

# Conciliation Rules of the Deutsche Gesellschaft für Recht und Informatik e.V. [German Association of Law and Informatics]

## Preamble

Deutsche Gesellschaft für Recht und Informatik e.V. [hereinafter: *DGRI*], having its registered office in Berlin, operates a conciliation office [*Schlichtungsstelle*] in order to resolve disputes relating to information and communications technology by way of mediation, conciliation proceedings [*Schlichtung*] and, if necessary, arbitration proceedings [*Schiedsverfahren*], on the basis of the following rules of procedure (Conciliation Rules [*Schlichtungsordnung*]).

## § 1 Scope of Application

- (1) The Conciliation Rules are applicable to national and cross-border disputes which are based on matters in the field of information and communications technology. These include, in particular, disputes
  - between providers and recipients of goods and services in the information and data-processing sectors;
  - between providers and recipients of on-line services including tele-media;
  - concerning the infringement of industrial or intellectual property rights, including rights to products of information and communications technology that are protected under competition law;
  - concerning employment agreements, contracts for services and contracts for work relating to the information-processing or data-processing value-added process.
- (2) Disputes between telecommunications providers and end users which come within the competence of the regulation authorities pursuant to § 47a(1), German Telecommunications Act [*Telekommunikationsgesetz, TKG*], shall not be the subject-matter of conciliation proceedings under the present Conciliation Rules.
- (3) Exclusively § 3, § 9, § 10(2) and § 11 of these Conciliation Rules shall apply to non-contentious, project-related conciliation proceedings. Other details of such proceedings shall be jointly agreed by the participants in such project-related conciliation proceedings.

## § 2 Institution of Proceedings

- (1) The conciliation proceedings shall commence on the date of receipt by the conciliation office of DGRI of a written request submitted by one party (Request for Conciliation [*Schlichtungsantrag*]). The request has to be submitted in duplicate together with copies for all participants. Copies missing shall be charged to the party filing the request by the conciliation office in accordance with the provisions of the German Act on Lawyers' Fees [*Rechtsanwaltsvergütungsgesetz, RVG*].

The Request for Conciliation has to contain the following information:

- (a) The names, addresses, telephone numbers, fax and other communications details of the parties and of the statutory representative(s) and, if applicable, of the counsel for the proceedings of the party submitting the Request for Conciliation, as well as of the statutory representative and, if applicable, of the counsel for the proceedings of the other participants, insofar as known;

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- (b) the language in which the conciliation proceedings are to be conducted in accordance with subsection 5 hereof, unless they are to be conducted in the German language;
  - (c) a brief presentation of the matter in dispute and an explanation of acceptance [*Unterwerfungserklärung*] of the terms of these Conciliation Rules;
  - (d) the documents necessary for comprehension of the matter (contracts, correspondence, technical documents, etc.).
- (2) The conciliation office shall provide a copy of the Request for Conciliation to the other parties mentioned therein, while setting a reasonable period of 2 weeks at the most for those parties to declare their consent to the conciliation proceedings. This set period may be extended once upon the request of each party.
  - (3) The conciliation office shall notify all parties about the date on which the conciliation proceedings will commence.
  - (4) The conciliation proceedings will terminate if the other participants fail to declare their consent in due time.
  - (5) As a matter of principle, the conciliation proceedings shall be conducted in the German language. They may be conducted in another language. The language of the proceedings has to be specified in the Request for Conciliation. A request for proceedings to be conducted in another language is only permissible if the parties have agreed on the language prior to submission of the Request for Conciliation. Otherwise the proceedings will be conducted in the German language.

