



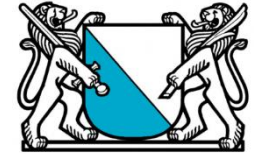
Mediation and Conciliation at the Commercial Court of Zurich **'The Zurich Method'**

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CEDR Accredited Mediator (London)



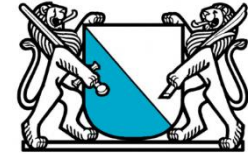
Content and overview

- 1 Problems at Courts
- 2 Normal approaches (long and complicated proceedings)
- 3 Negotiation - Litigation - Mediation/Conciliation
- 4 Institution of the Commercial Court
 - 4.1 Professional Judges and Expert Judges
 - 4.2 Specific Knowledge of the Expert Judges
- 5 Proceeding of Conciliation at Court (Zurich Method)
- 6 Q&A - General discussion



1 Problems at Courts





2 Normal approaches (long and complicated proceedings)

Statement of claim (ZPO 221)

Statement of defence (ZPO 222)

Counterclaim (ZPO 224)

Second exchange of written submissions (ZPO 225)

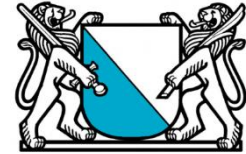
Main Hearing - Opening party submissions (ZPO 228)

New facts and evidence (ZPO 229)

Taking of evidence (ZPO 231) ==> testimony/ physical records/ exp.

Closing submissions (ZPO 232)

Final decision (ZPO 236 ff.) ==> Appeal to the Supreme Court



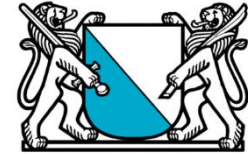
2 Normal approaches (long and complicated proceedings) "Alternative Dispute Resolution" at Court ==> Conciliation

Statement of claim (ZPO 221)

Statement of defence (ZPO 222)

==> Immediate "round table"

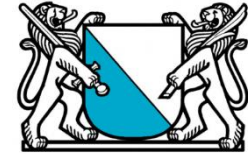
==> Abbreviation of the proceeding
(70% settlement agreements)
(settlement within normally six months)



3 Negotiation - Litigation - Mediation/Conciliation

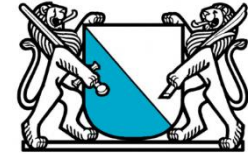
Negotiation Firms and Board	Litigation Courts	Mediation Firms and mediators
		

Presentation and Q&A with Chief Justice Prof. Dr. Alexander Brunner, Commercial Court of Zurich



3 Negotiation - Litigation - Mediation/Conciliation

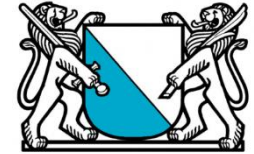
Negotiation Parties / Firms	Litigation Courts	Mediation Parties and Mediators
Voluntary	Not voluntary	Usually voluntary
If agreement, can be enforceable as contract	Binding, subject to appeal	If agreement, can be enforceable as contract
No third-party neutral involved	Imposed decision	Mediator selected by parties
Informal	Formal, rigid rules	Informal
Freedom to choose how and when to present evidence,	Opportunity for each party to present proofs	Freedom to choose how and when to present evidence
mutually acceptable agreement sought	imposed decision, supported by reasoned opinion	mutually acceptable agreement sought
Private	Public	Private



4 Institution of the Commercial Court

4.1 Professional Judges and Expert Judges

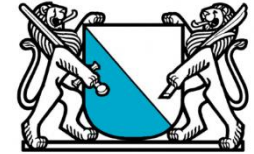
CC (ZPO 6) Composition →	Expert Judges (Sciences) Majority	Professional Judges Minority
Estimation of the facts	<i>Knowledge of</i> <i>Experts within</i> <i>the Court</i>	<u>depend on</u> expertise out of Court
Interpretation of the law	<u>depend on</u> lawyers	<i>Knowledge of</i> <i>material and</i> <i>procedural law</i>



4 Institution of the Commercial Court

4.1 Professional Judges and Expert Judges

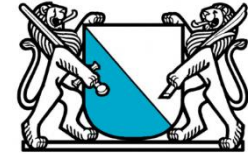




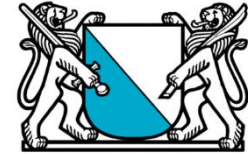
4 Institution of the Commercial Court

4.1 Professional Judges and Expert Judges





- 4 Institution of the Commercial Court
- 4.2 Specific Knowledge of the Expert Judges
 - 1. **Banks and Insurances**
 - 2. **Auditing, Trusteeship and Accountancy**
 - 3. **Construction and architecture**
 - 4. **Chemistry and Pharmacy**
 - 5. **Food industry and commerce**
 - 6. **Industry of machines and electricity**
 - 7. **Intellectual property**
 - 8. **Wholesale trading**
 - 9. **Textile industry**
 - 10. **Diverse branches of the market**



5 Proceeding of Conciliation at Court (Zurich Method)

Delegation of the commercial Court

Professional Judge

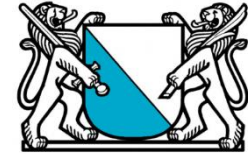
Expert Judges

Clerk

Mediation ==> Conciliation at the CC

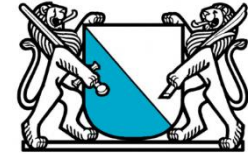
ZPO 124 III

The court may at any time attempt to achieve an agreement between the parties.



