hour or by the half-day or whole day.

A mediation process in building and construction cases can usually be completed in a half to a full day, excluding preparation time. However, larger cases may well require meetings over several days.

THE MEDIATION/CONCILIATION PROCESS IS OWNED BY THE PARTIES.
Together with the mediator or conciliator, the parties should plan the process and the meeting dates that are most suitable for all participants.

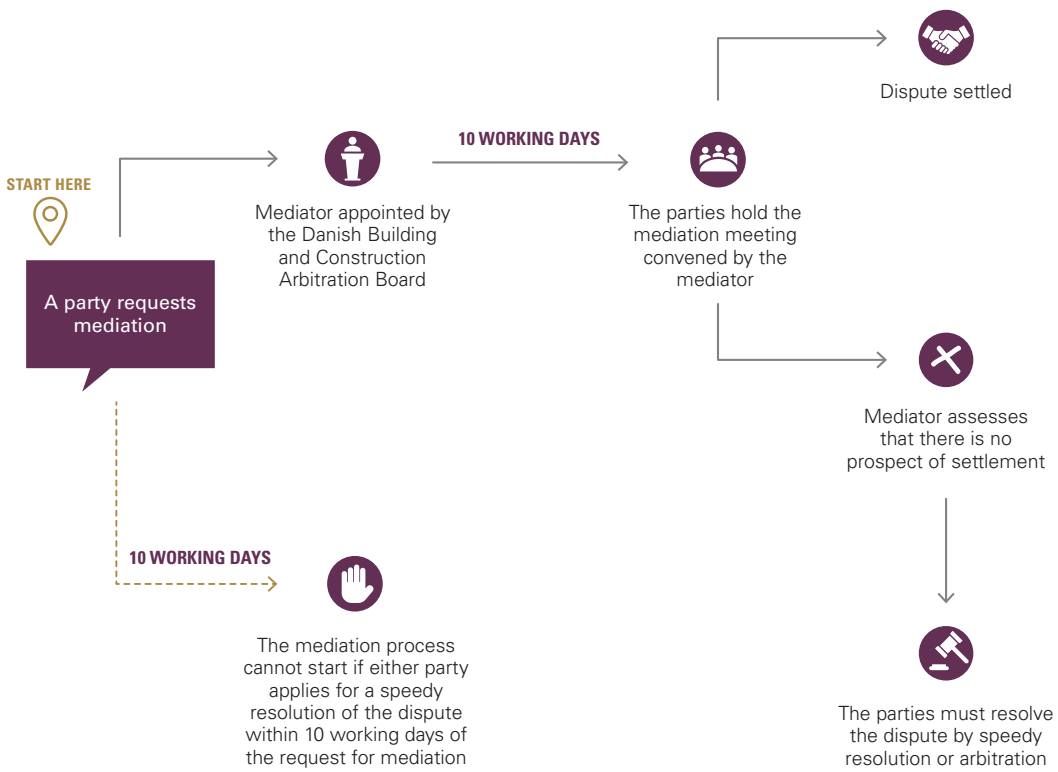


Figure 2. The mediation/conciliation process

REMEMBER THE INSURANCE COMPANY

Insurance companies may have an (indirect) interest in mediation or conciliation. Architects, engineers, client consultants and other advisers will typically have professional indemnity insurance that covers any errors. Similarly, contractors will be insured against consequential damage etc.

Where conflicts concern a matter that is normally covered by professional indemnity insurance, the insurance company should always be involved. If the parties accept the result of a mediation/conciliation process without the insurance company's approval, the company is not obliged to pay any potential claim that has been agreed.

Consultants or contractors taking part in a mediation or conciliation process should always obtain prior approval from the insurance company in the form of a mandate, or make the outcome subject to the insurance company's subsequent acceptance of the conciliation or mediation agreement. Make the parties aware of this early in the process and look out for any time limits.

CHOICE OF MEDIATOR OR CONCILIATOR

At the start of a mediation or conciliation, the parties contact the Danish Building and Construction Arbitration Board and request a mediator or conciliator. The Board requests the parties desired number of mediators/conciliators and their qualifications. The Board then suggests a mediator/conciliator and forwards a CV of the mediator or conciliator that they consider to be the most suitable. If there are no objections (e.g. regarding qualifications or eligibility), the suggested mediator or conciliator will be appointed.

