

ASA Reference Series

Settlement Facilitation: A Service by Arbitrators with Tradition

It is common for Swiss arbitrators to raise the issue of settlement with the parties and even offer their assistance in reaching an amicable resolution of their dispute where they believe this to be appropriate, bearing in mind the legal and cultural background of the parties and their counsel. This practice finds its origin both in the long Swiss tradition of international diplomacy as well as in the established practice of certain Swiss courts of holding settlement hearings after receipt of the parties' first submissions. It is also in line with the Swiss approach to dispute resolution more generally, which strives to resolve the parties' disputes in an effective and cost-efficient manner, keeping the best interests of the parties in mind.

Settlement facilitation by arbitrators can take many forms, all of which require the explicit consent of all parties as well as an advance agreement on a clear framework and process. As such, it is to be seen as an additional service that Swiss arbitrators are willing and able to provide to truly resolve a dispute. In order to ensure the integrity of the arbitral process, the parties will be asked to waive any right to subsequently challenge the arbitrators on the grounds of their involvement in the process.

Common forms that settlement facilitation may take include the following:

Settlement window as a procedural step: Where desired and agreed, a settlement window may be foreseen in the procedural timetable as a step in the proceedings. This has the benefit of incorporating a period for optional settlement discussions between the parties or even conciliation or mediation proceedings (conducted by an independent third party conciliator or mediator) into the arbitral process, without requiring one or the other party to take the initiative.

Preliminary views hearings: This is the most typical form. Where appropriate, and if requested by the parties, the arbitral tribunal may agree to schedule a so-called "preliminary views hearing" at which the arbitral tribunal shares its preliminary views of the case, based on an in-depth analysis of the then-existing record, with the parties. These views are shared without prejudice to any further evidence and/or pleadings that may subsequently be offered. While such a hearing can take place at any time, it is generally conducted after the first round of briefs or prior to the evidentiary hearing. Based on the input from the arbitral tribunal and armed with their knowledge of the case, the parties can then better assess the strengths and weaknesses of their claims; focus their subsequent submissions and any further evidence they wish to submit; and weigh the risks of proceeding to an award against the potential benefits of a settlement. This method offers the parties an early – and thus cost-efficient – route to a settlement and does so in a face-saving way. It also avoids the procedural pitfalls of early determination, while providing similar benefits.

Proposal of possible settlement: Where all parties so request, the arbitral tribunal may also agree to assist the parties further by proposing a possible framework for settlement of the dispute based on the arbitral tribunal's preliminary and without-prejudice assessment.

Arbitrators acting as mediators or conciliators: In contrast with the above, it is uncommon for arbitrators in Switzerland to switch roles and to act as mediators or conciliators. Swiss arbitrators are generally reluctant to caucus with the parties and more generally to engage in settlement facilitation processes in which one party discloses positions or facts that are not on record and not necessarily known to the other party or parties. Where the parties wish to have a form of active settlement facilitation, they usually opt for the involvement of an external mediator; this process can also be built into the procedural timetable, as mentioned above.