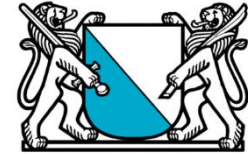
5 Proceeding of Conciliation at Court (Zurich Method)

Conciliation within Litigation	Mediation (CEDR Model)
Instruktions- / Einigungsverhandlung	Vermittlungsverhandlung
Parteien und Vertretung	Parteien und Vertretung
Klageschrift / Klageantwortschrift	Vorbereitungsunterlage Partei 1 und 2
Rechtsbegehren	Anträge
I. VORBEREITUNG INSTRUKTIONS- UND EINIGUNGSVERHANDLUNG	I. FRAMEWORK OF MEDIATION (RAHMEN FÜR DIE VERMITTLUNG)
1. Vorbereitung intern (Vorbesprechung)	1. Preparation phase (Vorbereitung)
2. Instruktionsverhandlung (1. Teil) Begrüssung/ Protokoll/ Vorstellung	2. Opening phase (Eröffnung) Begrüssung und gemeinsame Sitzung
Beweisfragen Befragung der Parteien	3. Exploration phase (Abklärungen) Austausch Informationen
3. Instruktionsverhandlung (2. Teil) Referate (II.) / Vergleichsverhandlung	4. Bargaining phase (Verhandlung) Problems and strategies in negotiation
4. Formeller Abschluss (Vergleich oder Verfahrensfortsetzung)	5. Closing phase (Abschluss) Doing the deal



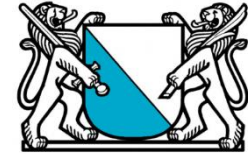
5 Proceeding of Conciliation at Court (Zurich Method)

II. REFERAT INSTRUKTIONSRICHTER	II. MEDIATION CORNERSTONES (→ 3. Exploration phase)
<ol style="list-style-type: none"> 1. Allgemeines und Prozessverlauf 2. Sachverhalt 3. Partei-Standpunkte 4. Rechtliche Würdigung 5. Kosten- und Entschädigung 	<ol style="list-style-type: none"> 1. Confidentiality 2. Ownership by the parties 3. Neutrality and Impartiality 4. Respect and Empathy <p><i>Kein Referat des Mediators !</i></p>
III. EINIGUNGSVERHANDLUNG	III. MEDIATOR AS A NEGOTIATOR
1. Rechtliche Stufe (vgl.: IR-Referat)	Triangle Proceeding
2. Wirtschaftliche Stufe Berücksichtigung ökonomische Frage; wenn kein Vergleich:	Skills for effective mediation Emotions Communication
3. Psychologische Stufe wenn kein Vergleich: Wichtige Rechtsfrage? Präjudiz?	(→ 4. bargaining phase) Negotiation Problems in negotiation Strategies in negotiation
4. Ergebnis	4. Ergebnis



5 Proceeding of Conciliation at Court (Zurich Method)

<p>EINIGUNGSVERHANDLUNG Alexander Brunner, Zur Strategie von Vergleichsverhandlungen, FS KassG, Zürich 2000, 159 ff.</p>	<p>MEDIATOR AS A NEGOTIATOR Karl Mackie/ David Miles/ William Marsh/ Tony Allen, The ADR Practice Guide, Commercial Dispute Resolution, London 2007</p>
<p>1. Rechtliche Stufe</p> <p>Ausgangslage</p> <p>Referate IR (Ziff. II)</p> <p>Übrige Gerichtsdelegation</p> <p>Parteien <i>akzeptieren</i> Vorschlag</p> <p><i>Vergleichsabschluss</i></p> <p>wenn kein Vergleich</p> <p>2. Wirtschaftliche Stufe \leftrightarrow</p>	<p>Triangle Proceeding</p> <p>law problems $\leftarrow \rightarrow$</p> <p>commercial problems \leftrightarrow</p> <p>emotional problems \leftrightarrow</p> <p>Parties <i>own</i> problem and solution</p>



5 Proceeding of Conciliation at Court (Zurich Method)

2. Wirtschaftliche Stufe

Ausgangslage

Zusätzliche Fragen aufgrund gewisser Indizien im Verfahren; insb.:

Vergleichsthema nur Teilaspekt eines grösseren Ganzen?
Bonität Parteien?
Erneuerung der Geschäftsbeziehungen möglich?
etc.?

Vergleichsabschluss
wenn kein Vergleich

3. Psychologische Stufe ↔

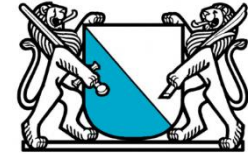
Skills for effective mediation

Emotions

Mediator
Parties
Lawyers and Advisers

Communication

Rapport building
Non-verbal communication
Active listening
Silence and minimal prompt
Questioning
Challenging
Summarizing
Reality testing
Problem solving
Developing other perspectives



5 Proceeding of Conciliation at Court (Zurich Method)

3. Psychologische Stufe

Ausgangslage

"Irrationale" Ablehnung von Ergebnissen der 1. und 2. Stufe; insb.:
Erklärung durch andere - nicht rechtliche und wirtschaftliche – Motive

Versuch einer Einigung durch Mittel der **Mediation**

Vergleichsabschluss

wenn kein Vergleich:
Wichtige Rechtsfrage? Präjudiz?

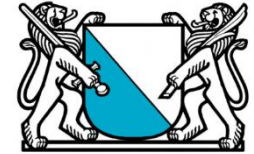
Negotiation (4. Bargaining Phase)

Problems in negotiation

Unrealistic expectations
Issues of "principle"
Emotions (ego and pride)
Desire of revenge
Breakdown of trust
Failure of communication
Wrong people at the table

Strategies in negotiation

What drives parties?
Problem solving techniques
Group dynamic
Avoid losing face
Using information (value difference)
Hurdle of first offer
Bottom lines
Global sums



6 Q&A - General discussion

After the discussion - in the Court Garden