The parties themselves may also find and agree on a particular mediator/conciliator – possibly one who has been attached to the project from the outset – and on this basis run the process independently of the Danish Building and Construction Arbitration Board. The Board may also be asked to simply suggest a mediator or conciliator without taking over the process.

If the case is brought before the Danish Building and Construction Arbitration Board, a more specific process is defined in the rules of procedure of the Board, which considers the wishes of the parties. If the parties themselves choose a mediator or conciliator within the project, this person will decide in consultation with the parties how the process should be conducted.

The choice of mediator/conciliator also depends on what the dispute is about. If there is a need for settlement regarding, for instance, contracts, agreements or questions of liability, a mediator/conciliator with a legal background could be a good idea. On the other hand, if the dispute is about deadline extensions, defects or extra work, a conciliator with a construction background would be appropriate. Construction experience may be especially relevant in cases concerning project planning and design, where the conflict is about which party should have picked up the issue at a given time. In larger cases, both a lawyer-mediator and a person with a technical background may be appointed.

Apart from general experience of the industry, it is important for the chosen mediator or conciliator to be skilled in the art of mediation or conciliation. In a mediation process, technical expertise is not as important as it is with conciliation, since the focus is on facilitating the dialogue between the parties. However, if you want to keep the option open regarding the opportunity to switch to conciliation at a later stage, you should start out with a mediator who also has conciliation skills.

Already when the contract is signed, the parties can appoint a mediator or conciliator to be called in if a conflict arises. Here, the parties should agree early on whether they intend to use mediation or conciliation and find a person with the right qualifications to assist in all future conflicts.

If the parties themselves do not know a suitable mediator/conciliator, the Danish Building and Construction Arbitration Board can be asked to suggest an established mediator or conciliator. Note that it may be more expensive to have a fixed agreement with one person being available throughout the project rather than a mediator/conciliator who is appointed when a dispute arises. An agreement regarding the level of fees should therefore be drawn up from the start. It is also important to ensure that the mediator/conciliator understands the processes in the AB system and that there is a test of suitability at the outset and during the construction process, as eligibility issues can crop up in the course of projects that run for several years.

PRELIMINARY MEETING WITH MEDIATOR/CONCILIATOR

The mediator/conciliator will contact the parties ahead of the actual mediation/conciliation to put the formal and practical aspects in place. This may be either a physical meeting (individually or with both parties together) or a teleconference. The preliminary meeting deals with, for instance:

- Who is to be involved in the mediation/ conciliation
- Where the meeting should be held
- The level and extent of written input from the parties, and any supporting documents
- Introduction and scoping of the process

SUPPORTING DOCUMENTS

At the mediation/conciliation meeting, the parties discuss the circumstances that led to the dispute and their views of the case. It may be good to have access to relevant minutes of site meetings, e-mails and invoices, access to the project website (byggeweb) or similar for the actual meeting. The documents should preferably be circulated before the meeting. Remember that this is not a court case. It is about finding a good solution, and the documents are only used as an aid if there is disagreement over the facts.

MATERIALS

At the preliminary meeting, the mediator/conciliator will agree on the level and scope of the materials to be prepared by the parties and if necessary submitted in advance. The written submissions should be kept short and factual and presented in summary form, and the length should be limited to, for example, 5 pages. The material should reflect the procedure as closely as possible and could include a timeline for the process. It will also improve transparency if claims, and the justification for them, are set out in a spreadsheet with a column for the other party to enter comments.

LEVEL OF DETAIL IN THE DOCUMENTATION

Although the processes are similar, there are big differences in the way a mediator or a conciliator runs the proceedings. A mediator only facilitates the process between the parties. In this process, it is not generally necessary for the mediator to know all the details of the dispute or the project, so the parties can initiate the process with a relatively brief note on the case and any key documents such as a summary of contract notes or invoices. In a conciliation process, the conciliator can make suggestions for how the conflict might be resolved, so the conciliator may need to go more deeply into the matter. This may require more documentation, and the conciliator may have to spend more time preparing ahead of the meetings.