### § 3 Composition of the Conciliation Team

- (1) The conciliation office shall notify the parties about the intended members of the conciliation team and shall appoint such members. Each party may submit proposals for appointments to the conciliation team. The conciliation office is not bound by such proposals when selecting the members of the conciliation team.
- (2) As a rule the conciliation team will be composed of a member of the legal profession who is qualified to exercise the functions of a judge, and of a publicly appointed and sworn computer expert. In appropriate individual cases a single conciliator or mediator may be proposed. The members of the conciliation team have to possess the requisite specialist knowledge and trustworthiness and, if possible, have to be experienced in out-of-court dispute settlement.
- (3) A third member holding one of the aforesaid qualifications shall be appointed by the conciliation office in accordance with subsections 1 and 2 above if the conciliation team is unable to agree on the proceedings, on a settlement proposal [*Vergleichsvorschlag*] (§ 6(1)) or on a conciliation award [*Schlichtungsspruch*] (§ 6(3)), or if the parties submit a corresponding joint request. Subject to an express divergent agreement between the parties, a third arbitrator shall always participate in arbitration proceedings (§ 6(4)).
- (4) The members of the conciliation team shall be neutral, impartial and independent. They may not (have) represent(ed) or advise(d) any of the parties in or out of court in connection with the matter in dispute. With the exception of work pursuant to § 6(4) hereof, they may not act as judges or arbitrators or in a similar function in proceedings relating to the subject-matter of the conciliation proceedings.
- (5) The members of the conciliation team shall issue a declaration of neutrality to the parties before commencing their work, in which they disclose all circumstances which could give rise to doubts as to their impartiality or independence.
- (6) The conciliation office, and in arbitration proceedings (§ 6(4)) the Regional Court [*Landgericht*] with jurisdiction for the registered office of the DGRI conciliation office, shall decide on requests concerning partiality [*Befangenheit*]. Any new appointment of a member of the conciliation team which may be necessary shall take place in accordance with subsections 1 and 2 above.

### § 4 General Procedural Principles

- (1) **Suspension of the statute of limitations [*Verjährungshemmung*]:** Conciliation proceedings are deemed to be a hearing in the sense of § 203, 1<sup>st</sup> sentence, German Civil Code [*Bürgerliches Gesetzbuch, BGB*]. Subject to other grounds for suspension, the statute of limitations is suspended with regard to all claims based on the subject-matter of the conciliation proceedings, as from receipt of the Request for Conciliation by the conciliation office until completion of the conciliation proceedings. If the conciliation proceedings are completed by an arbitration award [*Schiedsspruch*] in accordance with § 8(5), the statute of limitations shall be interrupted in accordance with § 204, BGB.
- (2) **Confidentiality:** Unless otherwise agreed by the parties, the conciliation proceedings shall take place in camera. All persons participating in the conciliation proceedings including the conciliation team, the parties, their legal counsel, experts and other persons present at the conciliation hearings, shall observe the confidentiality of the conciliation proceedings and shall not use or disclose in relation to third parties any information relating to or obtained in the course of the conciliation proceedings. At the request of a party, each of the above-mentioned persons shall issue a corresponding written declaration prior to participating in the conciliation proceedings. Following completion of the conciliation proceedings the parties shall return documents they have received during the proceedings from other parties to the party that introduced such documents into the proceedings.
- (3) **Legal counsel:** Each party may be represented or assisted by a legal counsel during the conciliation proceedings. At the request of the conciliation team or another party, the legal counsel shall present a written power of attorney.
- (4) **Service [*Zustellung*] of documents:** The Request for Conciliation and decisions made by the conciliation team shall be served on the parties by ordinary postal service against advice of receipt. Any further pleadings, summons or disposals (imposing set periods) shall be transmitted for service informally by letter, fax or e-mail. If a party is represented by legal counsel, service shall be made on such legal counsel.
- (5) **Duty to expedite proceedings:** The conciliation team shall endeavor to conduct the proceedings efficiently. The parties on their part shall expedite the proceedings through timely and complete preparation of the matter and by providing all information deemed necessary by the conciliation team so that the proceedings can, if at all possible, be completed after one hearing at the most. The conciliation office shall provide a manual to the members of the conciliation team containing instructions for efficient proceedings.

