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Settlement proceedings before a Swiss commercial court – a successful way out of litigation for companies

Michael Ritscher

Dr iur. Michael Ritscher, LL.M. (Georgetown), partner at MLL Legal in Zurich; since 2009, a commercial judge at the Commercial Court of the Canton of Zurich.

This article reflects the author's personal views.

More than 70 per cent of all proceedings before the Swiss commercial courts end in a settlement. This article examines the practice of settlement negotiations before the Swiss commercial courts, their procedure and their success factors. It explains why this instrument is particularly valuable for companies and addresses the central issue in this context of judicial bias, on which the Swiss Federal Supreme Court recently ruled in its judgment ATF 152 III 61.

I. Autonomous resolution of the dispute rather than a judgement

Conflicts are inevitable. The Swiss legal system provides several methods for resolving them and restoring 'legal peace', which Max Guldener – unlike the enforcement of subjective claims – regarded as the aim of civil procedure law. One exceptionally successful method is to be presented here. More than 70 per cent of all proceedings initiated before one of the four Swiss commercial courts[1] are settled at an early stage without a judgement. This not only relieves the burden on the courts but, above all, is in the interests of businesses and thus in the interests of the economy. With the imminent launch of the Zurich International Commercial Court (ZICC)[2] , the institution of settlement negotiations will become even more attractive for international disputes.

When two parties acting rationally and in their commercial interests are in dispute, and fail to reach an agreement even after consulting independent solicitors, the factual and legal situation is generally not black and white, but grey. Court judgements, however, are necessarily black and white. As a result, they generally cannot do justice to the situation or resolve the problem. Furthermore, court proceedings usually take a long time. Consequently, once a claim has been filed, uncertainty persists for an extended period, positions become entrenched, and the cost risk increases for both parties. For businesses, this is toxic.

Exceptions to this are 'economic wars' in the pharmaceutical and telecoms sectors, situations where a legal question of fundamental importance is to be resolved by the highest court, and cases where the court system is being abused.

However, the high settlement rate mentioned is not solely attributable to the obvious insight that court and arbitration proceedings are usually litigation traps – in other words, 'lose-lose scenarios'. Rather, it is due to the practice of the commercial courts in the cantons of Aargau, Bern, Zurich and St Gallen of conducting settlement negotiations before a judgement is handed down, and usually after the first exchange of written submissions. The experience of the commercial courts shows that companies are seeking a swift and professionally sound assessment and prefer a process designed not to be confrontational but to find a solution acceptable to all parties. It is precisely for this purpose that the settlement negotiations conducted by the Swiss commercial courts provide the appropriate framework.

With the ZICC, this tried-and-tested model is expected to be extended to international disputes from 2027 onwards. As a new jurisdiction of the Zurich Commercial Court, the ZICC is aimed in particular at parties involved in cross-border disputes that are to be conducted in English.

II. The procedure

The procedure for the 'instructional hearing', as referred to in Article 226 of the Swiss Code of Civil Procedure (ZPO)[3] , varies from court to court. As a rule, this hearing takes place after the first exchange of pleadings, i.e. after the statement of claim and the statement of defence. Experience shows that this timing is advantageous for both the parties and the court. This is the case even though (or precisely because) the facts of the case have not yet been definitively established, as the hearing takes place before the reply and rejoinder, and before any evidentiary proceedings involving on-site inspections or witness examinations.

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1 The four Swiss commercial courts are located in the cantons of Zurich, St Gallen, Bern and Aargau.

2 *Cantonal Government of Zurich*, press release 'Zurich to host an international commercial court' dated 17 July 2025, <https://www.zh.ch/de/news-uebersicht/medienmitteilungen/2025/07/zuerich-soll-ein-internationales-handelsgericht-erhalten.html> (last accessed on 12 August 2026).

3 Swiss Code of Civil Procedure (Code of Civil Procedure, ZPO) of 19 December 2008 (SR 272).

For the parties, this timing has the advantage that legal fees are still low and they also have the opportunity to rectify any weaknesses in their previous factual and/or legal submissions in the second exchange of pleadings. However, the reservation regarding the second exchange of pleadings and any subsequent evidential proceedings is also advantageous for the court. This is because it allows the court delegation – in addition to the fact that, in a judgement, other judges are involved who may hold a different view – to avoid having to commit to a definitive assessment at this stage.

Experience shows that a decisive factor in the success of settlement negotiations is that the responsible individuals participate in person – often meeting on this occasion for the first time since the conflict arose. It is at least as crucial that the court delegation, which usually consists of a professional judge and a commercial judge also elected by Parliament, possesses both personal and professional authority. It is helpful if the commercial judge works full-time in the parties' industry, and it is also beneficial that the parties typically sit together at a round table, that the settlement negotiations are not recorded, and that the parties are prohibited from referring later to statements made during these negotiations.

The starting point for settlement negotiations – and an indispensable prerequisite for success – is a carefully prepared preliminary assessment of the legal position by the members of the court delegation. These impartial opinions from third parties enable the parties to better gauge their prospects of success. Furthermore, in cases where no agreement is reached, they help the parties to focus on any potential weaknesses in the second exchange of written submissions.

This opening is usually followed, after a break, by brief statements from the parties, which are also not recorded in the minutes. The subsequent settlement discussions are chaired by the court delegation and are characterised by both parties moving away from their initial positions. In doing so, the parties enjoy almost unlimited freedom and can consider solutions that no one would previously have thought of. It is not uncommon for these discussions to be conducted in the local dialect, in French or in English, if this facilitates understanding. However, even though the court delegation occasionally urges the parties not to leave the room without having reached an agreement, and even though such negotiations can take a correspondingly long time and be exhausting for all involved, a settlement reached in such proceedings is ultimately an autonomous resolution of the underlying problem. Consequently, both parties are usually dissatisfied.