WHO SHOULD PARTICIPATE?

The parties to the conflict each bring in people they believe can help resolve the conflict. It is a good idea to agree at the start of the process how many people each party may bring to a mediation or conciliation process. It can complicate the process if too many people are involved, which makes it harder to reach an agreement. The crucial thing is that the participants on both sides should be participants who can make decisions. So there must be at least one person with the authority to enter into an agreement or a settlement of the conflict. It makes sense to have 1–2 participants along who are close to the project and the conflict and can present the details of the case. This could include a project manager or a site manager. Depending on the nature of the conflict, it may be helpful to have access to a finance person (at the meeting or on standby by phone) who has a grasp of the financial aspects of the conflict.

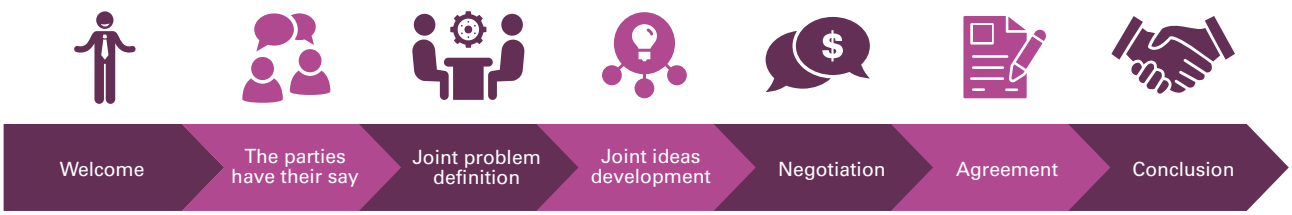
The parties may bring along lawyers who can assess and advise the parties on the legal elements of the conflict. In this case, it is also beneficial for the parties to 'mirror' each other, and to agree before the meetings (perhaps in a preparatory teleconference) on whether to involve lawyers or not. The more participants there are, the more cumbersome the process will be.

ARE LAWYERS NECESSARY?

In mediation and conciliation, the role of the lawyer is different from traditional arbitration and court cases. In mediation and conciliation cases, the lawyer acts as an advisor rather than a legal representative. The involvement of lawyers does not necessarily make it easier or harder to reach agreement, but it may be an advantage to have someone who can assess the risks of proceeding with an arbitration case.

In case of conciliation, the conciliator can also give an opinion as to how the matter will end, but it can be comforting to have your own lawyer to discuss such issues with. However, it may complicate the process if the lawyers for one of more parties do not agree with a conciliator's opinion or oppose the mediator in the process. It may be a good idea to insert short time-outs into the process where the parties can go to separate rooms and discuss the case in their own time.

PROCEDURE FOR MEDIATION OR CONCILIATION



The processes for mediation and conciliation are similar but, as mentioned above, the roles of mediator and conciliator are different. The mediation process focuses on finding a solution together and on preserving the working relationship, while conciliation is more about getting the particular dispute resolved quickly.

WELCOME

Mediator/mægler indleder mødet med at sætte rammen for mødet og forklare processen og de skridt, man skal igennem. Nogle af skridtene vil være forskellige, alt efter om det er mediation eller mægling. I sin indledning vil mediator/mægler typisk også forklare om den fortrolighed, der er tilknyttet mødet, samt om den metode, der benyttes – f.eks. hvordan man bruger åbne og afklarende spørgsmål for at få tydeliggjort sagen og parternes synspunkter.

CLARIFICATION OF THE CONFLICT

A great part of the value of this meeting also comes from gaining a clear view of the conflict.
Even if the parties do not reach agreement on a solution, they may gain a better understanding of the substance, redefine the conflict or resolve parts of it.

The parties start by introducing themselves by name, role and authority within the process. It is important for the parties to ask questions as they go along if they are unsure or to indicate where they have particular requirements or expectations of the process, e.g. 'We cannot conclude the negotiations until the proposed solution has been cleared with our insurance company.'

Finally, the mediator/conciliator and the parties define the overall ground rules for the meeting. The primary purpose is to get the parties to talk to each other, and it may be a good idea to agree on the tone of the meeting.