### § 5 Conducting the Conciliation Proceedings

- (1) The conciliation team shall determine the further proceedings in accordance with the following provisions.
- (2) The conciliation team may, at its own discretion and following prior written consultation with and written statements from both parties, first hold an oral consultation, also in the form of a mediation.
- (3) If the conciliation team does not hold a consultation pursuant to § 5(2) above or if the proceedings could not be completed at such consultation, the conciliation team shall give the parties the opportunity to submit pleadings stating the matter in dispute, the background to the dispute, the respective objective of the conciliation proceedings and the arguments regarding the legal situation. Significant deeds and documents and other means of evidence suitable for submission have to be attached. If copies of documents are submitted, the conciliation team may require submission of the original at the consultation if the authenticity is disputed. Other evidence (e.g. witnesses, evidence by inspection) shall be offered.
- (4) At any stage of the conciliation proceedings the conciliation team may call on one or both parties to submit further information or documents which the conciliation team deems expedient to a comprehensive evaluation of the factual and legal situation.

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- (5) Each party is entitled to restrict the provision of information or documents for which it claims a sufficient interest in confidentiality, to the conciliation team alone. The other party shall be notified accordingly. The conciliation team may not disclose such information or documents designated accordingly to the other participants without the written consent of the party invoking an interest in confidentiality.
- (6) Requests by the conciliation team pursuant to subsections 3 and 4 above may include a deadline. Such deadlines can be extended at the request of a party if this is in its legitimate interest and reconcilable with the interests of the other party. There is a legitimate interest if the party is unable to observe the deadline without being at fault and despite reasonable efforts.
- (7) Following the receipt of the written statements pursuant to subsection 2 and the pleadings pursuant to subsection 3 above, the conciliation team shall indicate the probable focus of the proceedings to the parties and at their request shall provide a non-binding estimate of costs.
- (8) The conciliation team will then as a rule set a date for a hearing which, insofar as it appears expedient in the circumstances, will take place at the place of the matter in dispute or otherwise at a place determined by the conciliation team. The conciliation team is entitled to inspect the matter in dispute and to consult with knowledgeable staff members or authorized persons of the parties, and with experts. The conciliation team may question such persons individually and may also negotiate in the absence of a party.
- (9) The conciliation team shall further the willingness of the parties to reach an agreement and, insofar as possible, shall submit proposals for an amicable settlement of the dispute or of individual issues thereof at any stage of the proceedings, also in the form of provisional or partial solutions.
- (10) The above procedural steps may be varied in agreement with the parties. In agreement with the parties, the conciliation team may also decide by way of written proceedings in uncomplicated cases. In that case the decisive aspects of the decision shall be notified to the parties in advance and they shall be given an opportunity to state their views.
- (11) The provisions of § 1042 – § 1050 of the German Code of Civil Procedure [*Zivilprozessordnung, ZPO*] apply mutatis mutandis unless these Conciliation Rules contain divergent provisions.

## § 6 Outcome of Conciliation Proceedings

- (1) **Conciliation settlement [*Schlichtungsvergleich*]:** If an agreement is brought about between the parties based on a proposal or with the participation of the conciliation team, it shall be recorded as the conciliation settlement and the minutes shall be signed by the members of the conciliation team and the parties or their respective legal counsel. Subject to the requirements of § 796a, ZPO, the conciliation settlement may also be concluded in the form of a lawyer's settlement [*Anwaltsvergleich*].
- (2) **Preliminary settlement:** The outcome of the conciliation proceedings may also be an agreement on individual disputed issues or preliminary settlements brought about on the basis of a proposal or the participation of the conciliation team, and which enable a matter still in dispute and still unresolved to be continued.
- (3) **Conciliation award:** If agreement cannot be reached between the parties, the conciliation team shall present a written conciliation award accompanied by concise grounds. The conciliation award has to take account of a fair balance of the interests (especially the commercial interests), of upholding a further possibility for cooperation and of the presumed outcome of court proceedings between the parties. The term for acceptance of the conciliation award is two (2) weeks. It can be extended once at the request of a party. If the conciliation award is accepted by all parties, it shall be considered a settlement in the sense of subsection 1 above. The conciliation team shall notify the parties accordingly in writing.
- (4) **Arbitration award:** The parties may agree in the form of § 1031, ZPO, that the conciliation team in its composition pursuant to § 3(2) and (3) hereof shall be instructed to arrive at a final decision on the matter in dispute as an arbitration tribunal [*Schiedsgericht*]. Such an agreement is