Most settlement negotiations conclude with an agreement that not only brings the proceedings to an end and thus settles the past, but also governs the future relationship between the parties. And it is not uncommon for the parties to resume their cooperation.

III. Between agreement and influence

Settlement negotiations in the commercial courts are a mixture of state jurisdiction and mediation. Because of the state element, the courts are occasionally accused of pressuring the parties to reach a settlement during the negotiations in order to make their own work easier. This risk does indeed exist. And often, following the court delegation's preliminary assessment, the settlement discussions continue late into the evening, with the parties frequently being sent back to their rooms for further internal consultation and then asked to return. However, in over thirty years of my legal practice before the courts, I am not aware of a single case in which the line between supporting the parties and abusing a position of power was crossed. Furthermore, the reduction in workload for the courts is usually very limited, as the effort required to prepare thoroughly for settlement negotiations often differs only marginally from that involved in drafting a judgement.

IV. Between a preliminary opinion and bias

Abroad, but also in French-speaking Switzerland, the fact that a judge who has expressed a preliminary opinion during settlement negotiations goes on to participate in any subsequent judgment – that is, the blending of state jurisdiction and mediation – is generally met with a lack of understanding. After all, it is well known that it is difficult to distance oneself from an opinion once it has been formed and to remain impartial. As already explained, however, it is precisely this combination – a swift yet well-founded assessment of the prospects of success, coupled with the fact that this assessment comes from members of the panel which will hand down any subsequent judgement – that is one of the reasons for the high settlement rate. The problem of judges' bias cannot and must not be underestimated. However, apart from the fact that bias can never be ruled out and ultimately depends on the integrity of the individuals concerned, there are measures that minimise this risk. These include, in addition to vetting the personal integrity of judges during the selection process, the disclosure to the parties at the outset of proceedings of even the most remote possible grounds for bias. Furthermore, each party has the right to refuse a court-mediated settlement hearing. Moreover, the settlement hearing generally takes place after the first exchange of written submissions, and the parties then have the opportunity to set out their positions comprehensively once again. They can also focus on the issues identified as decisive in the court delegation's preliminary opinion. Moreover, the findings of evidentiary proceedings could not yet have been taken into account in a preliminary opinion. Finally, the judgement is delivered not only by the two judges who have already conducted the settlement hearing, but also by a further professional judge and two additional commercial judges, who assess the case anew without knowledge of the preliminary opinion.

The Federal Supreme Court recently confirmed this practice of assessing the prospects of success at settlement hearings as being in accordance with federal law in its judgment BGE 152 III 61. In that case, a party had filed a motion for recusal against the President of the Commercial Court of the Canton of Aargau because he had expressed his preliminary assessment of the legal situation during the settlement hearing. The Federal Supreme Court dismissed the appeal and held that a preliminary assessment of the facts and the legal position by the court delegation did not, in itself, give rise to any appearance of bias.[4] The court delegation need not conceal its convictions behind a veil of reservations simply because it might otherwise fear being rejected as biased by the dissatisfied party.[5] The parties should not scrutinise the statements made by the court delegation too closely; rather, whether a member of the court delegation appears biased due to statements made at settlement negotiations must be decided on the basis of an overall assessment.[6]

V. Outlook

The tradition of resolving disputes amicably and with as little recourse to the courts as possible is highly valued in Switzerland. The success of settlement proceedings before the commercial courts lies in the ultimately autonomous identification of a solution acceptable to both parties, which is initiated by a professional judge and a commercial judge with industry expertise, backed by a preliminary opinion provided at an early stage and carefully prepared. An exchange of best practice in settlement negotiations has long been lacking even amongst the four cantonal commercial courts, but is now taking place, amongst others, within the Association of Swiss Commercial Judges, as well as – albeit with a focus on intellectual property law – at the

4 BGE 152 III 61 E 6.2.6.

5 BGE 152 III 61 E 6.2.11.

6 BGE 152 III 61 E 6.2.10.

Institute for Industrial Property Rights (INGRES), the Association Romande de Propriété Intellectuelle (AROPI) and the University of Neuchâtel. It is to be hoped that this successful Swiss instrument will also be applied and further developed beyond the commercial court cantons of Aargau, Bern, St Gallen and Zurich, and will also be adopted by other courts and in arbitration proceedings. The aim must be to offer the parties to a dispute assistance in resolving it amicably and avoiding the pitfalls of litigation.

VI. Appendix: Further reading

Roland Schmid, 'Experiences from settlement negotiations from a judge's perspective', ZZZ 2025 43 ff.; *Peter Nobel,* 'Settlement negotiations in practice (Part 1): How to resolve common deadlocks? 'Let's Have a Deal', SJZ 2021 154 ff.; *Mario J. Minder,* 'Intellectual Property Litigation: Report on a Conference Held on 5 December 2012 in St. Gallen', sic! 2013 254 ff.; *Philipp Maier/Judith Knobel,* 'Conflict Resolution Strategies in the Court-room: Reflections on the Structured Conduct of Court-Mediated Settlement Discussions', AJP 2015 551 ff.; *Martin Bernet,* 'The Zurich International Commercial Court (ZICC)', SJZ 2025 591 ff.