THE PARTIES HAVE THEIR SAY

In the next step, the parties have their say and set out their views on the case. Here, the parties have the opportunity to explain themselves and expand on the material submitted ahead of the mediation/conciliation. When the parties have presented their views, the mediator/conciliator will typically ask for their opinions or other angles, e.g. 'Thank you for the legal presentation. Can you say something about the process/the collaboration?' The other party listens to the presentation and the discussion between the first party and the mediator/conciliator.

In this process – as in the whole procedure – the mediator or conciliator can talk to each party behind closed doors if the discussions become very heated or go around in circles. The mediator or conciliator agrees with the parties on how much can be taken from the break-out into the general meeting room.

The mediator/conciliator will typically conclude by summarising the points of contention.

JOINT PROBLEM DEFINITION

Following the individual submissions by the parties, the next step is to try to agree on the problems to be resolved. For example, the summary points could be used to try to answer the questions:

- What is the conflict actually about?
- Did anything new come out of the presentations that moved us forward?
- Are there any contentious issues that are now irrelevant?
- What should we discuss looking ahead?

In this phase, the theme of the conflict can change, or there can be areas that the parties can resolve quickly because the issues have been clarified. It is also possible to revisit the points that the process kicked off with if the parties now agree, for example, that the focus should be different. For example, if the parties have suddenly realised that the costs of a delay on both sides of the table are greater than the sum of their claims, this may be what the mediation/conciliation process should be concerned with.

Whether it is a mediation or a conciliation process, it is a good idea for the parties to agree on the definition of the problem. In a conciliation, the conciliator may however take a more active role in pinning it down.

JOINT IDEA DEVELOPMENT

When the parties agree on the problem definition, a joint brainstorm may be a good way of coming up with possible solutions or suggestions for how to proceed with the discussion. This is part of the process for a mediation exercise, but it is also good to use in a conciliation context. In a conciliation, one can however agree that the conciliator can also suggest solutions.

The ideas from the brainstorm form the input for the subsequent negotiations between the parties. It helps to remember to look at the solutions from both sides, as suggestions that only benefit one party could escalate the conflict. Before the negotiations start, it may be good to call a time-out where the parties can each discuss the proposed solutions among themselves.

TIME-OUTS

You can always ask for a time-out during the process if you need to agree or clarify anything by phone, perhaps with a finance person, a lawyer or colleague who is not present.

NEGOTIATION

The negotiations can usefully start with the parties looking to see whether there are any 'low-hanging fruit' – i.e. obvious elements or solutions – that the parties agree on and can therefore be resolved or parked immediately.

The parties then negotiate on the proposed solutions, typically one point at a time. Patience is a keyword, and the parties will certainly feel at times that they are taking two steps forward and one step back.

A SOLUTION IS MANY THINGS

In a mediation/conciliation process, it is possible to incorporate all of the parties' interests into the solution. That means that things other than monetary amounts can be included in a solution – such as working relationships, safety concerns on the site, relations with neighbours, insurance issues, mutual assistance with future tasks etc.

It is often unhelpful to combine all points into one package for which an overall solution has to be found. Different problem areas may need to be handled differently and cannot be simply reduced to an amount. Having several negotiation points makes it easier to arrive at solutions to the individual items, since the parties can view the negotiations as 'swings and roundabouts' which together offer a reasonable solution for both parties.

In the negotiations, each party should look for the best solution for themselves but also keep in mind that it needs to be an acceptable solution for the other party too. It is about understanding each other's needs. For one party, it may be that time is crucial, while for the other part it is about covering costs. A good solution for one side is not always a problem for the other. So try to avoid quibbling over the fine details. In some cases, one party would rather have nothing (and take the conflict forward to speedy resolution and arbitration) than be content with part of the disputed amount. At other times, a sincere apology may soften the tone of the negotiations.

BEST AND WORST OPTIONS
During the negotiations, consider what would be good about finding a solution and what would be bad about not finding one. You could produce a risk analysis ahead of the meeting.

At both the early stages and during the negotiations, it is important to focus on what the conflict is about and what interests are in play. The causes of conflicts may be anything from opposing interests or different business processes, projects and/or organisations building up pseudo-conflicts, which often arise from misunderstandings, and it is important for each party to be clear about what the conflict means to them.