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possible prior to commencement of the proceedings, at any time during ongoing proceedings and after completion of the proceedings, in the latter case in the form of an arbitration award with agreed wording [*Schiedsspruch mit vereinbartem Wortlauf*] (§ 1053, ZPO). If confidential documents have been submitted during the conciliation proceedings by one party while invoking § 5(5) of these Conciliation Rules, the arbitration award may only be based on such documents if the principles of procedural equal treatment and the right to be heard are observed. If proceedings are to be instituted or set forth as arbitration proceedings according to the parties' intent, the parties may agree to conduct the arbitration proceedings according to the Arbitration Rules of the German Arbitration Institute [*Deutsche Institution für Schiedsgerichtsbarkeit, DIS*] or other national arbitration rules. In that case § 1025 – § 1062, ZPO, shall apply in addition to these Conciliation Rules. When arriving at its decision the conciliation team may, upon a corresponding agreement between the parties, make provisional decisions as an arbitration tribunal, e.g. may order the provisional disbursement of monies, the furnishing of securities, the provision of certain performances and the performance or forbearance of acts. Such decisions are binding on the parties until they are revoked by an amending arbitration award, by a divergent agreement between the parties or by a court judgment.

### § 7 Relationship Between Conciliation Proceedings, Court Proceedings and Arbitration Proceedings

- (1) Unless otherwise agreed by the parties, settlement proposals made by the parties or the conciliation team and the fact that a party appears willing to accept a settlement proposal or the conciliation award, concessions made or promised during the conciliation proceedings and other remarks made by the parties or the conciliation team or its individual members, may not be introduced into court proceedings or into arbitration proceedings conducted between the parties outside § 6(4) hereof. This does not apply to a conciliation award pursuant to § 6(3) hereof and its grounds.
- (2) Conciliation proceedings and provisional arbitration proceedings [*Vorläufiges Schiedsverfahren*] pursuant to § 6(4), 6<sup>th</sup> sentence, hereof may also be conducted or continued if litigation is pending or under way before a court of general jurisdiction [*Ordentliches Gericht*]. However, each party and the conciliation team may terminate the proceedings by way of a written declaration if the dispute is rendered pending in whole or in part before a court of general jurisdiction or if suspended court proceedings are resumed by one of the parties. Sentences 1 and 2 above apply mutatis mutandis where arbitration proceedings otherwise agreed are conducted.
- (3) The conciliation office shall always urge the parties to state clearly and concurrently the desired nature of the proceedings to be conducted.

### § 8 Termination of the Conciliation Proceedings

The conciliation proceedings shall terminate

- (1) if consent is not given to conducting of the conciliation proceedings (§ 2(4));
- (2) through the decision of the conciliation team that further efforts for conciliation proceedings are not promising in the absence of
  - the willingness of the parties or of one party to advance the proceedings, or
  - the willingness of one party to make available to the other participants information or documents deemed to be confidential pursuant to § 5(5) hereof, although such information or documents is/are considered decisive by the conciliation team for the decision on the dispute; prior to such a decision the conciliation team shall notify the parties of the obstacles and give them an opportunity to remove them;
- (3) if and when a settlement on the matter in dispute is brought about pursuant to § 6(1) hereof;
- (4) upon expiry of the deadline for acceptance of a conciliation award pursuant to § 6(3) above, irrespective of whether or not there is acceptance;

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- (5) upon a final arbitration award pursuant to § 6(4);
- (6) upon a declaration made pursuant to § 7(2);
- (7) by way of a corresponding written declaration made by a party at any stage of the proceedings.

The conciliation office shall be informed in a timely manner by the conciliation team about termination of the proceedings and their outcome.

### § 9 Exclusion of Liability

The conciliation team is liable in relation to the parties for acts and omissions in connection with the conciliation proceedings or the institution or termination thereof solely in case of intent. In an individual case the conciliation team may make a divergent agreement with the parties on behalf of its members. The conciliation office is liable in relation to the parties for acts or omissions in connection with the conciliation proceedings or the institution or termination thereof solely in case of intent or gross negligence.

### § 10 Costs

- (1) The conciliation team shall decide with binding force on the parties, at its reasonable exercised discretion [*billiges Ermessen*], on the allocation between the parties of the costs caused by the conciliation proceedings, while taking into account the status of the facts and the dispute so far. As a rule, the parties shall be ordered to bear the costs they incur. Exceptions from this require a separate statement of grounds.
- (2) The members of the conciliation team have a claim for remuneration against the parties in accordance with the provisions of § 11 hereof. Each member of the conciliation team retains his or her claim for remuneration even if his or her work ends before completion of the conciliation proceedings, unless that member is rightfully rejected due to culpable misconduct.

### § 11 Remuneration of Members of the Conciliation Team

- (1) The members of the conciliation team will calculate their fees on the basis of the time expenditure in connection with their conciliation work. This also applies if the conciliation team is appointed as an arbitration tribunal. The hourly rate is between EUR 200 and EUR 400. The hourly rate depends on the complexity, the economic significance and the difficulty of the matter in dispute. The conciliation office will propose the specific hourly rate for proceedings having consulted the conciliation team. The conciliation office may adjust the hourly rate for future conciliation proceedings in due course in accordance with the general economic development; the hourly rate in force at any given time may be enquired of at the conciliation office and is posted on the DGRI website at <http://www.dgri.de>. Documented costs for telephone, post, travel expenses and clerical costs will be added in accordance with the Act on Lawyers' Fees, instead of which a flat-rate charge for expenses amounting to one hourly fee may be charged, plus VAT [*Umsatzsteuer*].
- (2) The conciliation office shall receive compensation for expenses amounting to two (2) hourly rates according to subsection 1 above. If the head of the conciliation office avails himself of the DGRI office for administrative tasks in accordance with § 14(5) of the DGRI articles of association, he is entitled to a share of 60% of the compensation for expenses. The remaining 40% shall accrue to DGRI. If he does not avail himself of the DGRI office, he is entitled to the full amount of the compensation for expenses.
- (3) The parties are jointly and severally liable for the costs pursuant to § 11.
- (4) Following institution of the conciliation proceedings, the conciliation team may require each party to pay an equal amount as an advance on the fees of the members of the conciliation team and the other costs of the conciliation proceedings. The amount of such an advance payment shall be oriented towards the costs estimate presented by the conciliation team pursuant to § 5(7). Further advance payments may be required during the course of the conciliation proceedings.

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The conciliation team is under no obligation to continue or set forth its work before receiving the advance payments.

- (5) After completion of the conciliation proceedings the conciliation team shall provide the parties with a statement of the procedural costs incurred; taking into account the decision on costs pursuant to § 10(1) hereof, the conciliation team shall reimburse overpaid advance amounts to the parties or shall require the payment of outstanding fees or costs.

### **§ 12 Conciliation Office**

The conciliation office is a dependent entity of DGRI which is under the leadership of a person who is qualified as a conciliator in accordance with § 3(2) hereof. If the head of the conciliation office is unable to act, he or she shall be represented by the DGRI board member who is in charge of conciliation matters.