If there is a lot to talk about or it is a very complicated conflict, the parties may go into separate meetings from time to time and discuss the negotiations internally. Where it is not possible to resolve the conflicts in one day, the mediation/conciliation may continue at a later date.

During the negotiations there is a big difference between mediation and conciliation. A mediator facilitates the process, but the parties themselves have to work out potential solutions. A conciliator can take a more active role and propose solutions.

SWITCH FROM MEDIATION TO CONCILIATION

During a mediation process, it is possible that the parties may want to be presented with concrete proposals for resolving the conflict. If they agree that this will help them move forward in the process, the parties may choose to switch from mediation to conciliation. The switch might be made if the parties have got stuck in the negotiations and it is felt to be better for their relationship and future work together to have a third party proposing solutions.

A change requires the mediator to have the necessary legal or technical skills to switch to conciliation and to be able to offer input to solutions or asses how the case might turn out if it should go to arbitration. If you switch from mediation to conciliation, it is a good idea for the parties to summarise their arguments and views on the case before the former mediator (now the conciliator) makes an assessment.

It is a good idea to establish beforehand whether the mediator is also qualified to act as a conciliator if you decide to make this switch during the process. Otherwise, you may have to start the process all over again. Mediators from the Danish Building and Construction Arbitration Board can generally play both roles.

POINT OF NO RETURN

Once the mediator/conciliator has expressed an opinion, he/she is no longer 100% neutral, so it is not possible to go back to mediation.

HAVE FAITH IN THE PROCESS

If the parties have chosen to enter into mediation, they should also have faith in the mediator and the process. Do not get impatient in the hope of a speedy result. It often takes more time to get to the heart of the conflict and for all parties to pitch in with possible solutions. The switch from mediation to conciliation should only

be used in cases where the mediator, after a lengthy meeting without a settlement, has gained an insight into the matter and has the full confidence of the parties, and the parties therefore want the mediator's view on the matter in order to open the way to a settlement rather than leaving the meeting without a result.

AGREEMENT

Mediation or conciliation will hopefully conclude with the parties entering into a written settlement that is the solution. The parties themselves (possibly with help from lawyers and the mediator/conciliator) draw up the settlement, and it is important for the written settlement to be worded in such a way that doubts do not emerge later.

If the parties cannot proceed to an agreement, the case may go forward to speedy resolution or arbitration.

If, after further consideration, the parties still want to pursue the settlement option, the mediator/conciliator must be contacted again.

CONCLUSION

At the conclusion of the mediation/conciliation, the parties agree on how to proceed with the construction project. The parties agree on the next steps and how to avoid similar conflicts in the future. Finally, there may be a need for the parties to make a joint announcement on the agreement (or lack of one) to the other participants in the project, their own colleagues and any other stakeholders.

If the project is complete, the process ends here – but if it is still in progress, the parties should focus on re-establishing their collaboration. It is especially relevant to focus on re-establishing collaboration after a conciliation procedure, since conciliation may not necessarily have the same focus on relationships and further collaboration as a mediation process.

NEXT STEPS

A mediation process cannot be carried out to another/further dispute. The mediator produces only a brief report, recording the participants and whether a settlement was reached. However, it may be a good idea for the parties each to reflect on the mediation in their own organisation. Note, however, that the documents and notes produced in connection with mediation or conciliation cannot be presented in a later arbitration or court case.

VÆRDISKABENDE BYGGEPROCES (VÆRDIBYG) IS A PARTNERSHIP BETWEEN SEVEN OF THE MOST INFLUENTIAL ORGANISATIONS IN THE CONSTRUCTION SECTOR. VÆRDIBYG IS DEVELOPING A NEW STANDARD PRACTICE FOR THE CONSTRUCTION PROCESS COVERING THE DIFFERENT ACTORS IN THE INDUSTRY.

THIS GUIDE DESCRIBES AND EXPLAINS CONFLICT RESOLUTION BY WAY OF MEDIATION OR CONCILIATION. THE GUIDE ALSO MAKES RECOMMENDATIONS FOR HOW THE PARTIES CAN PREPARE THEMSELVES AND CONTRIBUTE TO EFFECTIVE MEDIATION OR CONCILIATION.